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Perception and Process: Towards a Behavioural Theory of Compliance

Daniel Peat*

ABSTRACT

Nowhere is the integration of behavioural insights into international legal theory more important than in relation to compliance. Such insights offer the potential to give us a more accurate understanding of how states behave, permitting both the development of more effective, empirically grounded normative propositions for legal and institutional change, as well as the creation of more convincing theories of compliance. Drawing on theoretical, empirical and experimental studies from political science and international relations, the article suggests that we need to understand compliance decision-making as a broader process that requires analysis of how and why decision-makers *perceive* new information the way that they do, and how the *process* by which they make decisions, such as their style of reasoning, might affect decision outcomes. To develop this point, the article uses data from international financial institutions and a novel sentiment analysis of Argentinian parliamentary debates to test empirically hypotheses generated by realist, liberal, and constructivist theories of compliance, the results of which demonstrate the benefit of adopting a behavioural approach to compliance.

1. INTRODUCTION

Nowhere is the integration of behavioural insights into international legal theory more important than in relation to compliance. Such insights offer the potential to give us a more accurate understanding of how states behave the way they do in relation to international law, permitting both the development of more effective, empirically grounded normative propositions for legal and institutional change, as well as

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the creation of more convincing theories of compliance. Indeed, if ‘all the law is potentially able to achieve is a change in . . . behaviour’,¹ it must surely be a prerequisite to understand how and why the subjects of the legal order respond to legal norms in the way they do.

Yet while early articles on behavioural international law and economics identified compliance as a potentially fruitful domain in which to apply the findings of the behavioural social sciences,² there have been few attempts to explore in detail what behavioural approaches might bring to the table and how they might affect international law theories of compliance.³

This article argues that existing theories of compliance in international law scholarship do not offer the best starting point from which to integrate behavioural insights into international theory, as they principally focus on two relatively circumscribed points in the process of compliance decision-making. Approaching compliance in this way risks oversimplifying the decision-making process that leads to (non-)compliance, and obscures the potential insights that behavioural social sciences might bring to bear on compliance decision-making.

Drawing on theoretical, empirical and experimental studies from political science and international relations, the article suggests that we need to understand compliance decision-making as a broader process that requires analysis of how and why decision-makers *perceive* new information the way that they do, and how the *process* by which they make decisions, such as their style of reasoning, might affect decision outcomes.⁴

This article is composed of five sections. Section 2 summarizes the main schools of thought on compliance in international law scholarship, highlighting the limitations of using those theories as a starting point from which to explore the relevance of behavioural insights. Section 3 elaborates this point by exploring two bodies of literature from international relations that are highly relevant to the compliance decision-making process: how elites perceive new information; and how the style of reasoning—or ‘epistemic motivation’⁵—of decision-makers affects the outcome. In order to explore whether it is necessary, or even worthwhile, to expand our conception of compliance to one that more readily accommodates behavioural perspectives, Section 4 takes the example of Argentina’s decision to comply with a series of five investment treaty arbitration awards in October 2013. Using data from international financial institutions and a novel sentiment analysis of Argentinian parliamentary debates, it empirically tests hypotheses generated by realist, liberal, and constructivist theories of compliance in order to explore the limits of their explanatory power.

1 C Engel, ‘Behavioral law and Economics: Empirical Methods’ in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (OUP, 2014) 125.

2 A van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 *Harvard ILJ* 421, 470–80; A van Aaken, ‘Experimental Insights for International Legal Theory’ (2020) 30 *EJIL* 1237.

3 For a notable exception, see V Fikfak, ‘Changing State Behaviour: Damages before the European Court of Human Rights’ (2018) 29 *EJIL* 1091.

4 See in particular R Jervis, *Perception and Misperception in International Politics* (Princeton UP, rev edn., 2017); PE Tetlock, *Expert Political Judgment: How Good is it? How Can we Know?* (Princeton UP, rev edn., 2017); B Rathbun, *Reasoning of State: Realists, Romantics and Rationality in International Relations* (CUP, 2019).

5 Rathbun, *ibid*, at 22.

Section 5 argues that the analysis conducted in the preceding section serves to highlight the ‘value added’ of adopting a behavioural approach to compliance. Section 6 concludes.

2. CALCULATING COSTS AND FORMING PREFERENCES: HOW EXISTING THEORIES APPROACH COMPLIANCE

Ever since the publication of Louis Henkin’s celebrated *How Nations Behave* in the late 1960s,⁶ the question of compliance has occupied a prominent place in international law scholarship.⁷ This literature has been heavily influenced by international relations theory, and the enduring prominence of realist, constructivist and liberal theories of compliance attests to the indelible mark that international relations scholarship has left on how international lawyers think about the issue.

These theories of compliance have done much to advance our understanding of state behaviour, and have played an important role (explicitly or implicitly) in the creation and evolution of international institutions and rules.⁸ However, this section argues that existing theories approach compliance from a certain perspective, one that focusses either on the mechanisms by which state preferences are formed or on identifying the constellation of external factors that must be aligned for a (self-interested) state to comply with international law. Thinking about compliance in this way limits the potential application of insights from the behavioural social sciences to two relatively discrete points in a complex decision-making process.

A. Realist Theories of Compliance

Realist theories of compliance start from the premise that state is a rational actor that strategically pursues its material self-interest when deciding how to act. In relation to international law, the state calculates whether compliance with the legal rule would be in its interest, and, if so, adapts its behaviour to conform to that which is required by international law.⁹

Jack Goldsmith and Eric Posner’s *The Limits of International Law* is one of the most developed (and most influential) realist theories of state action in international law scholarship.¹⁰ Goldsmith and Posner argue that states comply with international legal rules when one of four situations arises: first, states’ own self-interests might coincide with law-compliant behaviour; second, coordination with other states may cause the cost of compliance to be less than that of non-compliance; third, cooperation with other states may cause states to act against their immediate self-interest if such cooperation is in their mid- to long-term interest; and, finally, states may be

6 L Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia UP, 1968).

7 For an excellent overview of the compliance literature, see J von Stein, ‘The Engines of Compliance’ in J Dunoff and M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, 2012) 477.

8 Cumulative, I refer to the body of literature that aims to study and elucidate compliance behaviour as ‘compliance theory’.

9 I adopt Wuerth’s definition of compliance as ‘conformity between behaviour and international law’; see I Wuerth, ‘Compliance’ in J d’Aspremont and S Singh (eds), *Concepts of International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2018) 117.

10 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, 2005).

coerced into compliant behaviour that is contrary to their interests by a more powerful state.¹¹ In this conception of state action, international law fails to factor into a state's calculation at all; it is simply 'epiphenomenal'.¹²

Realist theories of law have been widely criticized for narrowly defining state interest and for failing to attach any importance to the normativity of international law, as well as for saying nothing about how a state's interests are actually formed.¹³ Partially in response to this, more nuanced theories have been developed that take the rational choice premise of realist theory but expand the scope of factors they suggest may influence a state to comply with international law. In *How International Law Works*, for example, Andrew Guzman has developed an institutionalist theory of international law, arguing that states may comply with international law because, *inter alia*, they consider it to be in their interest to forge or maintain a reputation for complying with the law, a reputation on which they may later capitalize in subsequent negotiations with states.¹⁴ This approach, and others that take rational choice theory as their starting point,¹⁵ move past the circumscribed definition of self-interest that Goldsmith and Posner take to be crucial for compliance, but they nevertheless adhere to the idea that states are rational, calculating actors that are influenced by material, and not ideological, factors.

B. Constructivist Theories of Compliance

Unlike realists, constructivists emphasize the role that non-material factors (in particular, identity) play in shaping state behaviour. For constructivists, the actions of states cannot be viewed in isolation; instead, their behaviour must be understood in the context of continuous interaction with other actors in the international arena, including other states, international organizations, and non-governmental organizations (NGOs), as well as with legal and non-legal norms.¹⁶ Although they disagree on the particular mechanism underlying the process,¹⁷ constructivists agree that the interaction with norms and other actors in international society results in the internalization of such norms by the state, which may, in turn, motivate law-compliant behaviour.

Jutta Brunnée and Stephen Toope's interactional theory of international law provides an illustrative example.¹⁸ Brunnée and Toope elaborate a theory of legal obligation grounded in the practice—or, to use their terminology, the 'shared

11 *ibid*, at 11–12.

12 A van Aaken, 'To do Away with International Law? Some Limits to "The Limits of International Law"' (2006) 17 *EJIL* 289, 292.

13 For some critical commentaries on Goldsmith and Posner's theory, see *ibid*; PS Berman, 'Seeing Beyond the Limits of International Law' (2006) 84 *Texas Law Review* 1265; K Raustiala, 'Refining the Limits of International Law' (2006) 34 *Georgia Journal of International and Comparative Law* 423.

14 A Guzman, *How International Law Works: A Rational Choice Theory* (OUP, 2008) 35.

15 See eg J Trachtman, *The Economic Structure of International Law* (Harvard UP, 2008).

16 See generally J Brunnée and S Toope, 'International Law and Constructivism' (2009) 39 *Columbia Journal of Transnational Law* 19; M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

17 Wuerth (n 9) 121.

18 J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP, 2010).

understandings’—of states.¹⁹ For them, the important point is that norms only qualify as legal obligations if they resonate with these underlying social norms, no matter whether they might be considered to be formally valid legal rules.²⁰ Crucially, the authors understand the interaction between norms and actors to be mutually constituting: the former may affect the acts of the latter, which, in turn, may reinforce the strength, depth, or prevalence of the former.²¹

In relation to compliance, Brunnée and Toope argue that states do not just act in accordance with international law if it is in their material self-interest to do so, as realists suggest, but rather that the congruence between legal rules and the shared understandings of states generates a form of ‘compliance pull’ that is peculiar to legal obligation, one that cannot be explained solely in terms of cost-benefit analysis.²² The flipside of this argument is that even formally valid legal rules will be unable to command compliance if those rules are radically at odds with the social norms shared by large parts of international society.²³

Constructivist approaches share some commonalities with other norm-oriented theories of compliance, like Derek Jinks and Ryan Goodman’s state socialization thesis and Harold Koh’s transnational legal process.²⁴ While constructivist theories explain states’ compliance with international law as the result of congruence between states’ identity and the rule, other norm-oriented theses leave open the possibility that beliefs and practices might be adopted by states without being persuaded of the legitimacy or validity of those norms. Instead, they argue that states might, for example, feel pressure to assimilate to a group, mimicking the practices of the group members to gain acceptance and ‘cognitive comfort’.²⁵

C. Liberal Theories of Compliance

Liberal theories of compliance challenge the assumption of the state as a unitary entity (a ‘black box’) that underpins much of the realist and constructivist literature, focusing on how sub-state entities—civil society, individuals, political parties, domestic courts—affect state action. While, like rational choice scholars, they assume that a state will act rationally to pursue its interests, they see these interests as being forged on the domestic, as opposed to the international, level.

One of the leading proponents of liberal theory is Beth Simmons, who argues that the ratification of international treaties acts as a commitment device for governments, which can then most effectively be held to account by their domestic constituents rather than other states or international institutions.²⁶ In her words, ‘no one has a more consistent, intense interest in whether and how a government complies

19 See in particular *ibid*, chp 2.

20 *ibid* 7.

21 *ibid* 351.

22 *ibid* 96–97.

23 See *eg ibid*, at 268.

24 See R Goodman and D Jinks, *Socializing States: Promoting Human Rights through International Law* (OUP, 2013); HH Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* 181; Koh, ‘Why do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599; Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 *Houston Law Review* 623.

25 Goodman and Jinks, *ibid*, at 22.

26 BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP, 2009).

with its human rights commitments than the human beings on the ground in that country.²⁷

Depending on the particular right at issue, individuals, organized religious groups, or civil society might mobilize to track the state's compliance record and hold it to account when necessary. A corollary of this approach is that those states in which domestic groups are most able to organize themselves, to voice their dissent to non-compliant behaviour, and to challenge such actions in elections or before domestic courts—in other words, in liberal democracies—are more likely to be pushed towards law-compliant behaviour.

D. Only Half the Story?

For the last half century, realist, constructivist and liberal approaches have framed how we think about compliance. But, despite their various forms, these theories focus on two relatively discrete points in the process of compliance decision-making: the formation of preferences (in the case of constructivist and liberal theories) and the configuration of external factors necessary for compliance to be in states' self-interest (in the case of realist and other rational choice theories). To be sure, these two junctures are crucial to understanding state compliance and either may well be analysed as a process, or mechanism, in their own right, as sociological approaches to compliance have shown.²⁸

However, if we take a step back, it is clear that these two points only form part of a process that a state may take when faced with a decision whether to comply with international law. A decision to comply is not simply the sum of preferences and circumstances; rather, it is the outcome of series of cognitive and information-processing events the complexity of which mirrors—or exceeds—that which we face in daily life.

When a state decides whether to comply with international law, we might expect the following steps to take place: first, the cognition of new information that may call for a state to act; second, the processing of this information in light of the pre-existing beliefs of the decision-makers within the state; third, the search for information that confirms or falsifies the initial perception of that new information; fourth, internal discussions amongst decision-makers regarding compliance; and, finally, the implementation of the decision regarding compliance.

The goal here is not to overcomplicate an already messy picture. Rather, it is to show that behavioural insights might have more purchase in understanding state action than mainstream theories of compliance might lead us to believe. Conceiving of the compliance decision-making process as being more than just the sum of preferences and calculations is crucial if we are to understand how psychological factors might affect compliance behaviour, and how the findings from the behavioural social sciences can be brought to bear on each step of the process. The following section builds on this point by examining two bodies of literature from political science and international relations that would seem to be highly relevant to states' decision-making process.

27 *ibid.*, at 356.

28 See in particular Goodman and Jinks (n 24) chp 2.

3. PERCEPTION AND PROCESS

International relations and political science scholars have long recognized that understanding the psychology of decision-makers is important to comprehend how and why states act in the way they do. Starting in the late 1960s,²⁹ the first wave of scholars drew on experimental work on heuristics and biases (in particular, prospect theory) to generate new hypotheses about the behaviour of states and elite decision-makers, the plausibility of which was often illustrated by reference to case studies.³⁰ More recently, a new wave of academics has started to engage with the behavioural insights, using experimental and quantitative methodologies (often in the form of vignette studies or large-N studies) to study the scope conditions for the application of various biases and heuristics, to examine heterogeneity in cognitive processes across individuals, and to explore the implications of those findings for foreign policy and international relations.³¹ The goal of this new wave of behavioural research is to move beyond the ‘sterile debate’³² between rational choice and behaviouralism, and to focus instead on the conditions under which individuals will act as behavioural theories suggest, including exploring the relevance of neurological, evolutionary and genetic influences on decision-making.³³

In the nascent stages of behavioural international law, the focus of the scholarship has been on exploring how heuristics and biases affect actors’ decision-making, whether they be judges, arbitrators, or interpreters.³⁴ Compliance has garnered particular attention, with scholars suggesting that the psychology literature may explain why states engage in costly punishment of non-compliance,³⁵ why the perception of a treaty partner may affect how reciprocity influences compliance,³⁶ and how psychological factors impact the operation of reputation as an engine of compliance.³⁷ The implications of more recent international relations literature on the heterogeneity of decision-makers have, however, as yet not been explored. Two strands of this

29 JW David and R McDermott, ‘The Past, Present, and Future of Behavioral IR’ (2020) IO 1, 3.

30 For some examples in international relations, see J Mercer, ‘Rationality and Psychology in International Politics’ (2005) 59 IO 77; R McDermott, *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy* (1998); JS Levy, ‘Prospect Theory and International Relations: Theoretical Applications and Analytical Problems’ (1992) 13 Political Psychology 283.

31 See, eg B Rathbun, J Kertzer and M Paradis, ‘*Homo Diplomaticus*: Mixed-Method Evidence of Variation in Strategic Rationality’ (2017) 71 S1 IO S33; AB Bayram, ‘Due Deference: Cosmopolitan Social Identity and the Psychology of Legal Obligation in International Politics’ (2017) 71 S1 IO S137; BL LeVeck and others, ‘The Role of Self-Interest in Elite Bargaining’ (2014) 111 Proceedings of the National Academy of Sciences of the United States of America 18536.

32 J Gross Stein, ‘The Micro-Foundations of International Relations Theory: Psychology and Behavioural Economics’ (2017) 71 S1 IO S249, at S250.

33 David and McDermott (n 29) 8.

34 See eg T Broude and I Levy, ‘Outcome Bias and Expertise in Investigations under International Humanitarian Law’ (2020) 30 EJIL 1303; Y Shereshevsky and T Noah, ‘Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts’ (2018) 28 EJIL 1287; S Franck and others, ‘Inside the Arbitrator’s Mind’ (2017) 66 Emory Law Journal 1115.

35 van Aaken ‘Behavioral International Law’ (n 2) at 471–73. See generally van Aaken, ‘Experimental Insights’ (n 2).

36 van Aaken, ‘Behavioral International Law’ (n 2) 473–75.

37 *ibid* 475–80.

literature are potentially relevant to our understanding of compliance decision-making: the first highlights how the pre-existing beliefs of an individual affects how the perception of new information; the second demonstrates how different styles of reasoning affect decision outcomes.

A. Perception

Perception and misperception are commonplace concepts in the international relations literature: scholars have argued that wars are caused by misperceptions,³⁸ that defensive strategy is driven by the perception of threat from other states or non-state actors,³⁹ and that a perceived reputation for resolve gives states the upper hand in negotiations.⁴⁰ Yet, despite its pivotal place in many realist and liberal explanations of state action, early authors failed to appreciate that perception is an inherently psychological concept. What we perceive something to be and what it actually is are two different things. And it is the former, and not the latter, that motivates states to act in a certain way.

The importance of understanding perception was first highlighted by Robert Jervis in the late 1970s,⁴¹ and has recently experienced renewed interest by international relations scholars.⁴² The starting point for this work is that information is inherently ambiguous: there are always several ways to understand an action, a statement, or an omission.⁴³ And as individuals, and therefore institutions, have a limited capacity to process information, they must view information against the backdrop of what they already believe.⁴⁴ These could be grand theories regarding the appropriate governance of a states, such as capitalism or communism, or they could be more fine-grained beliefs about a particular state or actor. A state that views another as inherently hostile towards it (eg as North Korea views the USA) is unlikely to view a seemingly beneficent act of the latter (such as the provision of aid to fight the coronavirus)⁴⁵ as anything but an extension of that hostility. Understanding information in light of pre-existing beliefs is not in itself a bad thing; indeed, it is necessary for us to have a way to comprehend information quickly and easily in a complex and sometimes contradictory world.⁴⁶ But it does have certain implications for how we should understand state action.

Importantly, the need for cognitive closure means that people—including the elites that determine state actions—are too quick to understand information to be in

38 See R Jervis, 'Deterrence and Perception' in R Jervis, *How Statesmen Think: The Psychology of International Politics* (Princeton UP, 2017).

39 See K Yarhi-Milo, *Knowing the Adversary: Leaders, Intelligence, and Assessment of Intentions in International Relations* (Princeton UP, 2014), chp 3.

40 J Kertzer, *Resolve in International Politics* (Princeton UP, 2016) 2.

41 Jervis (n 4).

42 See Yarhi-Milo (n 39).

43 Jervis (n 4), chp 4.

44 E Zamir and D Teichman, *Behavioral Law and Economics* (OUP, 2018) 58–60.

45 C Sang-Hun, 'U.S. Supports Aid to North Korea for Fighting the Coronavirus' *The New York Times* (14 February 2020) <<https://www.nytimes.com/2020/02/14/world/asia/coronavirus-north-korea-sanctions.html>> accessed 7 November 2021.

46 R Jervis, 'Understanding Beliefs' in Jervis, *How Statesmen Think*, (n 38) 28.

line with their prior beliefs, and hence fail to look for information that challenges their initial impression: they 'are theory-driven and closed-minded'.⁴⁷ This confirmation bias in turn strengthens our priors: because we see new information as supporting our pre-existing beliefs, our faith in those beliefs is also strengthened.⁴⁸ Not only does this approach to information-processing have the effect of confirming our prior beliefs, but it also means that we fail to update our beliefs in light of new information in the way that Bayesian theory suggests.⁴⁹ Information that would otherwise disconfirm our prior beliefs is ignored or discounted via assimilation with those beliefs.⁵⁰ Taking the example above, genuinely beneficent gestures by a donor state would not be perceived as such, and, accordingly, the belief that state was hostile would not be revised. This assimilation occurs up to a point: there may be information that is 'too vivid or salient to be ignored, too unambiguous to be discounted, or so directly in conflict with a decision maker's expectations that it becomes cognitively cheaper to abandon that belief instead of trying to tolerate the inconsistency'.⁵¹

While cognitive biases are important to understand how people appraise reality, scholars recognize that purely cognitive biases cannot fully account peoples' perceptions; to do this, we also need to take into account motivated biases.⁵² Two of these are particularly relevant for our purposes. The first is that individuals inherently try to avoid confronting painful trade-offs, often convincing themselves that such trade-offs are minor, in-existent or beyond their control.⁵³ The prospect of large-scale civilian casualties that result from a nuclear attack, for example, may be pushed to the back of the decision-maker's mind if they convince themselves that the presence of military targets justifies such action.⁵⁴ Second, individuals may perceive facts in a certain way in order to reach a desired conclusion; in other words, 'analysis and even deeply held beliefs may be more rationalizations than rationales'.⁵⁵ This kind of strategy allows individuals to set aside an objective assessment of reality in order to pursue—perhaps in the face of evidence to the contrary—a particular path of action.

The extent to which cognitive and motivated biases can be disentangled is questionable: a fact might be perceived a certain way either because it fits with our pre-existing beliefs or because it provides justification for a plan of action based on those beliefs. However, even in the latter case, our analysis of information is, to a large extent, preconscious; that is to say, we analyse information as providing support to our existing plan of action without even being aware of the bias.⁵⁶ This resonates with

47 Jervis, (n 4), xxxii. See also Rathbun (n 4), chp 3.

48 Jervis (n 46) 27.

49 Bayesian theory suggests that individuals update their beliefs in light of new information that confirms or challenges those beliefs.

50 Yarhi-Milo (n 39) 21.

51 *ibid* 4. See also David and McDermott (n 29) 4.

52 Jervis (n 4) lxxiv–lxxxviii. By 'motivated biases', Jervis means 'the relevant motives are ones other than striving for accurate perceptions', many of which are linked to emotions; *ibid*, at lxxiv. See also JD Kertzer and others, 'The Piece of Peace: Motivated Reasoning and Costly Signaling in International Relations' (2020) 74 *IO* 95.

53 PE Tetlock and others, 'The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals' (2000) 78 *Journal of Personality and Social Psychology* 853.

54 *cf* Jervis (n 4) lxxxiv.

55 *ibid*, lxxxix.

56 Jervis, 'Understanding Beliefs' (n 46), 30.

the findings of many psychological studies that have been conducted since Jervis' early work on perception. Indeed, confirmation bias,⁵⁷ belief perseverance,⁵⁸ and motivated reasoning⁵⁹ are all now well-documented biases in the literature. But the work on perception in international relations builds on the broader heuristics and biases literature in several important respects.

The first difference is that, unlike social psychologists and behavioural economists, international relations scholars focus on how biases affect the perception of elites—presidents, prime ministers, ministers of foreign affairs—as opposed to testing the universality of biases on a sample of the general public. This necessarily involves different methods: while psychological studies are normally based on lab-based experiments on a convenience sample, those working on perception draw on archival research, interviews with relevant actors, and, more recently, quantitative empirical analysis of elites' speeches, to support their arguments.⁶⁰ Adopting these methodologies means that the common criticism of the external validity of experimental evidence holds no water with respect to the perception literature. Instead, it shows that these biases affect elites themselves—the section of society that we, as international lawyers, should be concerned about.

The second extension is that the international relations literature examines not only on the perception of what might be called 'facts', but also the perception of attributes or characteristics of other states, such as aggression or resolve, that in turn may provoke a reaction.⁶¹ This is particularly relevant in a decentralized system, such as the international legal order, where the (predicted) responses of other actors is thought to play an outsize role in affecting compliance-related behaviour. For example, reputational concerns,⁶² the fear of reciprocal non-compliance,⁶³ and out-casting from a group⁶⁴ all have potential relevance in explaining compliance behaviour. In order to comprehend how these might play a role, we need first to better understand how states assess the likely future actions of others, including any psychological factors that may influence this.

What, then, might cause decision-makers to be more liable to change their beliefs in light of new information? Another, related body of literature, which examines the importance of the process by which the decision is made—and, more specifically, the importance of the style of reasoning of the decision-maker—provides a possible answer.

57 RS Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175.

58 L Ross, MR Lepper and M Hubbard, 'Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm' (1975) 32 *Journal of Personality & Social Psychology* 880.

59 Z Kunda, 'The Case for Motivated Reasoning' (1990) 108 *Psychology Bulletin* 480.

60 See eg Rathbun (n 4), chp 8.

61 See eg JD Kertzer and others, 'How Do Observers Assess Resolve?' (2019) 51 *British Journal of Political Science* 1.

62 R Brewster, 'Unpacking the State's Reputation' (2009) 50 *Harvard ILJ* 231.

63 van Aaken, 'Experimental Insights' (n 4) 1252–53.

64 Goodman and Jinks (n 24) 27–28.

B. Process

The pioneering research on the importance of different styles of reasoning on decision-making is Philip Tetlock's work on the predictive abilities of political and economic experts.⁶⁵ Tetlock studied 27,451 responses of 284 experts to a series of questions in order to study whether their forecasts were borne out in reality.⁶⁶ In order to understand why some experts performed better than others, Tetlock asked the individual experts to characterize their own style of reasoning. At one end of the spectrum were those who 'aggressively extend the explanatory reach of their one [grand theory] into new domains, display bristly impatience with those who "do not get it," and express considerable confidence that they are already pretty proficient forecasters'⁶⁷ (the so-called 'hedgehogs'). At the other end were those that were 'sceptical of grand schemes, see explanation and prediction not as deductive exercises but rather as exercises in flexible "ad hocery" that require stitching together diverse sources of information, and are rather diffident about their own forecasting abilities'⁶⁸ (the so-called 'foxes').

Tetlock found that there was a significant difference in the performance of hedgehogs and foxes; indeed, the hedgehog/fox distinction was a more reliable indicator of forecasting success than either the professional background or the political orientation of the expert.⁶⁹ Moreover, when the experts' willingness to revise their forecasts in light of new information was tested, hedgehogs, whose initial forecasts were less accurate, were significantly less likely to change their views than the better-performing foxes.⁷⁰ The driver behind this difference was, Tetlock argues, the way in which foxes reason. Their decision-making process was:

both self-critical in content and dialectical in structure, alternating between advancing reasons for expecting an outcome, then shifting into critiques of that reasoning and generating arguments for expecting opposing outcomes, and finally shifting into self-reflective efforts to forge viable syntheses of the clashing considerations.⁷¹

Hedgehogs, on the other hand, simply failed to entertain the possibility that their initial impressions may be wrong.⁷²

More recently, Brian Rathbun conducted experimental, archival and quantitative empirical work that supports, and builds on, the findings of Tetlock.⁷³ Rathbun focussed on exploring the 'epistemic motivation' of individuals, which refers to one's 'willingness to expend effort to achieve to a thorough, rich, and accurate

65 PE Tetlock, (n 4).

66 *ibid* 246.

67 *ibid* 73.

68 *ibid*. See further AW Kruglanski and DM Webster, 'Motivated Closing of the Mind: "Seizing" and "Freezing"' (1996) 103 *Psychological Review* 263.

69 Tetlock (n 65) 75.

70 *ibid* 128.

71 *ibid* 141.

72 *ibid*.

73 Rathbun (n 4); Rathbun, Kertzer and Paradis (n 31).

understanding of the world, including the group task or decision problem at hand'.⁷⁴ Those with high epistemic motivation are more motivated to search for contradictory information, less likely to suffer from premature cognitive closure, and are consequential more likely to behave strategically in line with rational choice theories of action.⁷⁵

C. The Value-Added of a Behavioural Perspective

There are three ways in which the above-mentioned bodies of literature complement and build upon existing theories of compliance.

First, the literature demonstrates the relevance of pre-existing beliefs for all theories of compliance, whatever their stripes. Theories based on assumptions of rational choice maintain that an actor's preferences are exogenous to the theory. However, they also expect actors to process information and update their decisions in light of new information, new information that the abovementioned literature argues cannot be understood without reference to prior beliefs. This idea, which finds parallels in the cognitive sociology concept of schemata,⁷⁶ is important because understanding how preferences change in light of new information is crucial to comprehend state behaviour: if international lawyers want to design norms and institutions that command greater compliance, they cannot just rely on providing incentives to comply, whether in the form of rewards,⁷⁷ sanctions⁷⁸ or otherwise, but need to engage with states' underlying beliefs through which information is refracted.

From the perspective of constructivism, this literature is an affirmation of the importance of beliefs and identity. But it also goes further than constructivist theories of compliance by suggesting that the interaction between actors and norms that constitutes identity or belief is necessarily mediated through prior beliefs, which have been shown to be very hard (if not impossible) to displace.⁷⁹ Furthermore, the literature shows that cognitive and motivated biases play a role in even in the social construction of identity, as the latter necessarily involves the cognition and processing of new information.

Second, as noted in the previous section, existing theories of compliance tend to focus on two rather discrete issues: the construction of preferences and the external factors taken into account by a self-interested actor when deciding how to best pursue those preferences. The bodies of literature outlined in this section, however, show that individual-level variations in style of reasoning affect decision outcomes as well as the likelihood of an actor revising their prior beliefs in line with Bayesian theory. This shows that a stage subsequent to those which many compliance theories focus on—the *process* by which a decision was made—might have an influential

74 CKW De Dreu, BA Nijstad and D van Knippenberg, 'Motivated Information Processing in Group Judgment and Decision Making' (2008) 12 *Personality and Social Psychology Review* 22, 23.

75 Rathbun (n 4), at 88.

76 See C Bicchieri and P McNally, 'Shrieking Sirens: Schemata, Scripts, and Social Norms. How Change Occurs' (2018) 35 *Social Philosophy & Policy* 23, 26–27; P DiMaggio, 'Culture and Cognition' (1997) 23 *Annual Review of Sociology* 263. Thanks to Moshe Hirsch for this point.

77 See A van Aaken and B Simsek, 'Rewarding in International Law' (2021) 115 *AJIL* 195.

78 See eg Goldsmith and Posner (n 10) 28–29.

79 See eg Yarhi-Milo (n 39) 4.

impact on a state's decision to comply. If the goal of descriptive fidelity is the goal of international lawyers, there would seem to be no reason why theories of compliance should not be extended to explore the impact that variations in the decision-making process itself has on compliance.

Third, and in line with the movement towards the focus on the heterogeneity of elites in international relations scholarship, one crucial take-away from the behavioural international relations literature is that actors' psychological traits not only cause result in deviation from rational choice expectations in a population, but also that those traits cause divergence *within* that population. Elites might generally be more or less 'rational' due to the effects of cognitive biases and heuristics, but also more or less 'rational' according to their own propensity to entertain or search for contradictory evidence or points of view, to base their opinions on empirical information, or to be easily satisfied with confirmatory evidence.⁸⁰ Compliance theorists need to grapple with how these important individual-level differences play out for compliance decision-making.

More broadly, the general literature on cognitive biases and heuristics—in particular, prospect theory—has a lot of intersections with compliance theory that would be fruitful to explore. The two core ideas of prospect theory are that gains and losses are viewed in relation to a reference point (which is often, but not invariably, the status quo) and that individuals are loss averse.⁸¹ The former is particularly relevant to the assessment of costs and benefits that underpins rational choice theories of compliance. For example, if financial considerations are paramount to compliance and the pecuniary cost of compliance is viewed by a state relative to a reference point (eg its gross domestic product or balance of payments), then we may expect relatively richer states to be better compliers with international law than relatively poorer states, not because of considerations of ideology or capacity but simply because compliance costs loom larger for them.

In relation to the second core idea of prospect theory, political scientists have suggested that loss aversion might play a role in how states evaluate the potential reputational damage of a particular course of action (thus suggesting that the prospect of reputational loss might play an oversized role in decision-making),⁸² or that action which involves the loss of property, such as territory or arms, might be particularly difficult to take.⁸³ Exploring the hypotheses generated by the application of prospect theory to compliance theories may enrich our understanding of state decision-making, particularly insofar as it relates to the calculation of future costs and benefits resulting from (non-)compliant behaviour.

80 Rathbun (n 4) 23–24.

81 D Kahneman and A Tversky, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 *Econometrica* 263; D Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economists' (2003) 93 *American Economic Review* 1449, 1457.

82 JS Levy, 'Prospect Theory and International Relations: Theoretical Applications and Analytical Problems' (1992) 13 *Political Psychology* 283, 285. See also Van Aaken, 'Behavioral International Law and Economics' (n 2) 477.

83 R McDermott, 'Prospect Theory in Political Science: Gains and Losses from the First Decade' (2004) 25 *Political Psychology* 289, 298.

Insights from the behavioural social sciences have the potential to further our understanding of how, when, and why state behaviour deviates from that predicted by existing theories of compliance—both rational choice theories and constructivist theories alike. The purpose of this section is to demonstrate that those insights go much further, surpassing the bounds of existing theories of compliance and giving us cause to look beyond preference formation and rational choice assumptions to see the full impact of psychological traits on compliance-related behaviour.

4. TESTING THEORIES OF COMPLIANCE: ARGENTINA'S 2013 COMPLIANCE WITH INVESTMENT AWARDS

This section moves from the theoretical discussion of the previous sections to a concrete example in order to explore whether there is scope for behavioural insights in compliance theory. It examines one case study—Argentina's compliance with a series of five investment treaty arbitration awards in October 2013—to test the explanatory power of existing theories of compliance and to identify where behavioural insights might usefully play a role.

A. Background to Case Study

Following a turbulent economic period in the 1980s, in which it experienced hyperinflation and near economic collapse,⁸⁴ Argentina opened up its markets from 1989 onwards, privatizing large parts of the government-owned industries and public utilities.⁸⁵ As part of these reforms, the Argentinian Government decided to peg the Argentine peso to the US dollar in 1991 to promote confidence in the stability of both the currency and economy.⁸⁶ In the 8-year period that followed, Argentina became the poster-child of the International Monetary Fund (IMF): for most of the 1990s, economic growth averaged nearly 6% per year, and foreign direct investment flows totalled \$60 billion from 1992 to 1999.⁸⁷ The IMF Managing Director at the time called Argentina's macro-economic performance 'exemplary', stating that 'Argentina has a story to tell the world: a story which is about the importance of fiscal discipline, of structural change, and of monetary policy rigorously maintained'.⁸⁸

The troubles, however, were just about to start. External shocks in the latter half of 1998 triggered a recession, driving up public debt and causing capital flows to dry up. In 2000 and 2001, despite the extension of emergency loans by the IMF, the deteriorating economic situation forced Argentina to take a series of emergency measures to try to control the crisis.⁸⁹ Importantly, these measures included the suspension of the right of utilities firms to adjust tariffs in line with US inflation and the decoupling of the Argentine peso from the US dollar.⁹⁰ Firms holding utilities

84 IMF, Independent Evaluation Office, *The IMF and Argentina: 1991-2001*, 11.

85 Reform of State Law No 23.696 of August 1989.

86 Currency Convertibility Law No 23.928 of March 1991 and Decree No 2.128/91.

87 *The IMF and Argentina: 1991-2001*, 11 (N.B. FDI figure quoted is gross).

88 Cited in *The IMF and Argentina: 1991-2001*, at 12.

89 For more on the crisis from the perspective of the interaction between Argentina and the IMF, see J Roos, *Why Not Default: The Political Economy of Sovereign Debt* (Princeton UP, 2019) chp 13.

90 Emergency Law No 25.561 of January 2001.

concession contracts in Argentina, now paid in pesos, suddenly found themselves with contracts worth a fraction of what they would have otherwise been.

Soon after these measures were taken, Argentina found itself faced with dozens of claims from investors made under various bilateral investment treaties. The first request for arbitration related to the crisis, *CMS Gas Transmission v Argentina*,⁹¹ was submitted just six months after the Emergency Law that unpegged the peso from the dollar was enacted; the following four years saw a further 33 arbitrations initiated by investors as a result of those measures.⁹² In a short period of time, Argentina went from being a minor actor in the nascent investment system to the being the main player in a highly politicized, controversial and expensive dispute settlement regime.

B. Selection of Case Study

The awards that resulted from the Argentine financial crisis were important in shaping the relatively nascent international investment law regime. The purpose of this section, however, is to test the limits of the explanatory power of compliance theories; accordingly, it is not necessary to establish that Argentinian example is exemplary of the behaviour of a broader cross-section of states.⁹³ Nevertheless, it provides a good case study on which to test theories of compliance for two reasons.

First, there was a clearly delineated change in Argentina's behaviour from non-compliance to compliance in relation to a series of five early arbitration awards.⁹⁴ These awards (including *CMS*) were rendered in the period from 2005 to 2008 and decisions on requests to annul or set aside those awards were given from 2007 to 2011.⁹⁵ During this period, Argentina refused to pay the investors the compensation ordered by the tribunals, arguing that awards were only to be treated as akin to a domestic court judgment and thus had to be enforced through recourse to domestic Argentinian courts.⁹⁶ But on 8 October 2013, after attempts by some of the award creditors to enforce their awards in other domestic jurisdictions,⁹⁷ Argentina

91 *CMS Gas Transmission Company v The Argentine Republic*, 12 May 2005, ICSID Case no ARB/01/8.

92 Data from UNCTAD Investment Dispute Settlement Navigator, <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina/respondent>> accessed 7 November 2021.

93 D Beach and R Brun Pedersen, *Process-tracing Methods: Foundations and Guidelines* (University of Michigan Press, 2nd edn, 2019) 6. The approach adopted here is 'theory-testing process-tracing'; *ibid* chp 8.

94 *CMS v Argentina*; *Continental Casualty Company v The Argentine Republic*, 5 September 2008, ICSID Case no ARB/03/9; *Compañía de Aguas Aconquija S.A. and Vivendi Universal S.A. v The Argentine Republic*, 20 August 2007, ICSID Case no ARB/97/3; *Azurix Corp. v The Argentine Republic*, 14 July 2006, ICSID Case no ARB/01/12; *National Grid P.L.C. v The Argentine Republic*, 3 November 2008 (UNCITRAL).

95 Note that one award, *National Grid*, was conducted under the UNCITRAL rules, not under the ICSID Convention. Argentina attempted to set aside the *National Grid* award under the US Federal Arbitration Act, as the arbitration was seated in Washington DC; see *National Grid v Argentina, Decision on Jurisdiction*, 20 June 2006, para 6; *Argentine Republic v National Grid PLC*, US Court of Appeals for the District of Columbia Circuit, No 10-7093, 11 March 2011.

96 See Letter from Alfredo V Chiaradia, Argentine Ambassador, to Timothy F Geither, US Treasury Secretary (25 August 2011, quoted in CB Rosenberg, 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2013) *Georgetown Journal of International Law* 503, fn 47.

97 See *Blue Ridge Investments LLC v Republic of Argentina*, US Court of Appeals for Second Circuit, 19 August 2013. Note that I use the term 'award creditors' instead of 'investors' as certain of the awards had been transferred to third-party investment firms.

announced that it had decided to comply with the five awards, paying the award creditors a discounted amount of the full value of the award in Argentinian bonds.⁹⁸

The ability to identify this changing point (and the fact that there actually was a changing point) is important for two reasons: first, it means that there was a conscious decision made to (partially) comply with the investment awards, and that the behaviour of the state was not just dictated by path dependence;⁹⁹ second, it enables us to identify with relative precision a time frame in which the factors that played a role in Argentina's decision to comply must have been in the ascendancy and finally reached a tipping point (that is to say, the period following which the first annulment request was rejected until the settlement agreement, ie 2007–2013).

Second, in the case of Argentina, we can access numerous indicators of the factors that the abovementioned theories suggest would influence a state's decision to comply. We can freely access transcripts from both houses of the Argentinian legislature (the *Cámara de Diputados* and *Cámara de Senadores*), information regarding Argentina's balance of trade, its currency reserves, and loans from international financial institutions, such as the International Monetary Fund (IMF), World Bank, and Inter-American Development Bank (IADB). Crucially, we can do so for the entire period at issue. The availability of this information enables us to formulate testable hypotheses on the basis of accessible evidence in order to explore the explanatory power of existing compliance theories.

That being said, a few caveats related to the choice of case study are needed. The behaviour examined here is compliance with investment awards, not compliance with the underlying conventional rule of international law (what has been called 'secondary' as opposed to 'primary' compliance).¹⁰⁰ The two have frequently been assimilated, with the former having been used previously to test the explanatory power of theories of compliance.¹⁰¹ That being said, there are important differences between the two. In particular, judgments and awards are likely to be directed towards one actor and to be more specific in terms of the behaviour that is required to comply. Accordingly, there is less room for ambiguity of the required action or lack of awareness to be an explanation of non-compliant behaviour. General lessons regarding compliance drawn from analyses of compliance with judgments and awards must be cognisant of this.¹⁰²

Finally, while the Argentinian example is in many ways the ideal case study on which to test theories of compliance, it is problematic in others. In particular, the

98 Ministerio de Economía y Finanzas Públicas, Resolución no 598/2013, 8 October 2013. I note that Argentina did not comply with the *full* value of compensation given in the awards but rather paid award creditors around 75% of the face value in Argentinian bonds. Whether this constitutes compliance depends on one's definition of that term. As indicated earlier, I adopt Wuerth's definition of compliance, according to which compliance is 'conformity between behaviour and international law', and hence also encompasses cases of what might be called 'partial compliance' like the present case study.

99 G Capoccia and RD Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 *World Politics* 341, 342.

100 von Stein (n 7) 478.

101 See eg D Pulkowski, 'Testing Compliance Theories: Towards US Obedience of International Law in the *Avena* Case' (2006) 19 *LJIL* 511.

102 From a doctrinal point of view, non-compliance with an award or judgment will often also entail the breach of a provision of the underlying treaty; see, eg arts 53 and 54 of the ICSID Convention.

myriad factors that may have influenced Argentina's compliance with the five awards at issue are often hard to disentangle in order to create testable hypotheses based on compliance theories. This section attempts to do just that but there are nevertheless certain events—in particular, the sovereign bondholder litigation that was on-going over the relevant period before US domestic courts—the influence of which is hard to isolate and capture in some independent variable.

C. Hypotheses Based on Existing Theories of Compliance

(i) *Realist factors*

What might we expect to see if Argentina's actions had been motivated by material self-interest as realist theory predicts? Three explanations have been suggested in the literature. The first is that the home states of investors (in particular, the United States the UK and France) threatened to block loans from international financial institutions if Argentina failed to comply with investment awards.¹⁰³

If the opposition to multilateral development bank loans were an important factor in compliance, we would expect to find that those states had gone through with their threats, resulting in a consequential decrease in the number and/or quantum of loans to Argentina approved by the World Bank and Inter-American Development Bank (IADB) in the period directly preceding the settlement agreement of October 2013.¹⁰⁴ (Note that, from 2007 to 2013, Argentina had no outstanding loans to the IMF,¹⁰⁵ having paid its debt in full on 3 January 2007).¹⁰⁶ Moreover, we would expect the amount of those 'lost' loans to be sufficient to induce compliance; in other words, they should be equal to or more than Argentina's outstanding liabilities under the five arbitration awards at issue, a total of \$677 million US dollars.¹⁰⁷

H1: Loans from the World Bank and IADB, worth more than Argentina's outstanding liability from the five arbitration awards, were vetoed by investors' host states in the period directly preceding the 2013 settlement agreement.

Second, under section 2462(b)(2)(E) of the US Trade Act of 1974, the President 'shall' refuse to designate a state as a beneficiary of the Generalized System of Preferences (GSP) scheme for developing countries if it fails to 'to act in good faith

103 See Written Answer by Justine Greening, Secretary of State for International Development, Hansard, HC Deb 12 February 2013, col 685W, question 142909, <<https://publications.parliament.uk/pa/cm201213/cmhansrd/cm130212/text/130212w0004.htm>> accessed 7 November 2021; Reuters, 'U.S. ends opposition to multilateral development bank loans to Argentina' 21 January 2016, at <<https://www.reuters.com/article/us-usa-argentina-loans-idUSKCN0UZ2H1>> accessed 7 November 2021.

104 Note that the United States, France, Germany and the UK are all members of both the IADB and the World Bank.

105 See IMF, 'Argentina: Financial Position in the Fund as of January 31, 2007' at <<https://www.imf.org/external/np/fin/tad/exfin2.aspx?memberkey1=30&date1Key=2007-01-31>> accessed 7 November 2021.

106 A van Schaick, 'Argentina: Government Pays Back IMF Debt' (NACLA, 25 September 2007) at <<https://nacla.org/article/argentina-government-pays-back-imf-debt>> accessed 7 November 2021.

107 Reuters, 'Argentina to pay \$500 million to resolve disputes with foreign firms' 18 October 2013, <<https://www.reuters.com/article/uk-argentina-worldbank-payment-idUKBRE99H16X20131018>> accessed 7 November 2021.

in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation'.¹⁰⁸

Following petitions made by Azurix and Blue Ridge Investments (which had purchased the CMS award) to the GSP Subcommittee requesting the suspension of Argentina's GSP status,¹⁰⁹ President Obama announced the suspension of Argentina's GSP status on 26 March 2012 (effective 28 May 2012) as the result of its non-compliance with two of the arbitral awards that were the subject of the 2013 settlement (CMS and *Azurix*).¹¹⁰ This was the first time in the history of the GSP programme that the United States had suspended GSP status on the basis of non-compliance with arbitral awards.¹¹¹ The US Trade Representative at the time, Ron Kirk, stated that 'the Argentine government has failed to pay two longstanding arbitral awards in favor of U.S. companies. We urge the Government of Argentina to pay the subject awards. This would allow us to consider reinstating Argentina's GSP eligibility and promote the growth of a mutually beneficial U.S.-Argentina trade and investment relationship'.¹¹² Argentina's GSP status was not reinstated until 1 January 2018.¹¹³

Some have argued that the suspension of Argentina's GSP status may have motivated it to comply with investment awards.¹¹⁴ If this was a consideration in its decision to comply, we would expect the value of exports to the United States affected by the loss of GSP status to exceed the cost of compliance with the awards.

H2: The economic damage caused by the loss of Argentina's GSP status in the U.S. outweighed the liabilities owed by Argentina under the five investment awards that were the subject of the 2013 settlement agreement.

Third, some suggest that Argentina's desire to access to the international debt markets motivated compliance with these awards.¹¹⁵ While fears regarding execution

108 19 USC § 2462(b)(2)(E) (Trade Act of 1974).

109 These petitions were submitted in 2009 (*Azurix*) and 2010 (*Blue Ridge*), and reviewed in August 2010. See *Petition for Review of the Republic of Argentina's Eligibility under GSP by Azurix Corp.*, 4 December 2009, 2009 Annual GSP Review; *Petition for the Withdrawal of the Application of Duty-Free Treatment to Articles of Argentina by Blue Ridge Investments, L.L.C.*, 23 June 2010, 2009 Annual GSP Review, 75 Federal Register 48, 737.

110 Reuters, 'Obama says to suspend trade benefits for Argentina' (26 March 2012) <<https://www.reuters.com/article/us-usa-argentina-trade-idUSBRE82P0QX20120326>> accessed 7 November 2021.

111 See Rosenberg (n 96) 524.

112 USTR Archives, 'U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences' (26 March 2012) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti>> accessed 7 November 2021.

113 Argentine Ministry of Foreign Affairs, International Trade and Worship, 'Argentina again to benefit from U.S. Generalized System of Preferences' Press Release, 22 December 2017, <<https://cancilleria.gob.ar/en/news/releases/argentina-again-benefit-us-generalized-system-preferences>> accessed 7 November 2021.

114 See RP Alford, 'The Convergence of International Trade and Investment Arbitration' (2013) 12 Santa Clara Journal of International Law 35.

115 M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016) 19 Journal of International Economic Law 681, 700–01. See also MercoPress, 'Argentina prepared to comply with World Bank arbitration and pay

of the awards in foreign jurisdictions may have worried Argentina, reports suggest that compliance was viewed primarily as a measure required to rebuild investor confidence in the ability and willingness of Argentina to comply with its debts.¹¹⁶ This was seen as one step in a series of measures—including reaching settlement with ‘hold out’ bondholders that had refused to participate in two debt restructurings that took place after the 2001 default—that was necessary to take before issuing further sovereign debt.

If the settlement agreement of October 2013 was motivated by a desire to access international debt markets, we would expect to see an increasing need for Argentina to access external financing prior to the settlement agreement, which may be demonstrated by comparing its external debt over that period with its total reserves (from which it could draw to service debt if its balance of payments was negative).

H3: Argentina’s total reserves decreased in the period from 2007 to 2013, whilst its external debt stayed constant, increased, or decreased to a lesser extent.

(ii) *Liberal and constructivist factors*

In the absence of any notable social movement on the international level that would motivate compliance with investment awards (indeed, if anything, there was ideological movement against the investor–state dispute settlement system),¹¹⁷ our focus is on changes on the domestic level over the relevant period.

From a constructivist perspective, previous studies have suggested that Argentina’s desire to be viewed as internationalist may explain its decision to comply with the series of investment awards in 2013.¹¹⁸ Of particular note is that, unlike both Venezuela and Ecuador, Argentina remained a state party to the ICSID Convention, despite reportedly having mooted withdrawal in early 2013.¹¹⁹ From a liberal perspective, some suggest that Argentina’s democratic system of governance and its domestic media exerted pressure on the Peronist government, led at that time by Cristina Fernández de Kirchner, to comply with investment awards.¹²⁰

If these suggestions are correct, we should be able to see manifestations of this change closer to the centre of power that ultimately made the decision to comply. One proxy that we can use is how legislators talked about investment arbitration

corporations with bonds’ (11 October 2013) <<https://en.mercopress.com/2013/10/11/argentina-prepared-to-comply-with-world-bank-arbitration-and-pay-corporations-with-bonds>> accessed 7 November 2021.

116 Reuters, ‘Argentina to pay \$500 million to resolve disputes with foreign firms’ (18 October 2013) <<https://www.reuters.com/article/uk-argentina-worldbank-payment-idUKBRE99H16X20131018>> accessed 7 November 2021.

117 See generally M Waibel and others, *The Backlash Against Investment Arbitration* (Wolters Kluwer 2010).

118 Hirsch (n 115) 702–03.

119 See Hogan Lovells, ‘If Argentina Withdraws from the ICSID Convention: Implications for foreign investors’ (4 February 2013) <<https://www.hoganlovells.com/en/pdfdownload?page={891D9102-8529-4ECA-9172-878DA69CBC89}&p=1>> accessed 7 November 2021.

120 Hirsch (n 115) 703–05.

within the two Argentinian legislative chambers: the *Cámara de Diputados* and the *Cámara de Senadores*.

If resurgent internationalism was the root cause of Argentina's compliance, we would expect to see that legislators decreased the hostility with which they spoke about investment arbitration, the administering institutions, and the international investment regime more generally. Similarly, if opposition political parties (or even members of the ruling Justicialist Party at the time) put pressure on the Government to settle investment awards, as liberal theory suggests, we would also expect to see a change in how arbitration was perceived in parliamentary debates. Without examining these debates in detail, we are unable to pick apart whether constructivist or liberal factors played a preponderant role. Nevertheless, it suffices for the purposes of this article to examine the change in the way in which legislators talk about arbitration over the relevant period to see if they provide plausible explanations that could be further explored.

Accordingly, if the constructivist or liberal explanations are correct, we would expect to see a decrease in hostility (or increase in positivity) in the way in which legislators talk about investment arbitration or related concepts over the relevant period, especially in the period directly preceding the settlement agreement.

H4: The sentiment attached to terms related to investment arbitration in debates in the Argentinian legislature was progressively less negative in the period 2007 to 2013.

D. Testing the Hypotheses

(i) *Realist factors*

In order to test hypothesis *H1*, I drew on publicly available data from the World Bank and IADB. [Figure 1](#) shows the change in approvals of loans from 2005 to 2015, shown as the total amount of loan approved per year in US dollars. It is notable, first, that the IADB was generally a larger lender than the World Bank to Argentina over this period. Second, the World Bank approved only very small grants to Argentina in 2012 (\$60,000) and 2013 (\$5,860,000), having, on average, approved \$835 million in loans and grants per year during the 10-year period shown on the graph. This subsequently increased from 2014 onwards. Finally, while virtually no World Bank loans were approved in 2012 and 2013, the approval of IADB loans continued throughout the period, only slightly decreasing over time.

The fact that IADB loans continued to be approved allowed Argentina to access some financing. However, the 'lost' value of loans from the World Bank far outweighed Argentina's liability under the outstanding arbitrations award: around \$834 million in 2012 and \$829 million in 2013, when calculated against the 10-year historic average. Both the timing and the quantum of these lost loans supports the idea that the settlement agreement of 2013 may have been motivated by a desire to ensure access to multilateral development bank financing again. Indeed, the fact that the World Bank revealed a new strategic partnership with Argentina just two days

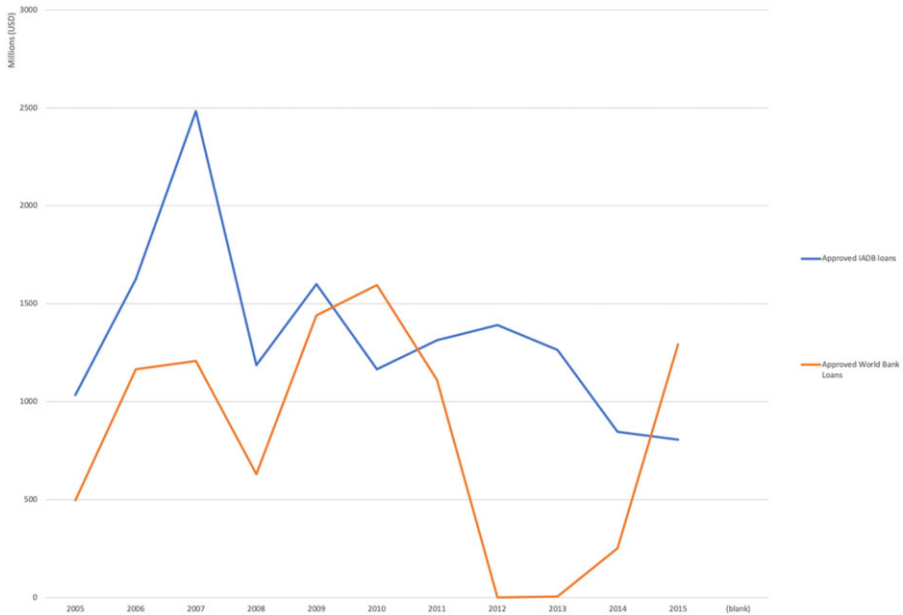


Figure 1. Approved World Bank/IADB loans to Argentina (total approved per year).

after the announcement of the 2013 settlement would seem to support the suggestion that the provision of World Bank loans played a role in Argentina's decision-making.¹²¹

In relation to hypothesis *H2*, in terms of the net loss to the Argentine economy of GSP status, official figures from the United States and Argentine Governments state that in 2011, between \$464 and \$477 million of Argentine imports benefitted from GSP treatment, or 10 to 11% of total Argentine exports to the United States.¹²² In absolute terms, this amount dwarfs the liability of the *CMS* and *Azurix* awards, which totalled around \$300 million plus interest, and comes close to matching the \$677 million owed under the awards of the 2013 settlement.

However, the total value of imports quoted by both governments is a misleading figure: the loss of GSP status does not prohibit imports, but rather means that the goods were subject to a higher tariff upon importation (which was, at the time, on average 3.5%).¹²³ Crucially, the cost of this additional tariff was significantly

121 The World Bank, 'Argentina/BM: New Strategic Partnership 2014-16' (10 October 2013) <<https://www.worldbank.org/en/news/press-release/2013/10/10/anuncian-alianza-estrategica-2014-16>> accessed 7 November 2021. I note that the announcement of this partnership did not in itself constitute the approval of loans, as has been recently reported; see E Gaillard and IM Penusliski, 'State Compliance with Investment Awards' (2021) ICSID Review 1, at 14.

122 USTR Archives, 'U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences', cf Argentine Ministry of Foreign Affairs, International Trade and Worship, 'Argentina again to benefit from U.S. Generalized System of Preferences'.

123 Embassy of the United States in Buenos Aires, Argentina, 'GSP Fact Sheet' <<https://web.archive.org/web/20151022124638/http://argentina.usembassy.gov/gsp2.html>> accessed 7 November 2021.

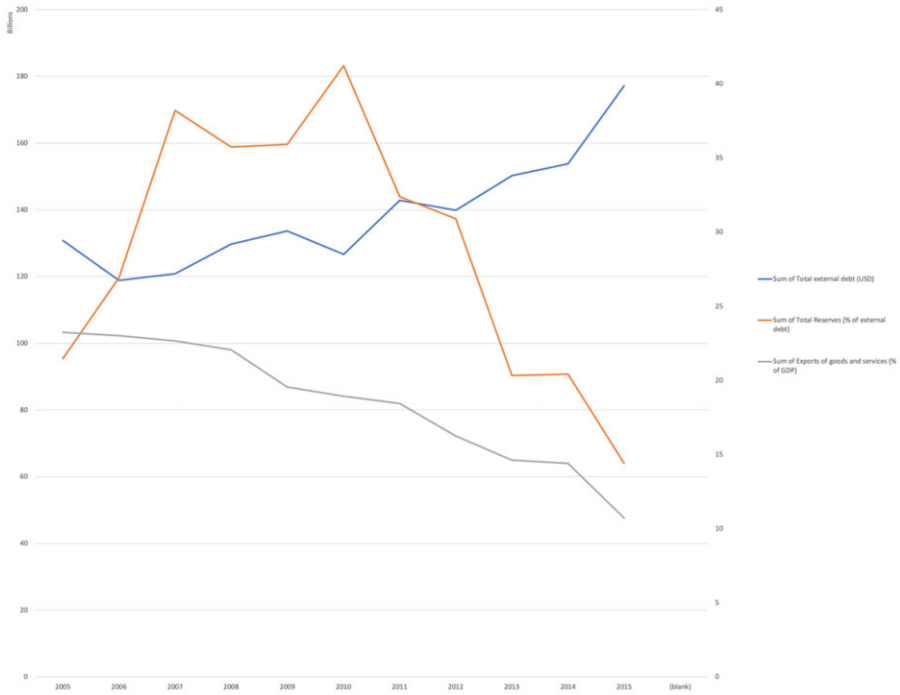


Figure 2. Argentina’s Reserves, Exports, and External Debt.

smaller than the liability of Argentina under any award: an estimated \$17 million per year.¹²⁴ From a purely economic perspective, then, it would seem to be unlikely that the additional costs caused by the loss of GSP status alone drove Argentina to comply with its outstanding debt from investment awards. The data therefore suggests that *H2* should be rejected.

In relation to hypothesis *H3*, data from the World Bank shows that Argentina’s total reserves (calculated as a percentage of its total external debt) decreased over the relevant period, from a high of 41% in 2010 to 20% in 2013.¹²⁵ This was accompanied by a decrease in total exports over the same period, from 23% of total GDP in 2007 to 15% in 2013, and an increase in external debt from \$121 billion in 2007 to \$150 billion in 2013. This trend is shown in [Figure 2](#).

This drop in exports and reserves, and increase in external debt, was caused by a combination of the Peronist government’s subsidization of key consumer goods and services, which grew from \$1.6 billion in 2005 to \$18.1 billion in 2011, and a

124 BBC, ‘US suspends special tariffs for Argentina’ (26 March 2012) <<https://www.bbc.com/news/business-17517838>> accessed 7 November 2021; Embassy of the United States in Buenos Aires, Argentina, *ibid*.

125 Excluding gold, Argentina’s reserves decreased from \$50 billion in 2010 to \$28 billion in 2013. It is notable that there is not a sharp decrease in exports around 2013/2014, which we might expect if the suspension of Argentina’s GSP status by the United States had any significant effect.

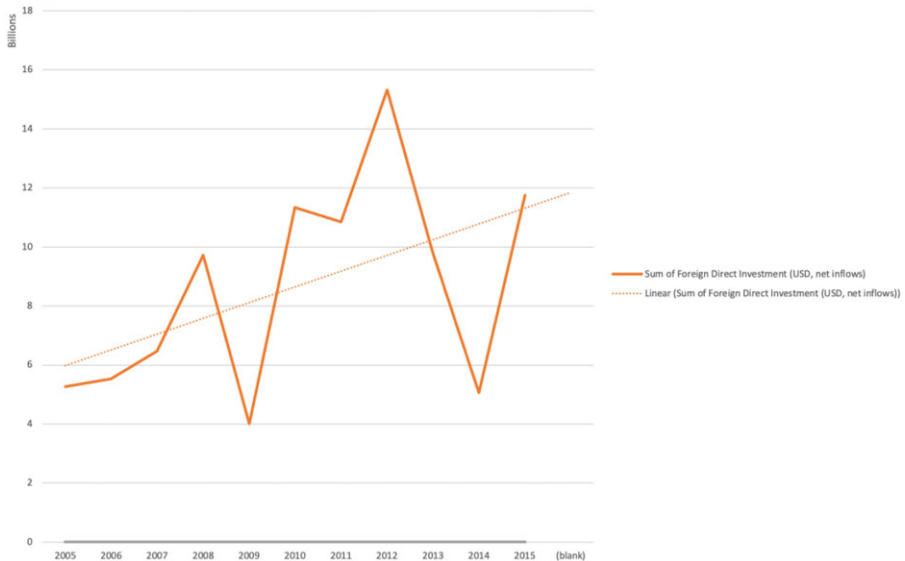


Figure 3. Foreign Direct Investment into Argentina.

significant decrease in economic growth, which dropped from 8.9% in 2011 to 2.2% in 2012.¹²⁶ As a result, in the words of one analyst writing in early 2013, ‘the challenge for Argentina’s international economic policy is to maintain sufficient dollar inflows to preserve adequate reserve levels needed to make future international payments’.¹²⁷ As Figure 3 shows, foreign direct investment (FDI), while not drying up over the period, was clearly insufficient to fill this gap.

In the absence of sufficient FDI or exports to cover the gap left by its dwindling currency reserves and stagnating economy, one of the only solutions left for Argentina to cover its international payments was to access the international debt market, something that it had not been able to do since its default on sovereign bonds in 2001. Compliance with its international arbitral awards, along with reaching an agreement with ‘hold-out’ bondholders that had not taken part in previous restructurings,¹²⁸ was seen as being a prerequisite for Argentina to gain access to international financing.¹²⁹ This was finally achieved in 2016 when a new Argentine administration, led by President Mauricio Macri, issued its first sovereign bonds in

126 JF Hornbeck, ‘Argentina’s Post-Crisis Economic Reform: Challenges for U.S. Policy’ US Congressional Research Service, (15 April 2013), 3–5 <<https://fas.org/sgp/crs/row/R43022.pdf>> accessed 7 November 2021.

127 *ibid* 11.

128 D Rosenheck, ‘Argentina’s Rational Default’ *The New Yorker* (7 August 2014) <<https://www.newyorker.com/business/currency/argentinas-rational-default>> accessed 7 November 2021.

129 Reuters, ‘Argentina to pay \$500 million to resolve disputes with foreign firms’ (18 October 2013) <<https://www.reuters.com/article/uk-argentina-worldbank-payment-idUKBRE99H16X20131018>> accessed 7 November 2021

15 years.¹³⁰ Accordingly, the data supports *H3*, and suggests that Argentina may have complied with investment awards as part of its plan (and need) to access international debt markets at the time.

(ii) *Liberal and constructivist factors*

In order to test hypothesis *H4*, I analysed all debates that took place in both houses of the Argentinian Congress (*Cámara de Diputados* and the *Cámara de Senadores*) within the relevant period.¹³¹ For this six-year period, the records of the legislature total 89,697 speeches of Senators and Deputies in 416 documents. These were converted from PDF to plain text format, the transcript elements of the documents were extracted, and the speech was split into individual interventions by legislators.¹³² The data was then limited to segments that contained one or terms related to investor-state arbitration in general,¹³³ or the disputes at issue in the 2013 settlement agreement specifically,¹³⁴ which resulted in a dataset of 86 speech segments.

Automated sentiment analysis on the dataset using a transformer-based library proved too unreliable when compared to a sample set of the data that was manually coded by research assistants. Accordingly, the dataset was coded manually for sentiment of the speech segment and the political party of the speaker. Initial intercoder reliability was moderate,¹³⁵ and remaining discrepancies were resolved by discussions between both coders and the author.¹³⁶

This method should provide a good picture of how these terms arose and who used them over the relevant period. Nevertheless, certain caveats should be mentioned. First, the dataset may be under-inclusive insofar as legislators spoke about ISDS using terms that are not included in the list of search terms. Expanding the list to include more terms (or broader terms), however, has the corollary problem of over-inclusivity. It was therefore decided to opt for a relatively circumscribed list that included general, broad terms related to investment arbitration, which would be sufficient to show a trend of changing attitude towards arbitration if one exists. Second, even if a change in identity or sentiment felt towards investment arbitration occurred during the relevant period, this analysis would only detect such a change if it were expressed by representatives in the two houses of Congress. It is clear that, over the

130 Reuters, 'Argentina says #CiaoDefault, paying holdouts after 14 years' (22 April 2016) <<https://www.reuters.com/article/argentina-debt-idUKL2N17P0NO>> accessed 7 November 2021.

131 The dataset and coding book for this analysis are available at <<https://doi.org/10.17026/dans-xatnxbd>>.

132 The code for this process, developed by Ben Companjen, as well as details regarding the steps involved in web-scraping, extracting text and creating a workable dataset, is available at <<https://gitlab.services.universiteitleiden.nl/ub-leiden/cds/argentinian-parliament-miner>>.

133 The general terms used were: 'Centro Internacional de Arreglo de Diferencias Relativas a Inversiones', 'CIADI', 'arbitraje', 'tratado bilateral de inversiones'.

134 The specific terms used were: 'CMS', 'Azurix', 'National Grid', 'Continental Casualty', 'Vivendi', 'Compañía de Aguas del Aconquija', 'Blue Ridge Investments'.

135 The interrater reliability was found to be $\kappa = 0.482$ ($p < 0.001$), 95% CI (0.325, 0.639), showing moderate inter-coder agreement according to the conventional standards; JR Landis and GG Koch, 'The Measurement of Observer Agreement for Categorical Data' (1977) 33 *Biometrics* 159, at 165.

136 On discussions as a method of resolving intercoder discrepancies, see C O'Connor and H Joffe, 'Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines' (2020) 19 *International Journal of Qualitative Methods* 1.

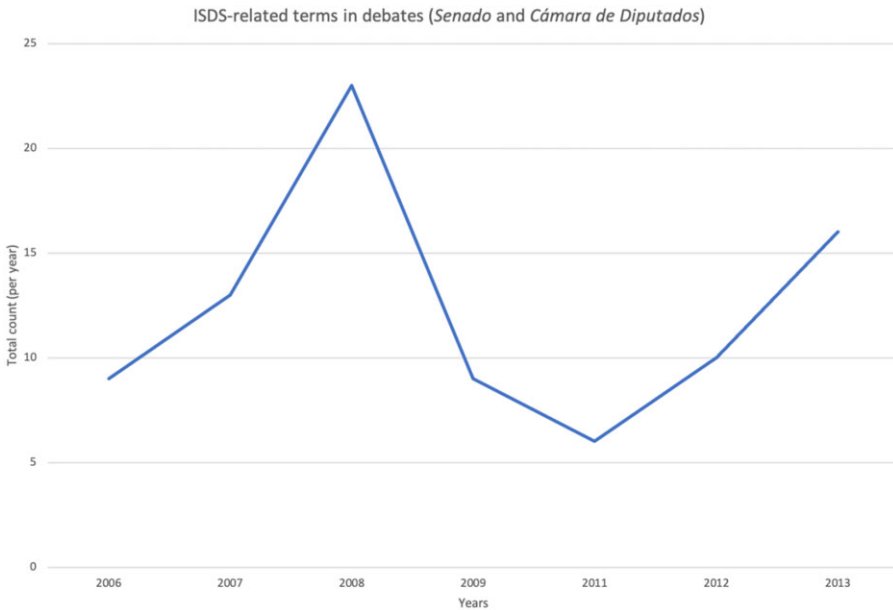


Figure 4. ISDS-related terms in debates (*Senado and Cámara de Diputados*).

relevant period, the Fernández de Kirchner Government had poor relations with the legislature, as demonstrated by the fact that the Government's Chief of Cabinet rarely complied with his constitutional duty to report to Congress monthly.¹³⁷ Accordingly, it is possible that any change in position that might be explained by constructivist or liberal factors occurred outside the doors of Congress.

Nevertheless, bearing these caveats in mind, the analysis does raise some interesting points. The first is that the frequency with which the terms were mentioned (shown in Figure 4) peaked in 2008 and rose again from 2011 to 2013. Yet, when we look at these changes on the level of the political party of the speaker (illustrated in Figure 5), it is clear that the majority of the increase in the count that we see in both 2008 and 2013 was a result of members of the ruling Justicialist Party itself, and not through an increase in interventions by members of opposing political parties.

When we turn to look at the general sentiment expressed in relation to investment arbitration over the relevant period, the data shown in Figure 6 suggests that there was no 'warming' to international arbitration within the Argentinian legislature in the relevant period, going against the constructivist theory that Argentina's compliance in 2013 resulted from a resurgent internationalist identity.¹³⁸ From the perspective of liberal theory, it also suggests that domestic political parties (and domestic constituents insofar as they exert influence through their elected

137 See 'Informes de Jefatura de Gabinete de Ministros' <https://www.hcdn.gob.ar/secparl/dgral_info_parlamentaria/dip/informes> (in particular, note the relative scarcity of reports from 2007 to 2013) accessed 7 November 2021. Thanks to Nicolás Bianchi for pointing this out to me.

138 cf Hirsch (n 115) 703.

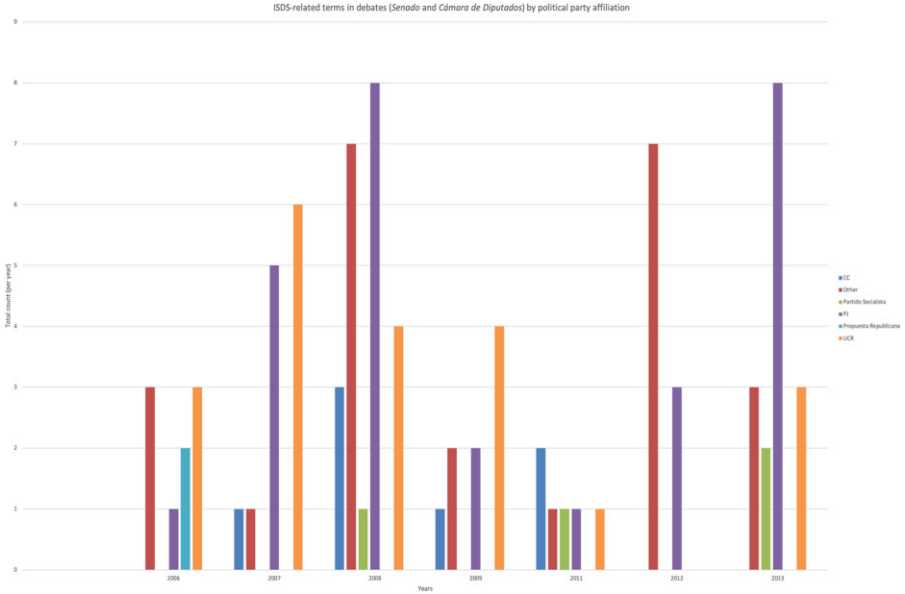


Figure 5. ISDS-related terms in debates (Senado and Cámara de Diputados) by political party affiliation.

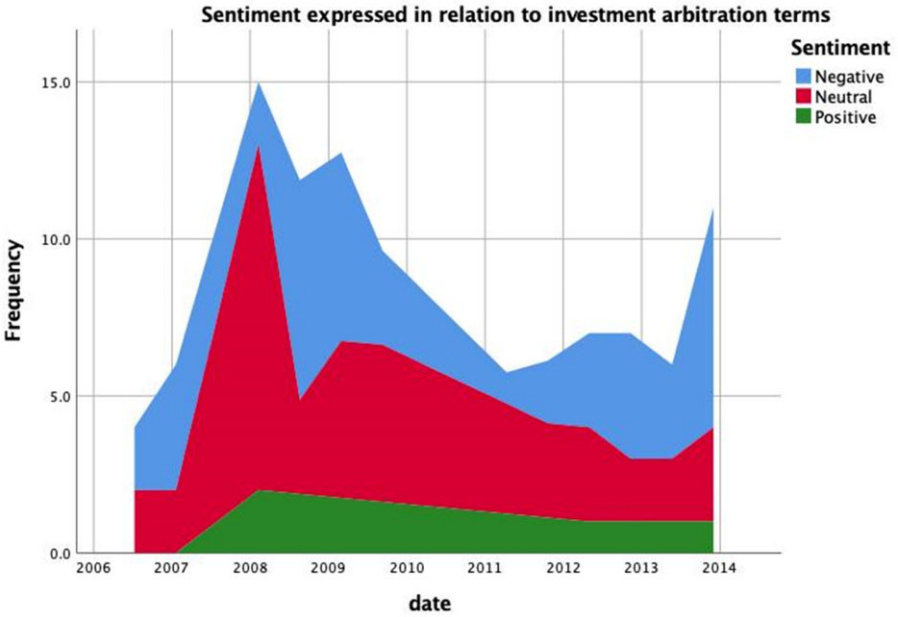


Figure 6. Sentiment expressed in relation to investment arbitration terms.

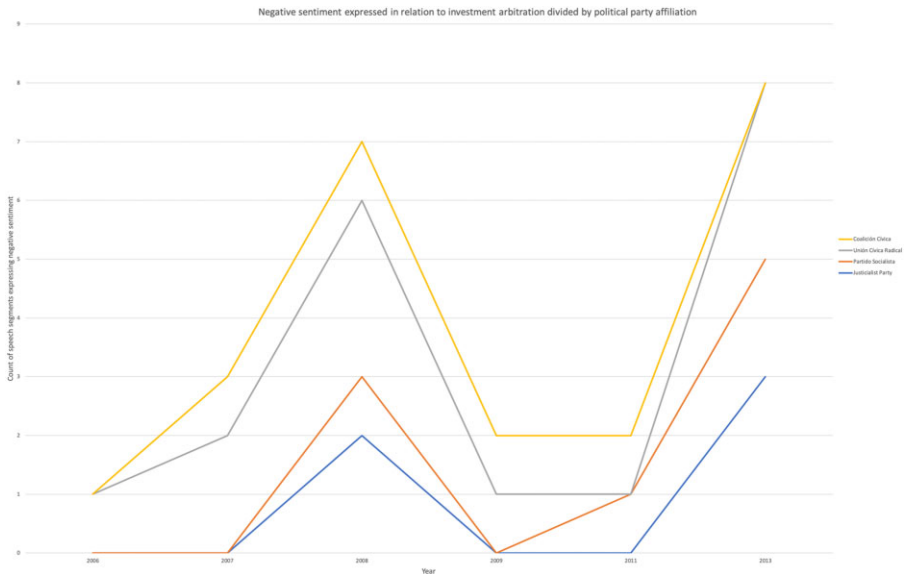


Figure 7. Negative sentiment expressed in relation to investment arbitration divided by political party affiliation.

representatives) did not push the Argentinian Government towards its decision to comply with the five investment awards. In other words, the data would seem to go against *H4*. That is not to say that matters of identity or domestic pressure wielded no sway over the government; rather, that the mechanism by which this took effect was not via the medium of the legislature, as one might expect.

This is supported when we disaggregate the sentiment data by political party. [Figure 7](#) illustrates the change in negative sentiment expressed by members of the ruling Justicialist Party and the three main opposition parties over the relevant period, the Partido Socialista, the Unión Cívica Radical, and the Coalición Cívica. Indeed, if anything, we see an *increase* in negative sentiment expressed regarding investment arbitration by legislators of all parties—both opposition and government alike—just before the 2013 settlement agreement, going against the liberal idea that domestic political pressures pushed the government to comply.

As a final point, it is worth noting that the data clearly shows that the sentiment expressed by the legislators in relation to arbitration was almost entirely negative or neutral during the entire period under review: of the 86 speech segments in which one of the terms was present, almost half (41) of those expressed negative sentiment, 41 were neutral, and only 4 were positive. This confirms the view that at least Argentinian law-makers—if not the general public more broadly—were generally critical of the investment arbitration system.¹³⁹

139 See *ibid.*, at 693–95.

5. REVISITING THE VALUE-ADDED OF A BEHAVIOURAL PERSPECTIVE

The previous section suggests that realist factors—in particular, the veto of World Bank loans by investors' home states and the need to access the international debt markets—could best explain Argentina's decision to comply with five arbitration awards in October 2013. What could a behavioural perspective add to this, if anything?

A. Perception and Prior Beliefs: Reaching Tipping Point

In Section 3, I suggested that conceiving of compliance decision-making as a process also encompasses understanding how states *perceive* new information and the *process* by which decisions are made. In relation to perception, adopting a behavioural perspective can help us understand why Argentina complied when it did.

In 2011, many of the factors that seemingly drove Argentina to comply with the awards were already in place. At their first meeting, in November 2011, President Obama and President Fernández de Kirchner spent 'the majority of their time'¹⁴⁰ discussing Argentina's non-compliance and the consequences that would flow from this, in particular, the suspension of Argentina's GSP status. Similarly, the United States announced in late 2011 that its policy would be to block World Bank and IADB loans to Argentina until the latter paid its debts,¹⁴¹ something that the French and US Executive Directors to the World Bank had already threatened in 2009.¹⁴² Moreover, the data in [Figure 2](#) shows that, already in 2011, Argentina's total external debt was rising while total reserves had sharply dropped from their previous high. Why, then, did Argentina not comply in late 2011 or early 2012, when the economic implications of these factors became clear?

While several explanations are plausible,¹⁴³ one reason could be how these factors were perceived by Argentina's leaders. Throughout the Peronist administrations of Nestor Kirchner and Cristina Fernández de Kirchner, there was general hostility towards the neoliberal economic system forged under the Washington consensus, including the World Bank and ICSID (which administered four of the five awards

140 Alford (n 114), at 52.

141 Reuters, 'U.S. ends opposition to multilateral development bank loans to Argentina' (21 January 2016) <<https://www.reuters.com/article/us-usa-argentina-loans-idUSKCN0UZ2H1>> accessed 7 November 2021.

142 See comments of the French Executive Director of the World Bank, 9 June 2009, at 46 ('...encouraging Argentina to take up steps to restore access to external financing and improve investor confidence in Argentina...in particular the issues of arrears clearance with the Paris Club and honoring the International Arbitration Awards [sic]'), <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/373911588932518302/transcript-of-regular-board-meeting-of-the-executive-directors-of-the-ibrd-ida-and-ifc-held-on-tuesday-june-9-2009>>; and the statement of the U.S. Executive Director, Mr. Whitney Debevoise, at the same meeting, available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/357101588925863652/statement-by-whitney-debevoise-at-the-meeting-of-june-9-2009> accessed 7 November 2021.

143 As noted above, one explanation that I do not explore is this article is whether the *cumulative* effect of the factors analysed here, in conjunction with the litigation that was at the time on-going in New York courts regarding Argentina's sovereign bond default, pushed Argentina to comply with the investment awards. The reason for this is that whilst might note that the cumulative effect of these factors plausibly played a decisive role, it is empirically very difficult (if not impossible) to measure this effect.

that were part of the 2013 settlement), and scepticism about the influence that the United States exerted over international financial institutions and arbitral tribunals.¹⁴⁴ It would be naïve to expect that this belief simply dissipated once economic factors made clear that Argentina would be left with little choice but to reach a settlement agreement with the award creditors. Instead, it would make sense to understand this prior belief as being the lens through which U.S. threats and looming economic consequences of non-compliance were viewed. Argentina's decision to comply did not, therefore, occur when rationalist theories might predict, but was rather delayed until Argentina reached a tipping point at which the economic realities overpowered its belief in the illegitimacy of the system.¹⁴⁵

B. Understanding Argentina's Reputation-Motivated Behaviour

The preceding section showed that one important factor in Argentina's decision to comply was the desire to gain investor confidence in order to access the international debt markets. Confidence and one's perceived reputation (in this case, for reliability) are notions that are inherently psychological.¹⁴⁶ The importance of reputation in international law is frequently operationalized in rational choice terms, according to which reputation is important only insofar as it allows a state to capitalize on that reputation in the future, for example, by driving harder bargains with negotiating partners.¹⁴⁷ But it is unclear (at best) whether reputation actually operates in this way.

Looking at the question of reputation and Argentina's access to the international debt markets from a behavioural perspective might push us to ask questions that we might not pose if we viewed the question from a rational choice or ideology-driven perspective. Why did Argentina think, for example, that compliance with these five arbitration awards would improve its reputation? Did the highly publicized nature of the litigation and subsequent non-compliance play a role in expanding its perceived reputational importance? If so, how might this link between salience and perceived reputation be harnessed to promote compliance in the future? How did Argentina perceive its reputation prior to 2013 settlement, and what did it base this perception on? How, and on what basis, did Argentinian officials expect other states, and institutional and private investors to react to the 2013 settlement agreement?

Looking for answers to these questions is beyond the scope of this article. However, a better understanding of how and why Argentina was seemingly motivated by concern for its reputation would be an invaluable contribution to compliance theory, and one that would necessarily have to engage with the psychological nature of reputation as a phenomenon.

144 Hirsch (n 115) 693.

145 On the concept of psychological tipping points, see E O'Brien, 'When Small Signs of Change Add Up: The Psychology of Tipping Points' (2020) 29 *Current Directions in Psychological Science* 55.

146 For a multidisciplinary treatment of reputation, see G Origi, *Reputation: What it is and Why it Matters* (Princeton UP, 2018). See also M Tomz, *Reputation and International Cooperation* (Princeton UP, 2008).

147 See Guzman (n 14) 35.

C. Not So Fast: Decision-Making and the Importance of GSP Status

In the previous section, I argued that the suspension of Argentina's GSP status by the United States could not in itself have led to the 2013 settlement. This was because, taken as a purely economic calculation, the liability owed by Argentina under the arbitral awards dwarfed the additional tariffs caused by the loss of GSP status. However, this assumes that Argentina acted in accordance with the tenets of rational choice and calculated the award liabilities and the cost of loss of GSP status, weighing the two against each other. And there is no indication that this happened.

What we do know, however, is that the prospect of the suspension of Argentina's GSP status was highly politicized and widely publicized: it was discussed by the Presidents of the respective states at their first meeting;¹⁴⁸ Argentinian officials travelled to Washington DC to testify before a sub-committee of the US Trade Policy Staff Committee to defend their GSP status; and US investors undertook an 'intensive lobbying effort', urging Treasury officials to take action against Argentina.¹⁴⁹ The prospect of losing GSP status no doubt loomed large in the minds of Argentinian officials; perhaps more so than the economic cost of suspension actually warranted.

While realist theory might lead us to reject the hypothesis that loss of GSP status played a role in compliance, studies in behavioural economics and social psychology have shown that individuals attribute particular weight to events that are vivid and easily recalled, attributable to what has been called the 'availability bias'.¹⁵⁰ The public nature of the US threats to suspend GSP status may have brought that consequence of non-compliance to the forefront of decision-makers' minds, but why did they not then discount it as rational choice theory would suggest?

One explanation could lie in the process in which the decision to comply was made and the 'epistemic motivation' of the decision-makers, as described in Section 3. If those charged with compliance decision-making failed to seek out additional information regarding the economic impact of the loss of GSP status and how this measured up to Argentina's liability under the awards, but instead were swayed by the very-conspicuous nature of the US threats and the process of losing GSP status, we might expect that the loss of GSP status played a greater role in Argentina's decision-making than either realist or constructivist theories would suggest.

6. CONCLUSION

Understanding how and why states decide to comply with international law is unsurprisingly a preoccupation for many international lawyers. Working from the premise that international lawyers should strive for descriptive accuracy of compliance theories, this article has argued that compliance should be reconceptualized in order to fully leverage the insights that the behavioural social sciences offer. While scholars have already noted the potential relevance of the heuristics and biases literature to

148 Alford (n 114), at 52.

149 *ibid.*

150 See A Tversky and D Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 4 *Cognitive Psychology* 207; N Schwartz and LA Vaughn, 'The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information' in T Gilovich and others, *Heuristics and Biases: The Psychology of Intuitive Judgment* (CUP, 2002).

compliance, this article has drawn on international relations literature to suggest that studies which explore the heterogeneity of decision-makers could be useful to understand compliance. In particular, studies on perception and decision-making style have shown that similarly situated decision makers reach different decisions on the basis of their prior beliefs and the process by which they come to their decision.

In order to illustrate this argument and test the value-added of a behavioural approach, the article used the example of Argentina's compliance with five investment arbitration awards in October 2013. Using data from international financial institutions and a sentiment analysis of Argentinian parliamentary debates, it tested hypotheses generated by realist, constructivist and liberal theories of compliance, suggesting that the most plausible factors that drove Argentina to comply were the blocking of loans by investors' home states from multilateral development banks and the need to access international debt markets. Despite *prima facie* suggesting that Argentina's decision to comply was motivated by realist factors, the article showed how behavioural insights could contribute to this analysis by suggesting an explanation for the timing of Argentina's compliance, prompting questions about reputation, and calling into question the rejection of hypotheses about trade sanctions.

By pursuing the avenues of enquiry that the behavioural social sciences open up, we can move towards more fine-grained accounts of compliance, which would allow us to better understand state behaviour. If international lawyers want to design rules and institutions that command compliance—and to understand the limitations of existing ones—they should move towards a behavioural theory of compliance.