International Investment Law and Foreign Direct Reinvestment*

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Abstract

One goal of the law is to provide a means to return disputing parties to cooperation. The conventional expectation is that international investment law largely does not do this; rather, an aggrieved foreign investor ordinarily sues the host state as a last resort and divests. I use a new database of Investor-State Dispute Settlement (ISDS) arbitrations and firm-level bilateral investment to show that, in fact, claimant investors reinvest in the host state at least 30.5% of the time (1990-2015). Controlling for sector, important correlates of reinvestment include the claimant's legal strategy; the extent of the claimant's grievance and success; and the incidence of post-arbitration litigation. Despite unique aspects of its institutional design, the de facto international investment regime can help solve host state time-inconsistency problems consistent with standard expectations of law. Whether the probability of reinvestment is high enough to reinforce host state commitments to this controversial regime is an open question.

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Thousands of international investment agreements and contracts that include Investor-State Dispute Settlement (ISDS) clauses allow foreign investors to sue host states directly for compensation regarding alleged property rights violations—in ad hoc tribunals without a formal appeals system, without the approval of their home states, and often without exhausting local courts in the host state. Unsurprisingly, the backlash against ISDS and its potential to constrain states' sovereignty grows as more arbitrations arise.[1] Dozens of states are renegotiating enabling treaties, with some pulling out unilaterally, although none of the 120-odd states that have been sued has eschewed ISDS altogether.[2] Such growing outcry prompts the question: what, if anything, is good about ISDS, particularly from the host state's point of view?

A primary goal of law is to coordinate the joint expectations of parties so as to forestall potential disputes.[3] Should a dispute nevertheless occur, and not be resolved through informal means, a secondary goal of law is to facilitate a return to cooperation between the parties via an ex ante agreed-upon formal procedure. In the setting of investor-state disputes, ISDS is the procedure: via adjudication in an international tribunal, the host state and foreign investor coordinate on the amount of compensation due as a result of the host state's (alleged) adverse action. Compensation can make a breach "efficient" in economics jargon: the host state takes an adverse action but pays compensation to make the investor whole to its ex ante position, such that the relationship can return to the ex ante status quo (or better).[4] Priest and Klein (1984) famously model litigation as "purely economic": as litigation proceeds, parties form rational expectations of likely decisions based on information revealed in the process and direct costs, which does not in itself preclude a return to cooperation.[5] Through an ISDS arbitration, it is possible that a claimant investor sees the revealed information of a host state's compliance with the arbitration process as evidence of commitment to rule of law and, thus, evidence that the process itself suggests reduced future risks.[6] At minimum, the hope is that resolving the dispute in an international legal setting should not in itself preclude a return to cooperation between the claimant investor and the host state.

The conventional wisdom is that the current form of international investment law that relies

[1] Waibel et al. 2010.
[2] Haftel and Thompson 2013, 2018; Simmons 2014.
[3] Johns 2012; Keohane 1984.
[4] On efficient breach, see Rosendorff and Milner 2001; Rosendorff 2005; Pelc and Urpelainen 2015 among others.
[5] Priest and Klein 1984: 4.
[6] On the positive relationship between FDI and rule of law, see Jensen et al. 2012.

on ISDS arbitration is far from achieving these goals. Much of the backlash against ISDS has to do with the costs host states face as a result of being sued. Third-party current and potential foreign investors observe the fact that a foreign investor found it necessary to sue, and FDI in the host state declines.[7] A host state worried about litigation may delay enacting policies that it would otherwise expect to be within its sovereign rights to enact, a phenomenon known as "regulatory chill." Being sued might have broader detrimental effects for a host state's reputation on international markets or on the interstate stage.[8] Further, despite years of econometric machinations, scholars have found it difficult to demonstrate that host state commitments to international investment law attract FDI—the key motivation for host state willingness to sign on to ISDS in the first place.[9] Consistent with these costs of being sued and host state frustrations with the law underpinning ISDS, the US Trade Representative argues that ISDS generates "the potential for future retaliation against the investor by the government being sued," making it "typically a recourse of last resort."[10] The implication here, and as offered by many other policymakers and scholars as well, is that ISDS arbitration would very likely generate conditions that push the claimant investor to exit.[11]

I challenge this conventional wisdom that ISDS consistently, if not inevitably, leads to retaliation and exit. I consider "reinvestment," which I define as the claimant investor retaining investment in the host state during and after the ISDS arbitration process, or exiting but later returning to the host state. I find that at least 30.5% of claimant investors reinvest (222 of 729 ISDS investment arbitrations, filed from 1990-2014, with reinvestment assessed as of December 2015). Sometimes, a foreign investor perceives that the host state violated its property rights, sues, and nonetheless reinvests. Often, it does not. What explains this variation?

One can think of reinvestment in terms of time-inconsistency. When the host state engages in a time-inconsistent (perceived) adverse action toward a particular investor, ISDS arbitration can help resolve that problem and thus move toward efficient breach. The incidence of time-inconsistent host state action is plausible, because we know that host states in the modern era maintain strong

[7] Allee and Peinhardt 2010, 2011.

[8] Kerner 2009; Hafner-Burton, Puig and Victor 2017.

[9] See Kerner and Lawrence (2014) for evidence of increased FDI under specific conditions.

[10] "Fact Sheet: Investor-State Dispute Settlement." Office of the United States Trade Representative, March 2015. The USTR also emphasizes high arbitration costs and a low winning percentage for claimant investors, points that have been debated in the scholarly literature.Van Harten 2012; Simmons 2014.

[11] This argument can be linked back to the leverage rich states have per dependency theory. See Caporaso 1978.

interests in FDI.[12] Even if a short-term shock disrupts the host state's commitment to protect the property rights of a foreign investor, the host state may still like to retain that particular investor. Briefly, it is cheaper to keep a "client" than to acquire a new one. This can be true even if being sued generates third-party costs for the host state.

A long-standing literature suggests conditions under which the foreign investor, for its part, would be quite willing to work through time-inconsistency problems and remain in the host state. A foreign investor with more immobile, site-specific assets has few exit options and thus can suffer from an "obsolescing bargain." Once it has sunk considerable investments that cannot be redeployed elsewhere, the foreign investor loses the leverage offered by credible exit options, and the host state gains latitude to break contracts.[13] Thus, immobile investors are exceptionally likely to have grievances over property rights protections. This finding generates two important implications for the setting here. First, if ISDS inevitably triggers retaliation and is a strategy of last resort, it follows that captured investors would select not to invoke it, lest they exacerbate their obsolescing bargain. Instances of immobile investors invoking ISDS provides prima facie evidence that international investment law has the potential to resolve rather than exacerbate grievances. Second, if it is only immobile investors that reinvest, international investment law is likely epiphenomenal to structural determinants of investors' willingness and ability to return to cooperation. In fact, while investors together reinvest 30.5% of the time, investors outside the canonical captured sectors of oil and gas, utilities, and mining reinvest at least 26.5% of the time. Think of the 30.5% or 26.5% reinvestment rate an an existence proof that ISDS is not always characterized by a worst case scenario in which the law fails to facilitate one of its core goals.

Still, in over two-thirds of cases I have no evidence of reinvestment. This accords with the expectation that host state actions need not be time-inconsistent. One unique aspect of international investment law is particularly relevant here: tribunals award compensation for the host state's adverse action, but they do not require the host state to change its policy.[14] Thus, compensation may coexist with what the claimant investor sees as continued adverse state action, such that the breach and its resolution are not fully efficient. Even if the host state does change

[12]Pandya 2016.

[13]Vernon 1971; Frieden 1994; Dunning 1980.

[14]This institutional design contrasts with the requirements under the World Trade Organization Dispute Settlement Mechanism (DSM). Rosendorff 2005.

its policy, it has learned that adverse policies have a price—one it may be willing to pay in the future, if for example its future motivation to implement an adverse action is not time-inconsistent. If a foreign investor in a politically risky host state expects that its particular relationship with the state may sour, it engages in political risk mitigation strategies. Among these, the investor may specifically aim to earn a sufficient return on investment before that conflict arises; seeking compensation through ISDS may be the planned last stage of its investment strategy. In fact, some see claimant investors as nefarious actors, intending to profit from ISDS arbitration without having made productive investments along the way.[15] Regardless, if an investor that has filed for ISDS arbitration perceives that its investment will not again become sufficiently profitable whatever the outcome, divestment is rational. If divestment always occurred, ISDS arbitration would directly result in only potential losses and no gains for the host state. The longevity of the regime would hinge on indirect incentives for states to commit—exactly those incentives that have proven increasingly elusive.

Documenting variation in reinvestment allows me to re-conceptualize international investment law within the bounds of traditional law while, at the same time, identifying the conditions under which it is unlikely to facilitate returns to cooperation. I argue that aspects of the underlying dispute and the legal process itself correlate with variation in reinvestment around the set of disputes that foreign investors select into ISDS arbitration. Foreign investors that sue by invoking contractual clauses—more specific and tailored than international treaties that generally facilitate ISDS—are more likely to reinvest. Foreign investors are also more likely to reinvest when they claim that adverse government actions disrupted the value of their property, say through re-regulation, rather than stripping them of ownership (direct expropriation). Further, foreign investors that settle after invoking ISDS, that win a pro-investor ruling, and that win a greater proportion of their initial claim are more likely to reinvest. Finally, claimant investors that do not face or engage in post-arbitration litigation, including annulment and/or enforcement proceedings, are more likely to reinvest. The fact that future cooperation sometimes occurs despite formal adjudication is a bright spot for a robust literature that finds positive correlations between rule of law and FDI.[16]

Correlates of reinvestment clarify the conditions under which ISDS arbitration is associated

[15] As one lawyer puts it, "You have a lot of scuzzy sort-of thieves for whom this is a way to hit the jackpot." Quoted in Hamby, Chris. "The Court the Rules the World." BuzzFeed News: 28 August 2016.

[16] E.g., Li and Resnick 2003; Staats and Biglaiser 2012; Jensen et al. 2012; Garriga 2016.

with continued or increasing investment by the claimant investor itself. This is a hithero unrecognized direct benefit possible under the current de facto regime. Nonetheless, these findings do not establish that the likelihood of reinvestment is high enough to motivate host state commitments to the current regime. It does, however, suggest an avenue through which institutional design that maximizes conditions conducive to reinvestment could increase the direct benefits of ISDS relative to its indirect costs. Those pushing to reform and not abandon the current regime would do well to focus not on the unique aspects of ISDS, but on how to strengthen the correlates of its conventional aspects.

ISDS and Reinvestment

Should an aggrieved investor invoke ISDS arbitration, its worries about political risks have been realized; the host state incurs costs through litigation and compensation, not to mention detrimental third-party effects; and bridges may be burned. Must this be the case? I ask whether an ISDS arbitration can result in reinvestment by the (once-)aggrieved, claimant investor.[17] I draw on a new database of ISDS arbitration filings by foreign investors from 1990-2014 and count 729 ISDS arbitrations that were brought in the period.[18] Neither all ISDS arbitrations nor all characteristics of known arbitrations are public. Usefully here, selection into public ISDS arbitration makes it harder to a relationship between ISDS and reinvestment, as states in public disputes may be more prone to posturing and less likely to make concessions that facilitate a return to cooperation.[19] Notably, however, these data account for 93 ISDS arbitrations that are not present in a standard data source provided by the UN Commission on Trade and Development (UNCTAD). Among the sample of investor-state disputes in which investors invoke ISDS and arbitrations are public, I find an overall reinvestment rate of 30.5%. One may consider 30.5% low or high. If, like the US Trade Representative, one expects post-arbitration retaliation by the host state to be the norm, the rate is notable for being far from zero. If, on the other hand, one expects that foreign investors are

[17] An ISDS arbitration is one where the claimant is a foreign firm(s) (or an individual foreign investor(s)) and the respondent is a state. Commercial arbitrations in which a state-owned enterprise is the respondent are governed by different law and are outside the scope of this article.

[18] Wellhausen 2016. I ignore the 26 public investment arbitrations filed from 1965 to 1989, as the post-colonial context in which these took place makes us skeptical that more recent behaviors are analogous. See Schultz and Dupont 2014.

[19] Stasavage 2004. On ISDS in particular, see Hafner-Burton, Steinert-Threlkeld and Victor 2016.

on the whole captured and the law has little relevance, the rate is far from 100%. Regardless, the determinants of variation in reinvestment can inform a host state weighing the costs of an adverse action. Understanding this variation is also important for actors interested in an institutional design that maximizes the likelihood of a return to cooperation.

I code reinvestment as occurring if I can find positive evidence of one of three conditions: the claimant investor stays in the host state during and after the ISDS arbitration; the claimant investor leaves during or after the arbitration but returns to the host state by December 2015; or the claimant investor is operating in the host state as of December 2015 (whether or not what happens in the interim is known).[20] I also code reinvestment when I have evidence that a subsidiary of the claimant fits one of these conditions. Indeed, continuing operations in the host state through a subsidiary—under a perhaps less publicized name—might in itself be a political risk mitigation strategy that enables the one-time claimant to reinvest without highlighting its contentious history. I either can or cannot find evidence of reinvestment, with the presumption that I am undercounting reinvestment and biasing results away from recognizing variation.

The variable Reinvest has empirical shortcomings. It is a binary variable that captures a foreign investor's presence in the host state at any intensity at any point in the period following the conclusion of the claimant's arbitration and ending in December 2015. This choice is, first, driven by data constraints. The precise characteristics of foreign investments are regularly private information. For example, it is naive to expect project announcements to be fully implemented per the numbers and timeline associated with the announcement. Transparency standards in FDI data, not to mention accounting practices, differ across host states and over time. There is little reason to believe that noise in (limited) observable data on the size or timing of investments would be randomly distributed with respect to these concerns. I see a binary variable as a second-best, and nonetheless valuable, measure.

Reinvest also has potential theoretical shortcomings. It is possible that a claimant investor remains in a host state after arbitration, and is coded as reinvesting, even if does not bring

[20]When multiple investors are claimants, I code reinvestment as occurring if at least one claimant fits at one of these criteria. To code reinvestment by publicly traded companies, several other coders and I check annual reports for the penultimate year of the arbitration process and the year it concludes to see whether the foreign investor stayed in or left the host state. We then check subsequent annual reports every two years through 2016 to see whether the foreign investor was present in the host state at a later date. For companies for which annual reports are not available, we rely on searches of specialty press to find evidence of reinvestment. IAReporter is a particularly useful source. See Codebook for details.

in one additional dollar from abroad to expand its operation. Additionally, a claimant investor would also be coded as reinvesting even if it pulled out mobile assets and only runs a skeleton operation. Nonetheless, REINVEST remains theoretically important. A claimant investor that does not fully exit must still incur minimal costs in order to maintain any presence in the host state. Whether the funds to pay these costs emanate from abroad or are reinvested (in the traditional sense) from local earnings is irrelevant—the claimant continues to choose a non-zero amount of cooperation. Crucially, host states can and do use the continued presence of one-time claimants, even at minimal levels of intensity, in attempts to assuage the worries of third-party observers. For example, Ukrainian officials in charge of FDI promotion emphasize reinvigorated cordial relations with some one-time claimants, particularly after settling. This is despite the fact that settlement implies the provision of some sort of compensation and at least a partial loss for the host state. Sometimes claimants that reinvest, too, publicly celebrate the resolution of their dispute even if their post-arbitration investment is minimal and has not scaled up to previous levels. The Western NIS fund, for example, highlighted to potential clients that it was able to use ISDS to resolve its dispute with Ukraine, as it sought to regrow its presence in the country.[21]

Finally, in this setting a return to cooperation need not be conceptualized as a continuous measure. Given the contemporary backlash, it is pertinent to ask whether ISDS suggests direct benefits of any magnitude, especially in the short-term, that could balance against its controversial costs.[22] If, all else equal, legal mechanisms around ISDS are associated with relatively quick reinvestment as measured here, one has evidence that international investment law correlates with traditional expectations of the law. This suggests a direct upside of the current institutional design that has largely gone unnoticed. Moreover, this upside is relevant whatever the multiply-caused, long-term trajectory of a particular investor's commitments to the host state. Thus, even with its shortcomings, the binary variable REINVEST is sufficient to uncover variation in short-term cooperation and begin to explain its relationship to host state behavior as well as possible reforms to current ISDS institutions.

By the end of 2015, there are 222 instances of reinvestment around 729 ISDS arbitrations

[21]Western NIS following Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2). Wellhausen 2015.

[22]In the vein of Li (2009), future research could investigate the half-life of reinvestment as measured against reinvestment when investors do not invoke ISDS, such as those captured by diplomatic records Gertz (2018). The importance of this research, however, would depend on the longevity of the current de facto regime.

filed from 1990-2014 (30.5%). Table 1 first reports reinvestment percentages among the 574 ISDS arbitrations that ended in the period. In 183 instances, I know that the claimant investor reinvested. In 159 instances, the claimant was present in the host state as of the end of 2015. In some instances, I can find evidence of what happened closer in proximity to the ISDS arbitration. The claimant investor continued operations in the host state during and for at least one year after arbitration concluded in at least 108 instances. In contrast, I find documentation that the foreign investor exited the host state but reinvested after arbitration in only 14 instances. This limited evidence in itself undercuts the argument that wholesale exit inevitably precedes the last-resort invocation of ISDS arbitration. Further, I code reinvestment for the 155 ISDS arbitrations that are filed through 2014 but incomplete by 2015. The coding rule here is whether the investor is present as of December 2015. I find that in 39 instances, the claimant investor remained in the host state while arbitration was ongoing, although I cannot observe post-arbitration behavior.[23]

Table 1: Reinvestment Summary

Category	*Reinvest*	*Pct*
Total	**222/729**	**30.5%**
Of 574 Completed ISDS Arbitrations		
Total	183	31.9%
Invested as of December 2015	159	27.7%
Retained investments during and after arbitration	108	18.8%
Exited host state but later reinvested	14	2.4%
Of 155 Incomplete ISDS Arbitrations		
Total*	39	25.2%

Notes: *Total = Retained investments as of December 2015.

The 30.5% reinvestment rate suggests that reinvestment is far from the norm. The absence of reinvestment could mean that the host state loses the investment altogether, but a host state could also find ways to substitute for that investment and mitigate the loss incurred around ISDS arbitration. For example, the host state could resell (or give) remaining assets to a domestic firm or continue operations itself. Note, however, that in these cases the host state incurs some loss from foregoing foreign ownership, given that foreign investors are more productive. Additionally, the host state could seek out an alternative foreign investor that may be willing and able to take over ownership and operate the remaining assets of its former competitor. In the 2005 ISDS arbitration *Walter Bau v. Thailand*, by the time the tribunal ruled in favor of the German investor in 2009,

[23] Results below are robust to including in-progress cases as appropriate or fully excluding.

Thailand had already hired an investor from Hong Kong to complete the toll road that Walter Bau had initially been hired to build. As a replacement foreign investor enters a setting in which political risks have been realized, it would likely attempt to mitigate risk by contracting in ways conducive to a higher rate of return. Nonetheless, a host state that prefers to exclude a litigious investor may be able to find imperfect substitutes and retain at least some of the investment, which would lessen the costs of foregoing reinvestment.

That said, reinvestment occurs. How might we understand a (once-)aggrieved foreign investor's willingness to operate in the host state that aggrieved it?[24] I see reinvestment as evidence that, at least sometimes, dynamics around international investment law are not unique. Rather than precluding a further relationship, formal adjudication under ISDS can allow the parties to coordinate on adjustments to their relationship in the wake of the host state's (perceived) adverse action.

A useful way to conceptualize reinvestment following a legalized investor-state dispute is through a time-inconsistency framework. If the host state evaluates that a foreign investor is not bringing about sufficient benefits, its short-term and long-term preferences would align and its adverse action would not be time-inconsistent. However, a host state may have a long-term preference that a particular foreign investor remain productive in its territory, if the host state evaluates that the foreign investor is generating sufficient benefits. Yet the host state may face a short-term shock that motivates it to act contrary to its long-term preference.

A variety of economic and political exigencies could generate such a short-term shock.[25] The host state may breach a contract to raise cash in bad times, or it might be motivated to reevaluate the fairness of contracted profit splits in good times. After political turnover, new leaders may force renegotiation of contractual commitments made by the the prior regime as has happened in Egypt and Romania, for example. The host state may face a shock to its foreign policy goals. For example, upon taking control of Crimea, Russia nationalized all Ukrainian-owned assets (and is being sued for these actions) although Russia generally accepts FDI. The host state may be moved to take adverse action against a sector or asset if foreign investors' contributions to the host economy become a low priority for a period of time. For example, during the 2008 financial crisis

[24]For more on the behavior of private litigants in international law, see Alter 2006.

[25]Maurer 2013. Weak institutions may allow the state's leaders more leeway to act on their incentives to breach. Jensen 2008.

Belgium bailed out its domestically owned banks but did not bail out a Chinese-owned bank Ping An (and is being sued for this inaction), despite the fact that Belgium remains open to FDI in its financial sector. A host state may be pushed to update a regulation that has an adverse impact on foreign investors—an outcome that may even be inadvertent. For example, Slovakia argued that its re-regulation of its health insurance sector had nothing to do with the Dutch insurers who later filed for arbitration; Slovakia claimed it had no idea that its action would be considered adverse.[26] Whatever its motive (or not), a host state can still be interested in accruing long-term benefits from a particular foreign investor despite taking an action today that conflicts with the foreign investor's property rights.

The incidence of reinvestment suggests that ISDS arbitration can at least sometimes be a means for a foreign investor and host state to resolve the costs of the host state's time-inconsistent action triggered by exigencies like these. Reinvestment indicates that the host state allows the claimant investor to remain in the country; ISDS arbitration is not consistently associated with a concept like retaliation, revenge, or the like on the part of the host state. Reinvestment also indicates that the foreign investor is sufficiently satisfied with the resolution of the dispute to continue to operate in the host state; invoking international law via a formal arbitration process is not consistently associated with exit. Cooperation despite formal adjudication reinforces a robust literature that finds positive correlations between rule of law and FDI.[27]

Under what conditions is reinvestment more likely to take place? I next use additional newly collected data to analyze which investor-state relationships are more likely to become cooperative again and which are more likely to dissolve in the wake of an ISDS arbitration. From the point of view of the host state, understanding the correlates of reinvestment can shape their decision to take an adverse action, and risk a formal adjudication process, in the first place.

Variation in Reinvestment

My baseline expectation of reinvestment comes from the well-known effects of the structural characteristics of investment in certain sectors. Beyond this, I hypothesize that legal processes are associated with reinvestment, including the claimant's legal strategy; the extent of a claimant's

[26] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11.

[27] E.g., Li and Resnick 2003; Staats and Biglaiser 2012; Jensen et al. 2012; Garriga 2016.

grievance and success; and post-ISDS enforcement actions.

The canonical explanation for the effects of investor-state relations on investment behavior operates via sector. Some sectors are more vulnerable to property rights violations, because their assets are characterized by immobility or site-specificity.[28] Investors in these sectors can negotiate particularly advantageous deals ex ante, if the host state requires the investors' capital and expertise. However, as time goes on and investors makes site-specific investments, they lose credible threats of exit, and their deals with the host state "obsolesce."[29] In our context, foreign investors that cannot feasibly exit would be more likely to reinvest despite the host state's adverse action.[30] A perennial problem in empirical literature on political risk is that site-specificity is surely a continuous variable but is difficult to measure as such. For example, the same property, plant, and equipment (PPE) assets may be site-specific in one setting but not in others. There may also be other sector-specific influences on the likelihood of reinvestment if, for example, firms in a given sector face strong competitive pressures to invest in risky emerging markets. Thus, use sector fixed-effects to identify off of within-sector variation in reinvestment.

Table 2 reports the distribution of ISDS arbitrations and rates of reinvestment by sectors endogenously created from the data. The reinvestment rate in the canonically site-specific oil and gas sector is the highest. The reinvestment rate is also high for investors in utilities, which consist mainly of water and sewage concessions, power plants, and electricity transmission networks. It is worth highlighting, however, that even investors in these traditionally site-specific sectors are at least sometimes willing to invoke ISDS, further undermining the expectation that formal international arbitration fatally mars the investor-state relationship.[31] Nonetheless, the reinvestment rate in manufacturing, a sector traditionally categorized as mobile, is above the overall mean while mining, traditionally site-specific, is below. Again, an important takeaway from Table 2 is that accounting for variation across sectors is necessary to present evidence that aspects of the law, and not simply the structure of investments, are important to understanding reinvestment.

[28]Frieden 1994; Dunning 1980.

[29]Vernon 1971.

[30]Note that these investors can reduce the size of their investment in a host state, but they are nonetheless more likely to continue some presence in the host state and thus be coded as reinvesting. Might host states with many site-specific investors be willing to sign onto ISDS-enabling law but then go on to not comply with the law? The value of such a strategy would depend crucially on the indirect effects of property rights violations on third parties.

[31]Note that the likelihood of an investor in a given sector invoking ISDS, while interesting, need not be measured in order to answer questions about the correlates of reinvestment once ISDS has been invoked.

Table 2: Reinvestment by Sector

Sector	*Reinvest*	*Cases*	*Pct*
Oil/Gas	46	113	40.7%
Utilities	53	140	37.9%
Transportation	18	53	34.0%
Telecommunications	17	51	33.3%
Manufacturing	32	98	32.7%
Overall mean	*222*	*729*	*30.5%*
Services	26	101	25.7%
Mining	15	64	23.4%
Agriculture	6	29	20.7%
Finance	7	52	13.5%
Real Estate	3	23	13.0%

Note: Sector is unknown in 5 instances.

Law and Reinvestment

Given that an aggrieved investor invokes ISDS arbitration, what relationship does the law have to its future behavior? First, I hypothesize that the source of an investor's access to ISDS arbitration correlates with reinvestment. Bilateral Investment Treaties (BITs) and the larger category of International Investment Agreements (IIAs) facilitate aggrieved investors' access to ISDS arbitration.[32] Beyond treaties, some foreign investors negotiate specific and thus more complete contracts with the host state that provide access to international investment arbitration. For example, resource concession contracts, contracts to provide services for the state such as managing trash collection, and contracts to build infrastructure for the state regularly have international arbitration clauses.

Cases adjudicated based on a CONTRACT rather than a treaty should be more likely to be associated with reinvestment. First, if claimant investors invoke treaties in order to access ISDS arbitration, other foreign investors (and their law firms) with access to that treaty are likely to be interested in how it is applied. Adjudication processes in the presence of active third-party observers are more complex than bilateral processes and may raise the risk that the parties cannot reconcile.[33] A foreign investor may worry that "advertisement" of its conflicts makes current and potential shareholders wary of reinvestment even if the investor desires it. On the

[32] Additionally, in some host states domestic investment laws guarantee foreign investors' access to ISDS arbitration. These are generally invoked in concert with treaties or contractual clauses.

[33] Johns and Pelc Forthcoming.

other side, domestic audiences in host states may interpret the investor as exploiting international law beyond the boundaries of what the host state intended with its commitments, pushing the host state to ostracize the investor.[34] There has been frustration with foreign investors seen to be "treaty shopping," for example when investors access relatively advantageous Dutch treaties despite the investor not being popularly understood as Dutch. In the backlash against ISDS, several states have targeted Dutch BITs, including Venezuela which unilaterally withdrew from its Dutch BIT. In contrast, specifically tailored contractual terms are inaccessible to otherwise interested outside actors and less informative of their political risks. Third-party observers should be minimal. Adjudication is more likely to proceed based on the interests of the disputing parties and not potentially disrupted by other influences.

Second, the ISDS clause in an investor-state contract is expected to be more specific and tailored than that in a treaty. Investor protections written in international treaties are often vague and subject to interpretation by arbitral tribunals. For example, arbitrators must regularly decide what it means to be "foreign," what it means to have an "investment," and to what extent investor expectations of treatment are part of the host state's legal commitments. In contrast, a contract should be more complete than a treaty from the point of view of efficiently resolving disputes, because the state's obligations toward an investor's specific property are clearly defined. Indeed, the existence of a contract with an ISDS clause demonstrates that both the investor and the state saw it as rational to put in the time and effort to negotiate it.

Hypothesis 1. *An ISDS claimant is more likely to reinvest if its arbitration is brought under an investor-state contract.*

Table 3 separates reinvestment by legal instrument invoked. Note that a claimant can invoke both a contract and an IIA; however, per Hypothesis 1, I expect more reinvestment once a contract is involved at all, because the more complete terms are available as a basis for adjudication.[35] Investors in 10 of 10 sectors file for ISDS arbitration under a contract, although investors in oil and gas and utilities account for 45.7% of cases. This imbalance again supports using sector fixed effects in full analyses.[36] As reported in Table 3, the reinvestment rate when a contract with the

[34]Stasavage 2004.

[35]Legal strategies behind invoking multiple instruments are worthy of future research.

[36]There is evidence that both large and small investors in a given sector negotiate contracts. See for example the variation in investment size documented at `resourcecontracts.org`. Other covariates, particularly about the size of the claim, help to control for variation by investor size.

host state is invoked is higher than the comparison group in which a contract with the host state is not invoked, as expected ($p<0.05$).

Table 3: Reinvestment by Legal Instrument Invoked

Type	*Reinvst*	*Cases*	*Pct*
Contract*	30	70	43.9%
IIA*	189	639	29.6%

*Categories are not mutually exclusive.

Next, I consider whether the type of adverse action of which a host state is accused affects the likelihood of reinvestment. The types of legal claims available to an aggrieved investor are determined by the treaty or contract invoked. The ability to claim direct expropriation is standard. Direct expropriation is the taking of property without consent, which means that the state's adverse action changes the ownership of otherwise foreign-owned property. The most extreme form is full nationalization, but direct expropriation occurs whether the state takes ownership of any expropriated assets, including buying them in an involuntary transaction. When investors claim direct expropriation, I expect less reinvestment. Simply, when as a result of the state's adverse action the claimant investor owns less property in the host state (if any), it has less ability to reinvest. Additionally, direct expropriation is the most severe realization of political risk, in the sense that the foreign investor is deprived of the ability to earn any profits from the expropriated property. More extreme realized risk is more likely to deter an aggrieved investor.

In contrast, other legal claims available to foreign investors in treaties and contracts concern the host state's adverse impact on the foreign investor's operations and its expected profits, for example through a forced renegotiation of the investor-state contract, but not the foreign investor's ownership. These claims include fair and equitable treatment; indirect expropriation; a minimal standard of treatment, including denial of justice; full protection and security (or similar); arbitrary, unreasonable, and/or discriminatory measures; national treatment; most-favored-nation treatment; transfer of funds; and umbrella clauses. When these claims are invoked, the investor accuses the government of reducing the value of its investment, but the investor does not accuse the government of having illegitimately taken over ownership of its assets. In the absence of direct expropriation, the claimant investor still owns its property in the host state and thus can more easily continue to invest. Additionally, Pelc (2017) argues that cases in which indirect expropriation is invoked are of lower quality. This coincides with the argument that a claim of direct expropriation indicates greater realized political risk than another kind of claim. I expect more reinvestment in instances when the investor do not include direct expropriation (No direct expropriation).

Hypothesis 2. *An ISDS claimant is more likely to reinvest if it does not invoke the legal claim of direct expropriation.*

In 474 instances, investors' claims are reported in public records. I code initial claims rather than resolved claims, as I expect an investor that sees itself as having been directly expropriated to predicate its reinvestment on that, whatever the legal outcome. Additionally, because of judicial economy tribunals typically do not adjudicate all claims. Investors in 9 of 10 sectors invoke direct expropriation. Nonetheless, in the the vast majority of cases in which the claims are public, claimant investors do not invoke direct expropriation; this trend reinforces the understanding that types of adverse treatment by host states are evolving given the greater overall demand for FDI in the modern era.[37] As expected, the reinvestment rate for investors invoking direct expropriation is significantly lower than the comparison group of any other claim ($p<0.05$). The reinvestment rate is not significantly different between investors that invoke direct expropriation alone and investors that select into the category of invoking both direct and any other claim.

Table 4: Reinvestment by Legal Claim

Type	*Reinvest*	*Cases*	*Pct*
Direct expropriation	13	74	17.6%
Any other claim	110	350	31.4%
Direct + Any other claim	8	50	16%

I now move on to the outcome of the investment arbitration. I expect that, on average, investors that invoke ISDS but settle their cases before a ruling (No Ruling) are more likely to reinvest than investors that choose to follow the arbitration through to a tribunal ruling. Settlement should occur when the value of the settlement, in terms of compensation as well as costs avoided, outweighs the expected value of the uncertain ruling, in terms of expected compensation as pulled down by expected costs, which can include spillovers from the dispute on third-party behavior. For an investor that settles, the counterfactual outcome were its case to go to ruling is unobservable. In contrast, investors that are not able to agree on a settlement will in expectation receive an outcome

[37] Pandya 2016.

better than the settlement. However, if some investors receive rulings worse than expected and worse than earlier settlement offers, they are dissatisfied once the outcome is reached. I expect satisfaction with the resolution of the dispute to correlate with reinvestment.

Two factors could weaken the predicted relationship between settlement and reinvestment. First, there is growing evidence substantiating the worry that ISDS can cause "regulatory chill," such that the respondent state and/or third-party states delay regulation at least until the legitimacy of that regulation under international investment law is verified. If regulatory chill is the claimant investor's goal, then it would always be more satisfied with a longer resolution process such that a ruling would trump any settlement. Second, if settlement indicates satisfaction, and satisfaction correlates with reinvestment, then investors that settle but never invoke ISDS should be the most likely to reinvest. Thus, the argument requires that not every claimant investor is motivated to cause regulatory chill, and that investors that invoke ISDS and then settle still derive sufficient satisfaction from settlement to reinvest.

Hypothesis 3a. *An ISDS claimant is more likely to reinvest if its arbitration does not end in a tribunal ruling as compared to when the arbitration goes through to a ruling.*

Additionally, the outcome of the arbitration with respect to compensation should be correlated with reinvestment. A claimant investor invokes ISDS arbitration with the expectation that it will be compensated for the costs of the state's adverse action via the process. Pre-ruling settlement generates compensation; even an investor that abandons its case may be thought of as having received compensation at least in that it caused the host state to incur costs. A claimant investor that wins a pro-investor tribunal ruling receives compensation, though this compensation may be less than the claimant requested. In contrast, when the tribunal makes a pro-state ruling, the claimant investor is not compensated (and it may have to pay the host state's litigation costs). I make the straightforward hypothesis that claimant investors that are compensated—through Settlement/Investor win—are more likely to reinvest than those that are not.

This seemingly banal point that winning compensation is associated with reinvestment is made more interesting because of what the design of international investment law says about host state obligations beyond compensation. As introduced above, ISDS only concerns compensation. Across the muddy field of international investment law, there is no requirement that a host state change its underlying policy action that caused the violation. As Pelc and Urpelainen put it, "Once payment is made, investors have no further recourse: the matter is closed."[38] This is a meaningful difference between the investment world and the trade world, as the World Trade Organization Dispute Settlement Mechanism (DSM) requires states to change policies in order to return to normal cooperation.[39] Relevant here is that compensation in the absence of policy change will not necessarily restore the investment environment to its ex ante position. Even if the host state changes the underlying policy—despite not being required to do so—the claimant investor would still operate in a host state that understands adverse actions have a price but are not prohibited. It is a legitimate exercise to test whether receiving compensation correlates with reinvestment when the law does not compel the host state to change its policy.

Hypothesis 3b. *An ISDS claimant is more likely to reinvest if it settles the arbitration before its conclusion or wins a pro-investor ruling as compared to when the ruling is pro-state.*

Of the 729 ISDS arbitrations filed from 1990-2014, 592 were complete by December 2015, and the outcome is public for 574. Of these, settlement occurred in 35%, the investor won in 30%, and the state won in 35%.[40] The coding for settlement includes a public notice of settlement and/or the discontinuation of the arbitration tribunal. It also includes ISDS arbitrations in which tribunals record no legal action that moves the arbitration forward for at least 10 years. A pro-investor ruling is any tribunal ruling in which the state was found to have acted unlawfully. A pro-state ruling is any tribunal ruling that results in no liability for the state; such rulings include outcomes based on jurisdictional issues as well as outright rulings that the claimant's complaints are without merit.

Table 5 reports summary statistics on reinvestment by case outcome. Consistent with Hypothesis 3a, investors that settle prior to a ruling are significantly more likely to reinvest ($p<0.01$). In fact, investors lose 54.0% of observed tribunal rulings, suggesting that arbitration outcomes may indeed often be disappointing to the investor. In support of Hypothesis 3b, investors that receive at least some compensation via settlement or a pro-investor ruling are significantly more likely to reinvest ($p<0.01$). That said, the 23.3% reinvestment rate following a state win is notable:

[38] Pelc and Urpelainen 2015: 257.
[39] Rosendorff 2005.
[40] The combined 65% settlements and pro-investor tribunal rulings suggest to some that investors benefit greatly from the system. Simmons 2014.

sometimes even losing claimants reinvest in the host state.[41]

Table 5: Reinvestment by Outcome

Outcome	*Reinvest*	*Cases*	*Pct*
Ruling (Hypothesis 3a)			
No ruling (Settlement)	79	200	39.5%
Ruling (Pro-investor or Pro-state)	104	374	27.8%
Compensation (Hypothesis 3b)			
Yes (Settlement or Pro-investor)	136	372	36.6%
No (Pro-state)	47	202	23.3%

Hypothesis 3b implies that the greater the compensation a claimant investor receives, the more likely it is to reinvest, which motivates Hypothesis 4.

Hypothesis 4. *An ISDS claimant is more likely to reinvest if it wins a larger proportion of the compensation sought.*

A key measure of the size of the investor's loss is its initial claim in ISDS arbitration filings.[42] To be conservative, I code only the main amount claimed and exclude ancillary claims regarding interest. If the claimant investor offers a range, I choose the lowest amount requested. I divide the awarded compensation by the investor's initial claim to generate % Claim won. Unfortunately, without confidence in what limited public data exists on settlements, % Claim won is generated based on rulings only. I have data on both the initial claim and the tribunal award in 338 instances. Despite missingness, this measure is meaningful, as these are the public data that host states and those seeking to reform ISDS institutions can observe.

Among the 147 cases in which compensation was awarded, the mean percentage of the claim won is 36.9% and the median is 27.9%. As reported in Table 6, 191 claimants were awarded 0 compensation (56.5% of 338 observations).[43] As expected, investors in the 0-50th percentiles are significantly less likely to reinvest than those in the 76-100th percentiles ($p<0.05$); the same is true for investors in the 51-75th percentiles ($p<0.05$).[44]

[41] Investors in 10 of 10 sectors reinvest following a host state win.

[42] I assume that the amount of claim-size inflation is randomly distributed.

[43] In 17 cases, the tribunal made a pro-investor ruling but did not award compensation.

[44] Reinvestment rates between the 0-50th and 51-76th percentiles are not significantly different. Investors from 10 of 10 sectors are represented in the 0-50th and 76-100th percentiles; 8 of 10 sectors are represented in the 51-75th percentiles.

Table 6: Reinvestment by Size of Compensation

Percentiles	*Avg. Claim Won*	*Reinvest*	*Cases*	*Pct*
0-50th	0%	53	191	27.7%
51-75th	12.0%	14	63	22.2%
76-100th	55.6%	34	84	40.5%

Finally, while there is no formal appeals process in international investment law, initial rulings can be followed by annulment and/or enforcement processes. Annulment is only possible at one venue, the World Bank's International Center for the Settlement of Investor Disputes (ICSID). The criteria for annulment are very limited, to questions of procedure rather than questions of the accuracy of tribunal rulings. Annulment processes can be invoked by the host state or the claimant investor, which may be interested in creating a clean slate that can facilitate another "bite at the apple." Claimant investors may also have other motivations, for example, to erase a tribunal ruling that they pay host state costs. Whether annulment is filed by the host state or the claimant investor, the ISDS arbitration itself has not fully resolve the investor-state dispute. I expect any reinvestment to be foregone or delayed, such that it is less likely to manifest in the time period under consideration.

Following arbitration in any venue, parties are generally allowed to challenge rulings in the domestic courts of the seat of arbitration, that is, under the domestic law of the state in which the arbitration is physically held. For example, when sued under NAFTA, Mexico is within its rights to apply to domestic Canadian courts to challenge a ruling in favor of a US investor, if the tribunal was constituted in Canada.[45] However, this is still not an appeals process. Even if a pro-investor tribunal ruling is set aside in the seat of arbitration, it does not necessarily remove the state's obligation to pay the award, because there is not binding precent in the complicated de facto international investment law regime.[46] Paulsson, a prominent arbitrator, writes that post-award litigation is "vexing to the party seeking to rely on the award."[47] Host states filing for set-asides are not necessarily rejecting payment of compensation but rather characteristics like its terms. Still, delay in compensation payment by the host state conflicts with the spirit of resolving the dispute in a timely way, whatever the law allows. In sum, whichever party files for a set-aside, the

[45]See, for example, Mexico's challenges to the award made in *Cargill v. Mexico*.
[46]Much contemporary litigation circles around the implications of set-asides. Bishop 2009.
[47]Paulsson 1991.

investor-state dispute has not been resolved by the ISDS arbitration. Thus, reinvestment should be limited.

Sometimes host states face domestic pressure not to pay awards: compensation awards require the host state to effectively pay money out of their coffers—including taxpayer pockets—directly to foreign actors. If the state does not pay the award to the foreign investor's satisfaction, the onus is on the investor to get the award enforced, as the regime is predicated on voluntary host state compliance. Under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), over 150 signatory states have committed to recognize international arbitration awards including those from ISDS proceedings. Foreign investors look to enforce their awards in domestic courts of third-party states that (1) are signatories and (2) in which the host state holds significant, accessible assets.[48] Accessible assets are those that are not subject to sovereign immunity protections. For example, in 2018 ConocoPhillips attempted to seize assets of the Venezuelan state oil company PDVSA in the Dutch Caribbean island of Curacao, as part of its efforts to enforce a USD 2 billion ISDS award against Venezuela. Assets that are part of legitimate international state activity generally cannot be seized, such as embassy property or central bank assets, although whether or not any particular asset qualifies is often the subject of litigation.[49]

Foreign investors sometimes choose to file for enforcement in the domestic courts of the host state.[50] Host states, too, sometimes challenge rulings in their own courts. While foreign investors are generally free to choose this path, the law in many if not all cases precludes the host state from going to its domestic courts after an ISDS arbitration. Indeed, a key motivation behind ISDS has been to adjudicate disputes outside of host state courts that may be biased toward the host state. In brief, follow-on filings in third-party states or in the host state's domestic courts indicate that arbitration does not fully resolve the investor-state dispute, reducing reinvestment.

Hypothesis 5. *An ISDS claimant is more likely to reinvest if the tribunal ruling is not followed by annulment and/or enforcement proceedings.*

The variable NO ENFORCEMENT PROCEEDINGS equals 1 when the initial tribunal ruling

[48]For example, foreign investors have tried to enforce ISDS compensation awards in states including the US, the UK, France, Luxembourg, Germany, Sweden, Austria, Denmark, the Netherlands, and Canada.

[49]Host states are accused of making themselves "enforcement-proof" when they take steps to keep assets out of claimants' reach.

[50]The most prominent example is Chevron's decision to file complaints in Ecuadorian courts in the 2010s.

is not followed by annulment and/or legal enforcement proceedings of any kind. Importantly, enforcement proceedings are costly and complicated. Once initiated, they can turn into a war of attrition between the foreign investor and a recalcitrant host state, often pulling diplomats into the fray. No enforcement proceedings implicitly assumes that claimant investors that do not pursue post-arbitration litigation are sufficiently satisfied with the arbitration outcome and the host state's compliance weighted against the costs of additional litigation. It should not be interpreted as a measure that claimants are not frustrated with the host state's willingness and speed in paying an award. Instead of starting post-arbitration litigation, frustrated foreign investors looking to get paid may agree to settlements on ISDS awards, by accepting a haircut on the award, agreeing to a payment plan, agreeing to be paid in a different currency, or accepting payment in sovereign bonds. Still, the notion that claimant investors resorting to ISDS arbitration might agree to settlements on awards rather than always pursuing further litigation suggests in itself an interest in returning to cooperation.

Table 7 provides summary statistics on all arbitrations in the data that reached an initial tribunal ruling. Average reinvestment in the case of annulment and/or judicial enforcement is below the overall mean.[51] The reinvestment rate given No enforcement proceedings is higher, with close to statistical significance ($p<0.11$).

Table 7: Reinvestment by Annulment and Enforcement Proceedings

Enforcement	*Reinvst*	*Cases*	*Pct*
Annulment (ICSID)*	24	91	26.4%
Formal Judicial Enforcement*	40	153	26.1%
No Enforcement Proceedings	137	411	33.3%

*Categories are not mutually exclusive.

Evidence

Moving beyond t-tests, I provide evidence consistent with these hypotheses in a series of multivariate regressions. Each line in the data codes the reinvestment status (as of December 2015) of the claimant foreign investor in each of the 729 ISDS arbitrations brought in the period 1990-2014.

[51]In 66.9% of cases, the investor starts post-arbitration litigation; of these, reinvestment occurs in 30.3%. In the remaining 33.1% of cases when the state starts post-arbitration litigation, reinvestment takes place in 16.3%. Annulment and/or enforcement proceedings take place in 10 of 10 sectors.

I use logit as the outcome is a bivariate one, indicating whether reinvestment took place in the period or not. I reduce the sample to completed ISDS arbitrations when this is the correct comparison category for hypothesis testing: No ruling; Settlement/Investor win; % Claim won; and No enforcement proceedings. Sector fixed effects are of crucial importance given heterogeneity in reinvestment rates across sectors (Table 2).[52] I also include host Region fixed effects. OECD host states are categorized as a separate region, given that the incentives foreign investors have in suing the richest host states may differ from those in suing developing countries. I control for Time since end, a time trend counting the years since the arbitration ended, since we might expect time to help heal wounds and facilitate reinvestment. Standard errors are clustered by host state.

Table 8 reports results for models testing each hypothesis separately. In all models, coefficients on variables of interest are positive and significant as expected. Aspects of the law are important correlates of reinvestment, even accounting for sectoral effects. Reinvestment is positively associated with a contract-based arbitration (Model 1), the absence of direct expropriation (Model 2), the percentage of the claim won (Model 4) and the absence of enforcement proceedings (Model 5).[53] Models 3a and 3b separate the outcomes of arbitrations with regard to different reference categories. Again as expected, reinvestment is positively associated with no ruling, as evidence of increased average investor satisfaction with the resolution (Model 3a); and a settlement or pro-investor ruling, as evidence of compensation (Model 3b). The coefficient is largest for % Claim won, suggesting that a host state observing the process and outcome of an arbitration may have more confidence in a quick return to cooperation when the investor wins more of its overall claim. Losing big is particularly unlikely to correlate with reinvestment.

Table 9 reports multivariate models that test hypotheses in combination. In general, coefficients of interest are positive although significance varies. Model 1 measures hypotheses relevant to the full sample of cases, complete and incomplete, whereas Models 2-5 are based on complete cases. When included, No direct expropriation is consistently positive and significant (Models 1, 4, and 5). Additionally, the % Claim won is significant in two of four models (Models 2 and 4). Coefficients on Contract, Settlement/Investor win, and No enforcement proceed-

[52]These also allow me to take obsolescing bargain dynamics into account while avoiding the suboptimal but standard dichotomous measure of immobility.

[53]When incomplete cases are excluded in Model 1, Contract misses significance; all other results are robust.

Table 8: Reinvestment (Testing H1-5 separately)

	(1)	(2)	(3a)	(3b)	(4)	(5)
Contract	0.583*					
	(0.347)					
No direct expropriation		0.745***				
		(0.230)				
No ruling (Settlement)			0.508**			
			(0.216)			
Settlement/Investor win				0.661***		
				(0.221)		
% Claim won					1.097**	
					(0.527)	
No enforcement proceedings						0.421**
						(0.208)
Years since end	0.00583	0.00260	-0.00391	-0.00770	-0.0179	-0.00392
	(0.0192)	(0.0221)	(0.0185)	(0.0186)	(0.0244)	(0.0192)
Constant	-1.862***	-2.039***	-1.930***	-2.149***	-1.629**	-1.951***
	(0.485)	(0.541)	(0.579)	(0.582)	(0.635)	(0.540)
Sector	Yes	Yes	Yes	Yes	Yes	Yes
Region	Yes	Yes	Yes	Yes	Yes	Yes
Exclude incomplete?	No	No	Yes	Yes	Yes	Yes
Observations	714	425	573	573	325	573

Standard errors clustered by host state.

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

INGS are consistently positive but do not achieve significance. Finally, in multivariate models, the sign on NO RULING is contrary to expectations albeit insignificant, suggesting that this is not a compelling correlate of reinvestment when considered alongside other variables.

Table 9: Reinvestment (Testing H1-5 in combination)

	(1)	(2)	(3)	(4)	(5)
Contract	1.098			1.285	0.960
	(0.671)			(1.410)	(1.340)
No direct expropriation	0.746***			1.004***	1.208***
	(0.229)			(0.380)	(0.383)
No ruling (Settlement)		-0.302		-0.477	
		(0.589)		(0.663)	
Settlement/Investor win			0.380		0.443
			(0.420)		(0.475)
% Claim won		1.289**	0.860	1.627**	1.162
		(0.582)	(0.669)	(0.735)	(0.806)
No enforcement proceedings		0.362	0.353	0.436	0.441
		(0.291)	(0.285)	(0.349)	(0.344)
Years since end	0.00502	-0.0196	-0.0170	-0.0430	-0.0424
	(0.0225)	(0.0271)	(0.0252)	(0.0332)	(0.0335)
Constant	-2.063***	-1.803***	-1.982***	-2.561***	-2.978***
	(0.543)	(0.625)	(0.660)	(0.708)	(0.776)
Sector	Yes	Yes	Yes	Yes	Yes
Region	Yes	Yes	Yes	Yes	Yes
Exclude incomplete?	No	Yes	Yes	Yes	Yes
Observations	425	325	325	265	265

Standard errors clustered by host state.

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Although the results in Tables 8 and 9 report the outcomes of hypothesis tests, they are quite far from sufficient to establish that aspects of the law cause investor behavior. However, the focus on correlation here is useful. As observers of these relationships, host states and institutional designers have an incentive to take systematic correlations into account. Host states choose actions that investors may see as adverse, and institutional designers face growing backlash against the status quo, without the luxury of clean identification strategies. Part of the contribution of this article is identifying variation in returns to cooperation between the host state and the particular investor that sued it. Given the existence of reinvestment, host states acting under uncertainty consider correlates in sharpening their estimates of the relative costs and benefits of actions influencing foreign investors.[54] Those interested in institutional reform have incentives to use correlational evidence today in shaping the future of these institutions, particularly because the push for reform is on the agenda now.

In terms of robustness, specialists may be interested in including ICSID as a covariate, supposing that the venue in which the ISDS arbitration is heard has relevance for reinvestment. The International Center for the Settlement of Investment Disputes (ICSID) is the World Bank institution formed by treaty in 1966 and ratified by over 150 states. While it was largely ignored for decades, ICSID today is the venue for hundreds of ISDS arbitrations. In arbitration clauses in modern IIAs as well as many contracts, the standard is that foreign investors get an explicit commitment that the host state is willing to have ISDS arbitration hosted by ICSID. Most importantly for my purposes, ICSID requires transparency such that we know the full population of ISDS arbitrations heard there, though specific details of claims and awards can be kept private.[55] Of the 729 arbitrations in my data, 466 (64%) have been brought at ICSID. Other ISDS arbitrations are heard in a variety of venues and by ad hoc tribunals, generally facilitated by procedures set by the United Nations Commission on International Trade Law (UNCITRAL).[56] UNCITRAL rules have long allowed ISDS arbitrations to remain private, in incidence as well as details. UNCITRAL adopted new transparency requirements in 2013 that apply to treaty-based ISDS but not contract-based ISDS, which reinforces my expectation that reinvestment rates will continue to be different for contract-based cases.

I do not have strong ex ante priors on what effect, if any, ICSID should have on reinvestment. On one hand, ICSID publicizes cases, which can raise the stakes of a return to compliance and dampen reinvestment. On the other hand, investors that bring cases at ICSID might reinvest if they see benefits from the host state's participation sufficient to overcome their frustration with realized political risks, if for example the role of the World Bank carries weight. Regardless, the common expectation among practicing lawyers in this area is that venue choice is more a matter of convenience than strategy. The most important reason to expect venue to be unimportant is that

[54]Poulsen 2015.

[55]Hafner-Burton, Steinert-Threlkeld and Victor 2016; Hafner-Burton, Puig and Victor 2017.

[56]The additional 93 arbitrations in the data here (Wellhausen 2016), beyond those collected by a common data source UNCTAD, are all from venues other than ICSID. Important venues include the Permanent Court of Arbitration (PCA), the Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce (ICC).

the actual law to be adjudicated is determined by the treaty or contract invoked, not the venue. Contrast this with the importance of trade dispute venue-shopping, in which the venue is a key determinant of the treaty accessed.

With these data and theoretical issues in mind, the reinvestment rate for ICSID cases is 35.6% (166/466). For the sample of cases outside of ICSID in the data, the rate is 21.3% (56/263). Results in Table 8 are robust to including ICSID membership, except that the coefficient on CONTRACT misses statistical significance. Results in Table 9 are fully robust.[57] While I am reluctant to interpret the coefficient on ICSID, it is consistently positive and significant in all models.

While sector fixed effects are key controls in order to isolate effects of law, existing literature suggests that firms in sectors marked by more mobile assets would be less likely to reinvest. Table 10 reports coefficients on sector covariates, with oil and gas as the excluded category: compared to this canonical immobile sector, coefficients on other sectors should generally be negative. In Model 1, all sector coefficients are negative.[58] One can intuit that assets in finance and services would be relatively mobile. Agriculture—marked today by capital assets and not just by (immobile) land—also has a significant and negative coefficient, as does real estate—characterized by leasing services and not just (immobile) buildings. Coefficients are not significant for telecommunications, transportation, or utilities, several sectors more traditionally thought of as immobile. Unexpectedly, the coefficient on mining is negative and significant in Model 1, but this washes out once Model 2 includes legal covariates. In fact, in Model 2 all significance on sector disappears and some coefficients flip to positive.[59] Altogether, the evidence in Table 10 suggests that sector generally correlates with reinvestment in ways consistent with previous literature. However, the structural effects of sector are not sufficient to explain variation in reinvestment, specifically when considered alongside legal variables.

Illustration

Consider this illustration of what ISDS arbitration and associated reinvestment looks like in practice. Three foreign manufacturers sued Mexico under NAFTA Chapter 11 which provides ISDS,

[57]See replication files.

[58]Note that the 5 instances in which sector is unknown are excluded.

[59]In this specification, replicating Table 9, Model 5, missing data on agriculture causes it to drop out.

Table 10: Reinvestment (Sector effects, relative to Oil/Gas)

	(1)	(2)
Agriculture	-1.113**	
	(0.475)	
Finance	-1.430***	-1.251
	(0.510)	(0.807)
Manufacturing	-0.392	0.186
	(0.291)	(0.548)
Mining	-0.854**	-0.389
	(0.424)	(0.747)
Real Estate	-1.588**	-1.089
	(0.666)	(0.881)
Services	-0.787**	-0.208
	(0.319)	(0.515)
Telecommunications	-0.341	0.419
	(0.347)	(0.882)
Transportation	-0.400	-0.303
	(0.384)	(0.685)
Utilitites	-0.209	-0.350
	(0.266)	(0.479)
Contract		Yes
No direct expropriation		Yes
Settlement/Investor win		Yes
% Claim won		Yes
No enforcement proceedings		Yes
Years since end	0.0133	-0.0424
	(0.0177)	(0.0335)
Constant	-0.443	-1.727**
	(0.348)	(0.822)
Region	Yes	Yes
Observations	724	265

Omitted sector: Oil/Gas.

Standard errors clustered by host state.

Model 2 replicates Table 9, Model 5.

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

in response to a 20% tax on soft drinks passed in 2001. That tax applied to high fructose corn syrup-sweetened drinks—an industry segment dominated by foreign investors—but not to cane sugar-sweetened drinks—dominated by domestic and state-owned Mexican producers. The tax was found to be discriminatory and thus illegitimate, and two of the foreign manufacturers won awards in 2007 (US$34 million) and 2009 (US$58 million), which Mexico paid. In each case, the manufacturer reinvested in Mexico. However, Mexico was frustrated with the large award Cargill received in 2009, of US$78 million. The state's argument was that the tribunal had exceeded its jurisdiction and awarded Cargill compensation based not just on its direct investments but also on exports. Mexico began applied to get the award set aside in domestic Canadian courts, as the hearing physically took place in Canada. Cargill waited while Mexico lost several cases but ultimately, frustrated with the delays, filed for enforcement of the award in court in New York. Mexico relented and agreed to pay in 2013. After this resolution, Cargill began a US$7.2 billion expansion plan in Mexico slated to run from 2015-2018, which celebrates "its 50-year presence in Mexico...with more than 1750 employees in 13 states and 30 facilities."[60]

Clearly, one illustration allows us no leverage on adjudicating multiple hypotheses. What I mean to highlight is that the explanatory variables on which I have focused are integral to retelling the story of investor behavior around ISDS arbitration. In this illustration, reinvestment took place, despite the fact that these investors are not in a sector marked by canonically immobile, site-specific investments and thus have more exit options. Aspects of the legal process push the likelihood of reinvestment in different directions. Pushing toward reinvestment, the investors did not claim direct expropriation as the host state's action did not change ownership. Additionally, the claimants won large awards. Pushing against reinvestment, the claimants sued under NAFTA and not contracts, reducing the specificity of the law to their particular relationships with the host state. One of three faced post-arbitration enforcement proceedings, although it reinvested after those were complete. In short, even in this cherry-picked case, I cannot link all explanatory variables of interest to the realized outcome. What I hope the reader takes away is that the explanatory variables I identify are relevant, theoretically reasonable, and capable of being weighed by host states and institutional designers, even if one cannot conclude that they have a causal effect on

[60] "Cargill animal nutrition premix plant in El Salto, Mexico completes $5 million expansion." Cargill News Release: 13 August 2015.

foreign investor behavior.

Conclusion

While one's perspective on the rarity of reinvestment could vary, reinvestment can be thought of as an existence proof that ISDS need not unequivocally mar the investor-state relationship even in the immediate post-arbitration period. Empirical trends show that reinvestment is not only linked to the structure of a foreign investor's sector, but also to qualities of the formal legal process by which the dispute is adjudicated.

What does evidence of reinvestment mean for our expectations of host state behavior? In particular, might a high likelihood of reinvestment spur the state to breach in the first place? Host state incentives have been lurking behind this article. To a host state weighing the decision to breach, whatever domestic political benefits might come as a result of breach could be augmented by the potential for reinvestment. If reinvestment is a possible benefit of breach or a means of minimizing its costs, reinvestment might make breach more "efficient." Consistent with the concept of efficient breach from law and economics, the host state could breach today, make the aggrieved investor financially whole to its ex ante position, and still derive benefits through reinvestment tomorrow.[61] Thus, host states may be emboldened in the presence of the correlates explored here.

If inovking ISDS need not be a last-ditch effort to salvage an investment, selection into formal international arbitration is more puzzling. Might formal adjudication be more likely if a host state's time-inconsistent action is a product of an exogenous shock rather than fickle domestic preferences? Might investors of certain nationalities be more likely to select into formal law given their socialization? Further, how might selection effects influence host state behavior? Are host states more likely to change their underlying adverse policy if aggrieved foreign investors promise not to sue? Pursuing this research on selection effects could reinforce that one need not reinvent theories of the political economy of international law to understand relationships between aggrieved investors and host states.

Nothing of what is argued here establishes that current ISDS provisions are normatively

[61] For consideration of efficient breach in the realm of international law, see Posner and Sykes 2011; Pelc 2010; Guzman 2002. Pelc and Urpelainen (2015) argue that breach-and-pay systems that allow the state to violate agreements but compensate affected parties should be particularly common in investment treaties as compared to trade treaties.

the best way to organize the adjudication of investor-state disputes. Certainly, the usefulness and fairness of the de facto international investment regime are topics of considerable scholarly and public debate. This article contributes to that debate by specifying and providing evidence on one possible upside in terms of reinvestment, implying that beneficial institutional reforms might focus on maximizing the likelihood of reinvestment. Reinvestment correlates with implementation of the rule of law. Rather than consistently destroying bilateral investor-state relationships, international investment law can sometimes reinvigorate FDI from the aggrieved investor itself.

References

Allee, Todd and Clint Peinhardt. 2010. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions." *International Studies Quarterly* 54:1–26.

Allee, Todd and Clint Peinhardt. 2011. "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment." *International Organization* 65(3):401–432.

Alter, Karen. 2006. "Private Litigants and the New International Courts." *Comparative Political Studies* 39:22–49.

Bishop, R. Doak. 2009. *Enforcement of Arbitral Awards Against Sovereigns.* Jurisnet.

Caporaso, James. 1978. "Introduction to the special issue of International Organization on dependence and dependency in the global system." *International Organization* 32:1–12.

Dunning, J. 1980. "Toward an Eclectic Theory of International Production: Some Empirical Tests." *Journal of International Business Studies* 11(1):9–31.

Frieden, Jeffry A. 1994. "International Investment and Colonial Control: A New Interpretation." *International Organization* 48:559–593.

Garriga, Ana Carolina. 2016. "Human Rights Regimes, Reputation, and Foreign Direct Investment." *International Studies Quarterly* 60:160–172.

Gertz, Geoffrey. 2018. "Commercial Diplomacy and Political Risk." *International Studies Quarterly* 62:94–107.

Guzman, Andrew T. 2002. "A Compliance-Based Theory of International Law." *California Law Review* 90:1823–1887.

Hafner-Burton, Emilie, Sergio Puig and David G. Victor. 2017. "Against Secrecy: The Social Cost of International Dispute Settlement." *Yale Journal of International Law* 42:279–343.

Hafner-Burton, Emilie, Zachary Steinert-Threlkeld and David Victor. 2016. "Predictability versus Flexibility: Secrecy in International Investment Arbitration." *World Politics* 68:413–453.

Haftel, Yoram Z. and Alexander Thompson. 2013. "Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties." *International Organization* 67(2):355–387.

Haftel, Yoram Z. and Alexander Thompson. 2018. "When Do States Renegotiate Investment Agreements? The Impact of Arbitration." *Review of International Organizations* 13:25–48.

Jensen, Nathan. 2008. "Political Risk, Democratic Institutions, and Foreign Direct Investment." *Journal of Politics* 70(4):1040–1052.

Jensen, Nathan M., Glen Biglaiser, Quan Li, Edmund Malesky, Pablo M. Pinto, Santiago M. Pinto, and Joseph L. Staats. 2012. *Politics and Foreign Direct Investment*. University of Michigan Press.

Johns, Leslie. 2012. "Courts as Endogenous Coordinators: Enforcement and Jurisdiction in International Adjudication." *Journal of Conflict Resolution* 56(2):257–289.

Johns, Leslie and Krzysztof Pelc. Forthcoming. "Free-Riding on Enforcement in the WTO." *Journal of Politics* .

Keohane, R. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton University Press.

Kerner, A. 2009. "Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties." *International Studies Quarterly* 53(1):73–102.

Kerner, Andrew and Jane Lawrence. 2014. "What's the Risk? Bilateral Investment Treaties, Political Risk, and Fixed Capital Accumulation." *British Journal of Political Science* 44(1):107–121.

Li, Q. 2009. "Democracy, Autocracy, and Expropriation of Foreign Direct Investment." *Comparative Political Studies* 42(8):1098–1127.

Li, Quan and Adam Resnick. 2003. "Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries." *International Organization* 57:175–211.

Maurer, Noel. 2013. *The Empire Trap: The Rise and Fall of US Intervention to Protect American Property Overseas, 1893-2013*. Princeton University Press.

Pandya, Sonal S. 2016. "Political Economy of Foreign Direct Investment: Globalized production in the twenty-first century." *Annual Review of Political Science* 19:455–475.

Paulsson, Jan. 1991. "ICSID's Achievements and Prospects." *ICSID Rev. Foreign Investment Law Journal* 380:386.

Pelc, K. and J. Urpelainen. 2015. "When do International Agreements Allow Countries to Pay to Breach?" *Review of International Organizations* 10(2):231–264.

Pelc, Krzysztof J. 2010. "Eluding Efficiency: Why do we not see more efficient breach at the WTO?" *World Trade Review* 9:629–642.

Pelc, Krzysztof J. 2017. "What Explains the Low Success Rate of Investor-State Disputes?" *International Organization* 71:559–583.

Posner, Eric A. and Alan O. Sykes. 2011. "Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues." *Michigan Law Review* 110:243–294.

Poulsen, Lauge. 2015. *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge University Press.

Priest, George L. and Benjamin Klein. 1984. "The Selection of Disputes for Litigation." *The Journal of Legal Studies* 13:1–55.

Rosendorff, B. P. 2005. "Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure." *American Political Science Review* 99(3):389–400.

Rosendorff, B. Peter and Helen Milner. 2001. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." *International Organization* 55:829–857.

Schultz, Thomas and Cdric Dupont. 2014. "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study." *European Journal of International Law* 25(4):1147–1168.

Simmons, B. 2014. "Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment." *World Politics* 66(1):12–46.

Staats, Joseph L. and Glen Biglaiser. 2012. "Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law." *International Studies Quarterly* 56(1):193–202.

Stasavage, David. 2004. "Open-door or closed-door? Transparency in domestic and international bargaining." *International Organization* 58:667–703.

Van Harten, Gus. 2012. "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration." *Osgoode Hall Law Journal* 50(1):211–268.

Vernon, R. 1971. *Sovereignty at Bay*. Basic Books.

Waibel, M., C. Balchin, L. K. Chung and A. Kaushal. 2010. *The Backlash against Investment Arbitration: Perceptions and Reality*. Kluwer Law International.

Wellhausen, Rachel. 2015. *The Shield of Nationality: When Governments Break Contracts with Foreign Firms*. Cambridge University Press.

Wellhausen, Rachel. 2016. "Recent Trends in Investor-State Dispute Settlement." *Journal of International Dispute Settlement* 7(1):117–135.