Once Bitten, Twice Shy?
How Disputes Affect Regulatory Space in Investment Agreements

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Abstract

More than 3000 international investment agreements (IIAs) provide foreign investors with substantive protections and, in most cases, access to binding investor-state dispute settlement (ISDS). For several decades, and in particular since the 1990s, these treaties gained traction and proliferated around the world. In recent years, however, states increasingly have sought to change their treaty commitments through the practices of renegotiation and termination, so far affecting about 300 IIAs. The received wisdom is that this development reflects a backlash against the regime and an attempt by governments to reclaim state regulatory space (SRS), especially in response to the threat of investment arbitration claims. This conviction relies mostly on anecdotal evidence, however, and lacks solid theoretical and empirical foundations. Using new data on the varying degree to which SRS is restricted by IIA provisions, this paper provides perhaps the first systematic investigation into the effect of ISDS experiences on state decisions to adjust their treaties. The empirical analysis indicates that, indeed, exposure to investment claims leads either to the renegotiation of IIAs in the direction of greater SRS, or to their termination. This effect varies, however, with the nature of involvement in ISDS and with respect to different types of treaty provisions.

Introduction

The global investment regime, consisting of thousands of bilateral investment treaties (BITs) and other agreements with investment provisions (Salacuse 2010, 6-10), is undergoing a period of reflection and reform. We have witnessed widespread efforts by governments, often spurred by legislatures and civil society groups, to scrutinize and reformulate their policies toward international investment protection, a trend that includes both developed and developing countries. In particular, considerable debate has focused on how to update international investment agreements (IIAs) in order to clarify obligations and balance the treatment of investor and host government interests, with the goal of producing a new generation of "modernized" treaties (UNCTAD 2017a).

Although a variety of issues have been raised, the main driver of this change is concern that international obligations restrict the flexibility of host states in a broad range of public policy areas, such as environmental regulation, public health, social policy and national security. Many states have questioned whether the potential political and economic benefits of their IIAs—in terms of stimulating investment and development—are worth the erosion of regulatory autonomy in such areas (Gaukrodger 2017). In other words, concerns with the investment regime are a specific instance of the "sovereignty cost" questions that arise with many legalized international institutions (Abbott & Snidal 2000). In the context of IIAs, these problems are exacerbated by the binding investor-state dispute settlement (ISDS) provisions found in most agreements, which allow foreign investors to challenge their hosts in international tribunals and to receive compensation (often in the range of tens of millions of dollars) if their rights have been violated.[1]

[1] Among publicly known disputes decided in favor of investors, the average amount awarded was $522 million and the median was $19 million (UNCTAD 2017b).

Dissatisfied states face a range of options when it comes to altering their international investment obligations. Some states, in an attempt to extricate themselves from the regime as much as possible, have pursued relatively dramatic actions such as terminating treaties and withdrawing from related institutions, especially the International Centre for Settlement of Investment Disputes (ICSID). Unilateral termination of an IIA is usually possible only after the expiration of its initial term (typically between 10 and 20 years) and has limited legal benefits and potentially high costs (Carska-Sheppard 2009; Lavopa et al. 2013). It was therefore a relatively rare phenomenon but has gained popularity in recent years (Gordon and Pohl 2015, 18-19). According to our data, about 100 IIAs have been terminated to date, either unilaterally or by mutual consent.

Most governments have pursued the less dramatic option of modifying their IIA obligations, thereby seeking change from within the regime rather than rejecting it. For any new treaties, this can be done by seeking better terms and by updating the "model" BITs that many countries use as a template for negotiations. For the thousands of existing agreements, however, the most effective recourse is renegotiation. The first renegotiations occurred about twenty years ago and they have accelerated in recent years, resulting in about 200 renegotiated IIAs. These two options, termination and renegotiation, are the main strategies used by states to reclaim flexibility vis-à-vis investment agreements.

We focus on the practices of renegotiation and termination to investigate the politics of sovereignty and change in the international investment regime. In previous research, two of the authors asked why some investment agreements are renegotiated and showed a link between state exposure to ISDS and renegotiation (Haftel & Thompson forthcoming). However, we lacked data on treaty design to determine what changes were actually made. In this paper, we take advantage of a new dataset on the design of IIAs, developed by the authors, to examine these changes in more detail. Like other recent

efforts to use treaty text as data, we are able to systematically compare IIAs (Alschner & Skougarevisky 2016; Allee & Lugg 2016). However, rather than focus on the degree of overlap in text per se, we are interested in capturing particular and theoretically meaningful dimensions of these treaties. Specifically, our coding scheme allows us to determine, across a range of provisions, whether a treaty provides for more or less "state regulatory space" (SRS), a concept we explain below. By revealing not only *when* states renegotiate but also *what* they renegotiate—that is, which provisions are changed and how—our analysis sheds light on the concerns that drive renegotiation. In cases of renegotiation and termination, we can measure how much SRS is increased, decreased or preserved by the revised treaty or by reverting to a no-agreement outcome, respectively. Arguably, deliberate and well-informed choices to renegotiate or terminate tell us even more about design preferences than initial negotiations, which, especially in the case of IIAs, often took place with less information about the consequences of alternative treaty provisions (Poulsen 2015).

Our fundamental question is this: How do states react to their experience with ISDS in subsequent treaty design? We consider both the frequency of disputes and their outcomes—whether states win or lose—to generate hypotheses about the likelihood that states will seek greater levels of SRS. We also ask whether states are more likely to seek change in SRS by modifying either the substantive provisions of IIAs or the procedural provisions related to ISDS itself. In the process, we also consider whether there are different explanations for renegotiation versus termination as alternative means for adjusting treaty commitments.

In the next section, we explain the concept of SRS, link it to the growing role of ISDS in the investment regime, and present our hypotheses. The third section explains our

research design and presents the results of our data analysis. A concluding section suggests implications for the investment regime and avenues for further research.

Arbitration and State Regulatory Space

We define state regulatory space as the ability to freely legislate and implement regulations in given public policy domains.[2] SRS should be conceived as a continuum, where at one extreme governments have maximum flexibility to pursue policies at the domestic level with minimal pressure from foreign investors or risk of arbitration and liability. At the other extreme, governments are highly constrained by IIA rules and the specter of ISDS deters regulation in the public interest. SRS is a function of both substantive provisions, which determine the obligations of states with respect to foreign investors, and procedural provisions related to ISDS, which determine the risk of binding arbitration and therefore affect the cost of violating substantive rules. From both a theoretical and political perspective, SRS is arguably the most important dimension along which investment treaties vary.

To understand when states are more likely to seek greater SRS, it makes sense to begin with the most controversial aspect of IIA practice when it comes to host government flexibility: ISDS, which has played a central and complicated role in the international investment regime. For years it remained an obscure and seldom-used part of the legal architecture (Yackee 2008). Beginning in the mid-1990s, however, the number of ISDS cases began to rise, accompanied by some high-profile disputes that entailed large awards. To date, there are over 800 known cases of ISDS based exclusively or partially on IIAs, involving 114 countries (UNCTAD 2017b).

[2] For further development of this concept, see Broude et al. 2017.

The investment regime's decentralized system of arbitration has produced inconsistent results that have sometimes surprised governments with expansive interpretations of investor protections (Franck 2005; UNCTAD 2010; Pelc 2017). A wide range of private and government actors have raised legitimate fears of a "regulatory chill" if provisions ostensibly designed to attract investment, combined with the threat of binding arbitration, curtail the pursuit of important social, environmental and economic goals in the public interest (Cotula 2014; UNCTAD 2015; Schill 2007). Indeed, merely being challenged with an ISDS claim can be enough to affect the reputation of host governments and deter investors (Allee & Peinhardt 2011). As a result, there has been growing concern and even a "backlash," partly driven by populism and economic nationalism, against investment arbitration in recent years (Waibel 2010; Langford et al. 2015). This has included a search for new approaches to resolving investor-state disputes (Sardinha 2017; Franck 2014).

These concerns are consistent with the finding that states involved in ISDS cases are more likely to renegotiate or terminate their IIAs (Haftel & Thompson forthcoming). Important questions remain, however. We propose a set of hypotheses to determine whether states seek change as a result of sovereignty concerns that arise through their ISDS experience, as the conventional wisdom suggests, and to shed light on the more precise dynamics of these processes. Specifically, we consider both the extent of ISDS involvement and its different types to see what prompts states to learn about the impact of their treaty commitments and thus to seek greater levels of SRS.

First, and perhaps most directly, governments may learn about the consequences of particular treaties and provisions from ISDS experience. If a treaty has been used frequently as the basis for arbitration claims by investors, this is a strong indicator that its provisions favor investor rights at the expense of domestic policy priorities. Dyads

involved in such disputes thus have an incentive to change their shared IIAs to reduce the risk of investor claims and tip the balance in favor of greater SRS. We hypothesize:

Hypothesis 1: When parties to a particular treaty have experienced a high number of dyadic disputes, that shared treaty is more likely to be renegotiated with greater SRS or terminated.

Alternatively, these learning dynamics could be more general and diffuse. Simply being involved in investment disputes, either as a respondent state or as the home state of a claimant, could promote learning by governments about the consequences of IIA provisions and their potential sovereignty costs, prompting a search for greater SRS. Indeed, Schill (2009) points to ISDS as an important mechanism for clarifying uncertainties surrounding BITs and van Aaken (2009, 532) refers explicitly to the "learning effect" of arbitration, which has allowed states to approach IIAs with greater knowledge and sophistication. As a corollary to this logic, we might expect the effect to be stronger when a state is not merely involved in ISDS but is in fact the target of claims brought by investors. Poulsen and Aisbett (2013) describe a "narcissistic" effect, whereby states learn most when they are themselves targeted by ISDS. We explore these possibilities with Hypothesis 2, which we test by comparing involvement as a host to a claimant to involvement as a respondent.

Hypothesis 2: States that have been involved in more investment disputes are more likely to renegotiate agreements with greater SRS or to terminate them.

In addition, we should consider not only the extent of a state's involvement with ISDS cases, but also the outcomes of those cases. Presumably, a state that is often on the losing end of claims is more likely to infer that its existing IIAs are not doing enough to preserve policy space in the face of investor complaints.

Hypothesis 3: States that lose a higher number of investment disputes are more likely to renegotiate agreements in the direction of greater SRS or to terminate them.

Finally, we consider whether changes to SRS follow a different pattern if we look only at changes to ISDS provisions, as opposed to substantive protections. This distinction allows us to investigate whether concerns over ISDS per se—perhaps as the most high-profile and politically consequential aspect of IIAs—are driving the desire to renegotiate or terminate, as claims of a "backlash" against investor arbitration might suggest. Alternatively, the investment protection standards themselves could be the main concern of governments, leading them to focus on those substantive provisions. These are distinct logics, which seem equally plausible, and indeed are not mutually exclusive – after all, IIA termination, for example, frees the state of both substantive treaty obligations and ISDS. On the one hand, states may consider the substantive rules as striking a fair balance between investor and states interests, but view the institutional ISDS procedures as problematic. On the other hand, they may be pleased with the institutional side but concerned by the onus of the obligations. This is a crucial issue for the design of future agreements, which we capture with the following hypotheses:

Hypothesis 4a: When states seek to change SRS, they are more likely to do so by modifying ISDS provisions.

Hypothesis 4b: When states seek to change SRS, they are more likely to do so by modifying substantive provisions.

To be sure, although current discussions of IIA reform are often fueled by a perceived loss of regulatory space, this is not the motivation for all renegotiations. Notably, the vast majority of investment policy changes around the world are designed to liberalize and promote investment, not restrict it (UNCTAD 2016b, 90). Anecdotal

evidence suggests that lessons from ISDS experiences can be positive and some states have used renegotiation to improve investor protections, even at the expense of SRS. Germany, for example, renegotiated several BITs during the 1990s and 2000s in order to add "high-standard" ISDS provisions (often replacing agreements with no ISDS at all). During the same period, China also reformed its BIT policy to embrace more constraints on host states, which it implemented in new treaties and in renegotiated ones (Gallagher and Shan 2009).

Indeed, on the question of whether states historically have sought more or less SRS in their renegotiated BITs, the evidence is mixed. In the past, most renegotiated texts provided less SRS than the initial ones, although this has changed in recent years (Broude et al. forthcoming). This countervailing evidence suggests that each of the hypotheses above has a plausible null hypothesis, where ISDS experiences are not associated with greater SRS in renegotiated treaties.

Research Design

To test the hypotheses discussed in the previous section, the analysis herein investigates the change from the original investment agreement to the one replacing it, or to no agreement in the case of termination. The unit of analysis is thus the individual treaty. In contrast to a previous study (Haftel and Thompson forthcoming), we include only modified or terminated IIAs rather than comparing such IIAs to those that have remained intact. Given our interest in the nature and direction of change, this is the relevant set of agreements. The dependent variables are operationalized as continuous measures of change in SRS (as described next), thus our main analyses employ ordinary least squares

(OLS) estimation with robust standard errors.[3] The rest of this section elaborates on the dependent variables, sample and data, and then outlines independent and control variables. Tables A1 and A2 in the Appendix report summary statistics and bivariate correlations, respectively, of all variables used in the analysis.

Dependent Variables

In order to gauge change in SRS, we first need to define and measure this underlying concept. To do this, we build on the IIA Mapping Project, a text coding scheme developed by the United Nations Conference on Trade and Development (UNCTAD), with the assistance of several experts.[4] This scheme examines the most important substantive and procedural provisions of agreements and codes them on the inclusion, exclusion or degree of various elements. The UNCTAD Mapping Project is designed for "raw" comparative purposes, not with SRS in mind. We have therefore adjusted the coding criteria to reflect our research interests.

As we discuss in greater detail elsewhere (Broude et al. 2017), we have classified all provisions in ninety-three separate indicators subsumed under forty-two categories, which in turn are grouped in nine broader dimensions of IIAs with relevance to SRS. The coding scheme is reported in the Appendix. The coding of each category, as well as the cumulative measures, ranges from zero (0) for limited SRS (less policy space), to one (1) for greater SRS (more policy space).[5] Terminated IIAs reflect maximum policy space and therefore score a value of 1 on all aspects of SRS. As we note in our discussion of

[3] As a robustness check, we also transformed the two dependent variables into binary ones, scoring 1 for a positive change in SRS and 0 for either no change or a negative change. We then duplicated many of our analyses using logit models. The results, available from the authors, remained intact.

[4] UNCTAD, "IIA Mapping Project," http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu (visited 30 September 2017).

[5] The various indicators are weighted equally. Although their impact on regulatory space is unlikely to be uniform, we currently do not have a sufficiently strong theory to guide us on how to weigh the different indicators.

Hypotheses 4a and 4b, states might be especially motivated to alter either ISDS provisions or substantive ones. To test for these possibilities, we use two versions of the dependent variable, one that includes *only* substantive provisions and one that includes *only* ISDS indicators.

The dependent variables – labeled *Delta SRS Substantive* and *Delta SRS ISDS*– capture the difference between the SRS value of the original treaty and its replacement. Recalling that the SRS score varies from zero to one, the values on these variables can range from +1 to -1, where positive values indicate an increase in SRS and negative values indicate a decrease (zero indicates no change in SRS). The values of these variables can be either positive or negative for renegotiated IIAs.

In one prominent example, the 1959 Germany-Pakistan BIT – the first 'modern' BIT' - had an SRS value of 0.35 on substantive provisions and a corresponding value of 1 on ISDS provisions (reflecting the fact that it lacked such provisions). It was replaced in 2009 with a BIT that has SRS values of 0.25 and 0.07 on substantive and ISDS provisions, respectively. Thus, the values for this observation are -0.10 for *Delta SRS Substantive* and -0.93 for *Delta SRS ISDS*. In contrast, the 1996 Canada-Panama BIT with SRS scores of 0.30 and 0.26 on substantive and ISDS provisions, respectively, was replaced in 2010 with a somewhat more "progressive" BIT, with corresponding scores of 0.49 and 0.40. Thus, the values for this observation are 0.19 for *Delta SRS Substantive* and 0.14 for *Delta SRS ISDS*.

The values for terminated IIAs are almost always positive, of course. That is because the change is from an agreement that includes at least some constraints on the host government to no agreement at all.[6] For instance, the 1984 Norway-Malaysia BIT, with an

[6] A handful of terminated IIAs that had no ISDS provisions, such as the 1973 France-Indonesia BIT, score zero on *Delta SRS ISDS*.

SRS values of 0.255 on substantive provisions and 0.056 on procedural ones, was terminated in 2001. The values of *Delta SRS Substantive* and for *Delta SRS ISDS* for this observation are therefore 1 – 0.255 = 0.745 and 1 – 0.056 = 0.944. Given that the dynamics of IIA renegotiation and termination might be different, we report the results with and without termination. As we shall see, the inclusion of terminated IIAs in the sample can have a substantial impact on the results.

Sample and Data

As already mentioned, our sample includes both renegotiated and terminated IIAs. With respect to the former, we account for IIAs in force that were either replaced by a new treaty (a BIT or an FTA with investment chapter) or amended by a protocol (for further elaboration, see Haftel and Thompson forthcoming; Broude et al. 2017). We identified 196 IIAs that meet these criteria. Coding these agreements on SRS requires the texts of all initial and renegotiated treaties. Using UNCTAD's database and additional resources, such as the UN Treaty Series and national databases, we were able to collect both texts for 176 IIAs included in our data set (about 90% of the entire sample). These treaties come in a variety of languages. We tackled this coding challenge by employing coders proficient respectively in five languages: English, French, Spanish, Arabic, and Russian.

Even though the UNCTAD Mapping Guide is very detailed and provides ample instructions and examples, coding of complex legal texts such as IIAs is susceptible to different interpretations and understandings. In order to reduce the risk of coding errors, the three co-authors coded several treaties and arrived at a consensual coding baseline. Each coder then had to code these treaties as well as compare and reconcile her or his coding with this baseline. Only upon completing this training did she or he start coding additional BITs. Furthermore, most treaties were coded by two research assistants, who

later compared and converged on an agreed-upon coding. In any cases of remaining disagreements, the coding was reviewed by the authors, who made the final decision.

For terminated IIAs, we relied on UNCTAD's records and mapping, which was made publicly available in 2017. Eighty-nine IIAs are listed as terminated either by mutual consent or unilateral denunciation. Seventy-one of these IIAs were mapped by UNCTAD's research collaborators and are thus included in the analysis here.[7] According to UNCTAD (2017), "Each treaty is double-mapped to increase the quality and reliability of results, i.e. at least two participants (typically from different universities) map it independently and consolidate the results."[8] Given these assurances, we take UNCTAD's coding at face value. After obtaining it from the UNCTAD web site, we transformed the raw data into SRS, according to the procedure described above. Figures 1 and 2 report the histograms for *Delta SRS Substantive* and *Delta SRS ISDS*, respectively, broken down by renegotiated and terminated IIAs. They demonstrate the ample variation on these two variables.

[Figure 1 & Figure 2]

Independent Variables

Our hypotheses suggest that involvement in ISDS is likely to prompt treaty renegotiation or termination that results in higher levels of SRS. We consider three sets of ISDS-related variables, discussed in turn. For all of these variables, we employ data from UNCTAD's Investment Dispute Settlement Navigator, which records data on over 800 disputes.[9]

[7] Twenty-four out of eighty-nine IIAs were terminated by mutual consent, thus the majority of terminated IIAs were unilaterally denounced. Eleven of the seventy-one mapped IIAs were terminated by mutual consent.

[8]http://investmentpolicyhub.unctad.org/Upload/Documents/Mapping%20Project%20Description%20and%20Methodology.pdf, p. 2.

[9] http://investmentpolicyhub.unctad.org/ISDS. Data downloaded on October 15th, 2017.

Dyadic investment disputes – Most directly, a party or parties to an IIA that has served repeatedly as the basis for investment claims may want to revise or terminate it. This is the logic behind Hypothesis 1. The variable *Dispute Dyad* is therefore a count of all disputes within a given dyad from the year in which the IIA was signed until the year in which it was renegotiated or terminated.[10] One should note that the occurrence (and recurrence) of such dyadic disputes is pretty rare in our sample: only ten percent of all observations have a non-zero value on this variable, which is almost always one. Nonetheless, the relative frequency of such disputes is higher among terminated IIAs, compared to renegotiated ones. In one extreme case, five investment disputes were based on the 1991 Netherlands-Venezuela BIT before it was terminated in 2008.[11]

Monadic investment disputes – As Hypothesis 2 suggests, governments may learn and update from their broader experience with ISDS. We therefore count the overall number of investment claims (based on any IIA, not just with each other) that both parties were involved in from the year in which the IIA was signed until the year in which it was renegotiated or terminated. We have good reasons to believe that states will draw different lessons from their experience, based on their role as either a respondent state or a home to the claimant. In addition, given the possibility of 'treaty-shopping' (in which a firm uses a subsidiary in a country with a more investor-friendly IIA to file a claim), the claimant's declared home state can be deceptive.

[10] For this, and all other ISDS-related variables, we also counted the number of cases from the year of entry into force rather than signing, which can differ rather substantially (Haftel and Thompson 2013). This did not affect the results in a meaningful manner. These models are not reported here and are on file with the authors.

[11] In theory, a dispute can be filed after a treaty has been terminated if the investment is grandfathered under the treaty's "survival" clause. Such disputes obviously would not influence the decision to terminate and, in any case, we do not include them in our analysis.

We therefore construct two separate monadic variables to capture the logic behind Hypothesis 2. The first, labeled *Dispute Respondent*, is the total number of investment disputes both parties to each (renegotiated or terminated) IIA were a respondent in. The second, labeled *Dispute Claimant*, is the total number of investment claims filed by investors from both parties to each IIA. For example, the Germany-DRC (Democratic Republic of Congo) BIT was signed in 1965 and renegotiated in 2010. Over these forty-five years, Germany was a respondent in two disputes and the DRC in four. The value for *Dispute Respondent* is therefore 2 + 4 = 6. During these years, German investors were claimants in twenty-five cases and Congolese investors were in none. The corresponding value for *Dispute Claimant* is thus 25 + 0 = 25. The bivariate correlation between the two variables is fairly low (r^2 = ~0.15); we therefore include them in the same statistical models.

Dispute outcome – As discussed above in the context of Hypothesis 3, states may respond not only to dispute initiation but also about dispute outcomes. UNCTAD classifies each completed case with a known outcome into one of these five categories: decided in favor of state; decided in favor of investor; decided in favor of neither party; settled; and discontinued. Given our expectation that rulings in favor of the claimant will have the most pronounced impact on changes in SRS, *Pro Investor Ruling* is the total number of cases decided in favor of the investor for both IIA parties.[12] With respect to the Germany-DRC BIT mentioned above, the latter lost two cases and the former lost none, resulting in a value of two (0 + 2 = 2) on this variable.

For a number of reasons, one should be cautious about the coding of this variable. First, UNCTAD defines a pro-investor outcome as one in which "the tribunal found that

[12] As a robustness check, we constructed alternative versions of all three monadic variables (Dispute Respondent, Dispute Claimant and Pro-Investor Ruling) that are based on the party with the highest value rather than the sum of the values of the two parties. The results did not change.

the respondent State committed one or more breaches of the applicable IIA and awarded monetary compensation or non-pecuniary relief to the claimant investor." While this is a reasonable definition, whether one lost or won is, at least to an extent, in the eye of the beholder. For example, governments that had to pay a monetary award that is much smaller than the one initially demanded by the investor may still view the outcome favorably. Second, many investment disputes fall in neither the pro-investor nor the pro-state categories. About a third of more than seven hundred cases are still pending at the time of writing and over a hundred cases are settled. The settlements in such cases are usually confidential and could very well favor the claimant – but in any case reflect a willingness of the host state to compromise, due to an assessment of potential liability. Despite these caveats, this variable should offer a useful first cut at assessing the effect of dispute outcome on changes in SRS. *Pro Investor Ruling* is highly correlated with *Dispute Respond* (r^2 = ~0.80), thus they are reported in separate models.

Control Variables

Extant research on the global investment regime points to several factors that might explain changes in the content of IIAs and states' approach to SRS. We present them in turn and describe their definition and operationalization.

Time Period of Change – The global investment regime has evolved in a number of distinct waves (Jandhyala et al. 2011). In the 1990s, states largely embraced neoliberal economic policies and a pro-investor attitude. Since the mid-2000s, on the other hand, there is much talk of a "backlash" against the regime, reflected in an effort to rebalance investor rights and host state flexibility. We distinguish between IIAs that were renegotiated or terminated during the backlash years and those that were renegotiated or terminated in earlier years. Thus, *Period* is a dummy variable that scores 1 if the year in which the treaty was renegotiated or terminated is 2005 or later, and 0 otherwise.

FTA – The type of renegotiation might have implications for SRS. Elsewhere, we found that investment chapters in FTAs tend to have higher levels of SRS compared to stand-alone BITs (Broude et al. 2017). We might expect, then, that BITs replaced with an FTA, rather than another BIT or a protocol, will have a positive effect on the change in SRS (but not compared to a terminated IIA). *FTA* is a dummy variable that scores 1 if the renegotiated treaty is an FTA, and 0 otherwise.

Western Hemisphere – Different world regions appear to have divergent perspectives on the global investment regime. In previous studies, we found that countries in the Americas are especially sensitive to concerns about regulatory space (Broude et al. 2017). *Western Hemisphere* is a dummy variable that scores 1 if at least one party to an IIA is from the Americas, and 0 otherwise.

North-South IIA – Much of the IIA universe is comprised of either North-South or South-South agreements (North-North agreements are still quite rare). It is widely assumed that the former bear greater economic significance than the latter and that the two are driven by divergent motivations and needs (Poulsen 2015). One might surmise, then, that the two types of IIAs embody different attitudes towards regulatory space, which might have ramifications for change that results from renegotiation or termination. *North-South IIA* is dummy variable that scores 1 if the treaty involves an economically developed country, and 0 otherwise.

New EU Member – Given the need to conform to its rules and regulations, countries acceding to the European Union (EU) had to revise or terminate their IIAs. A glance over the data shows that, indeed, new EU members are among the most active participants in treaty renegotiations and termination (Haftel and Thompson, forthcoming). This group of treaties may also reflect a particular approach to SRS, perhaps one that is derived from the accession process. In addition, many of these treaties (but not all) were updated with an

amending protocol rather than a new agreement, which might have implications for the nature or degree of change. *New EU Member* is a dummy variable that scores 1 if the treaty involves at least one party that joined the EU in the 2000s, and 0 otherwise.[13]

Results

Table 1 presents four OLS models with *Dispute Dyad* as the main independent variable. Model 1 estimates the effect of this and other independent variables on *Delta SRS Substantive* for the sub-sample of renegotiated IIAs. Model 2 includes terminated IIAs, but is otherwise similar to Model 1. Models 3 and 4 replicate the first two models for the dependent variable that contains only procedural provisions, *Delta SRS ISDS*. Tables 2 and 3 are similar to the first table on all aspects except for the main independent variables. Table 2 includes the two monadic variables, *Dispute Respond* and *Dispute Claimant*, and Table 3 includes *Pro Investor Ruling*.

The results offer substantial support for the expectation that experience with investment disputes induces states to reclaim regulatory space. They also point to several interesting nuances with respect to these relationships. Starting with dyadic disputes (Hypothesis 1), Table 1 shows that they have no effect on SRS in renegotiated IIAs but a positive and statistically significant effect when terminated IIAs are included in the analysis. This result suggests that, to the extent that governments change the agreement between them that served as the legal basis for investment claims, they would rather terminate than revise it. In one telling example, after facing several claims based on its

[13] Romania renegotiated several BITs in the 1990s, well before joining the EU was conceivable. They score zero on this variable.

BIT with the Netherlands, Venezuela first considered renegotiating this treaty but eventually decided it was better off denouncing it.[14]

The monadic variables tell a more consistent story. As expected with Hypothesis 2, states with a great deal of experience as respondents in investment disputes seek greater regulatory space in their treaties, either through renegotiation or termination (with a stronger effect in the models that include terminated IIAs). As Tables 2 demonstrates, *Dispute Respond* is always positive and almost always statistically significant, regardless of the specification of the dependent variable. The substantive effect of this variable is also rather sizable. Based on Model 6 in Table 2, an increase in one standard deviation of *Dispute Respond* (about ten claims) increases SRS by about 0.1, on average (on a -1 to +1 scale). Thus, as the number of claims faced by states mounts, their governments will attempt to regain regulatory flexibility.

The effect of *Dispute Claimant* is also positive and significant in several models, but the impact appears less pronounced than for *Dispute Respond*. *Dispute Claimant* is statistically significant in the models that include terminated IIAs but not in most models that exclude them. This might seem surprising at first: Why would home states to firms that benefit from ISDS be interested in terminating their IIAs? One possible answer is that they are not, but that their partners are. That is, states whose investors filed multiple claims are more likely to see their partners unilaterally denounce their agreements, perhaps because the former are reluctant to renegotiate. For example, in recent years India produced a new "model" BIT with a much higher SRS compared to earlier treaties. After Western European countries refused to renegotiate their treaties based on this template, India moved to unilaterally terminate them. Even in the models that include terminated

[14] "Venezuela surprises the Netherlands with termination notice for BIT; treaty has been used by many investors to "route" investments into Venezuela," *Investment Arbitration Reporter*, May 16th, 2008.

IIAs, however, the substantive and statistical effects of *Dispute Claimant* are smaller than for *Dispute Respond*, suggesting that the latter has a greater impact on governments' inclination to pursue greater SRS. This might emanate from greater sensitivity to the direct costs associated with claims against them than to the indirect benefits resulting from the legal remedies available to their home firms.

The results for these variables also shed light on Hypotheses 4a and 4b in interesting ways. *Dispute Respond* and *Dispute Claimant* are both statistically insignificant in Model 7, which evaluates the determinants of *Delta SRS ISDS* and includes only renegotiated IIAs. This suggests that states with greater involvement in ISDS are more likely to focus on SRS in substantive rather than procedural provisions in their treaty renegotiations. With respect to termination, the results are largely similar when we compare changes to substantive versus procedural provisions.

Turning to the effect of dispute outcomes, the results are again consistent with the theoretical expectations (specifically, Hypothesis 3). *Pro-Investor Ruling* (which implies host state losses) is always positive and almost always statistically significant. The substantive effect of this variable also appears meaningful, albeit smaller than for *Dispute Respond*. Based on Model 9 in Table 3, an increase in one standard deviation of *Pro-Investor Ruling* (2.55) increases substantive SRS only by about 0.007. States do seek greater SRS when they have been on the losing end of cases, but they seem to be sensitive to the costs of arbitration regardless of the outcome (Allee and Peinhardt 2011).

A look at the entire set of results related to investment disputes underscores three conclusions. First, states are especially responsive to their overall experience as respondents to investment claims. As their exposure to such claims increases, they are more likely to seek greater SRS through renegotiation or termination of their IIAs. The impact of serving as a host to claimants and the outcome of disputes are also positive, but

these findings are less pronounced. Second, the models that include terminated IIAs produce, on the whole, stronger results, suggesting that in the aftermath of involvement in ISDS states often prefer to terminate entire treaties, regardless of the cost, rather than tinker with their content. Third, in the models that exclude terminated IIAs, we again observe a greater effect on substantive provisions than on ISDS provisions. This indicates that even in the aftermath of investment disputes, parties to IIA renegotiations appear relatively content with the ISDS procedures but pursue greater SRS in substantive rules.

The control variables behave mostly as expected. *Period* is positive and statistically significant in most models. The effect of this variable is particularly noticeable in the models that include terminated IIAs. This finding comports with the reality that termination was very rare until the late 2000s, but has become more widespread since then. It is also consistent with the observation that states are more active in their effort to "rebalance" the global investment regime in recent years. *Western Hemisphere* is also positive and almost always highly statistically significant. Thus, the Americas appear to lead the way in terms of regaining greater SRS through treaty renegotiation and termination. This is apparent in the more "progressive" IIAs signed by countries like Canada, the US, Peru, and Chile, and in unilateral terminations by countries such as Ecuador and Venezuela. *New EU* changes signs and levels of statistical significance across models. Indeed, a closer look at treaties associated with countries that acceded to the EU in 2000s shows that renegotiation led to little if any change in SRS.

Looking at different types of IIAs, *FTA* is mostly positive and statistically significant, suggesting that trade agreements with investment chapters that replace older BITs usually embody higher levels of SRS, compared to renegotiated BITs or amending protocols. Note that *FTA* is negative and statistically significant in the models that include terminated IIAs. This is a likely artifact of the much larger increase in SRS that results

from termination, compared to a renegotiated FTA.[15] *North South IIAs* is negative and statistically significant in most models that exclude terminated IIAs and estimate *Delta SRS ISDS*. This result is probably driven by the renegotiation of several older BITs that lacked ISDS provisions, by countries such as Germany, France, and Switzerland (resulting in greatly reduced SRS in the area of ISDS). This variable is mostly statistically insignificant in other models, suggesting that, perhaps, terminations and renegotiations have had an offsetting effect.

Conclusion

This paper examines the practices of treaty renegotiation and termination to shed light on change in the rules of the global investment regime, as embodied in the provisions of international investment agreements (IIAs). Although various observers and stakeholders associate these steps with dissatisfaction over the regime's presumed pro-investor bias,[16] little systematic evidence has been brought to bear on this timely question.

Constructing and using new data on state regulatory space (SRS) in close to 300 renegotiated and terminated IIAs, we look at the relationship between involvement in and exposure to investment arbitration, on the one hand, and change in the content of existing treaties, on the other. The empirical results indicate that, indeed, experience with ISDS leads to greater SRS in renegotiated treaties and, even more clearly, to their termination. This effect varies, however, with the nature of involvement in ISDS and with respect to different types of treaty provisions. It appears that the number of cases brought against a state has the strongest impact on changes in SRS. Being a home to a claimant or losing these ISDS cases seems less important. In addition, the results indicate that when states

[15] Indeed, the logit models, which do not take into account the size of the change, produce positive results for this variable.
[16] On whether investment arbitration is biased, as measured in terms of outcomes, see Schultz and Dupont 2014 and Pelc 2017.

renegotiate their IIAs, they focus more on the substantive rules than on ISDS provisions. This suggests that governments are less concerned about the institutional arrangements for settling disputes (possibly because they view them as biased in favor of investors), than in recalibrating the level of protections that they guarantee. These intriguing findings call for further analysis of how states learn from and react to ISDS and what specific provisions of IIAs they are most interested in revising.

As tactics to shape the investment regime, renegotiation and termination should become even more important in the near future, as the initial durations of hundreds of IIAs are set to expire in the next several years (UNCTAD 2017a, 3). Understanding these practices will give us insight into the concerns and design choices that are driving the evolution of the investment regime. Focusing specifically on the role of ISDS in motivating change should produce lessons for how states can successfully navigate the most politically controversial aspect of the investment regime, balancing investor rights and sovereignty concerns in the process.

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Figure 1: Histogram of Delta SRS Substantive, by Type of Change

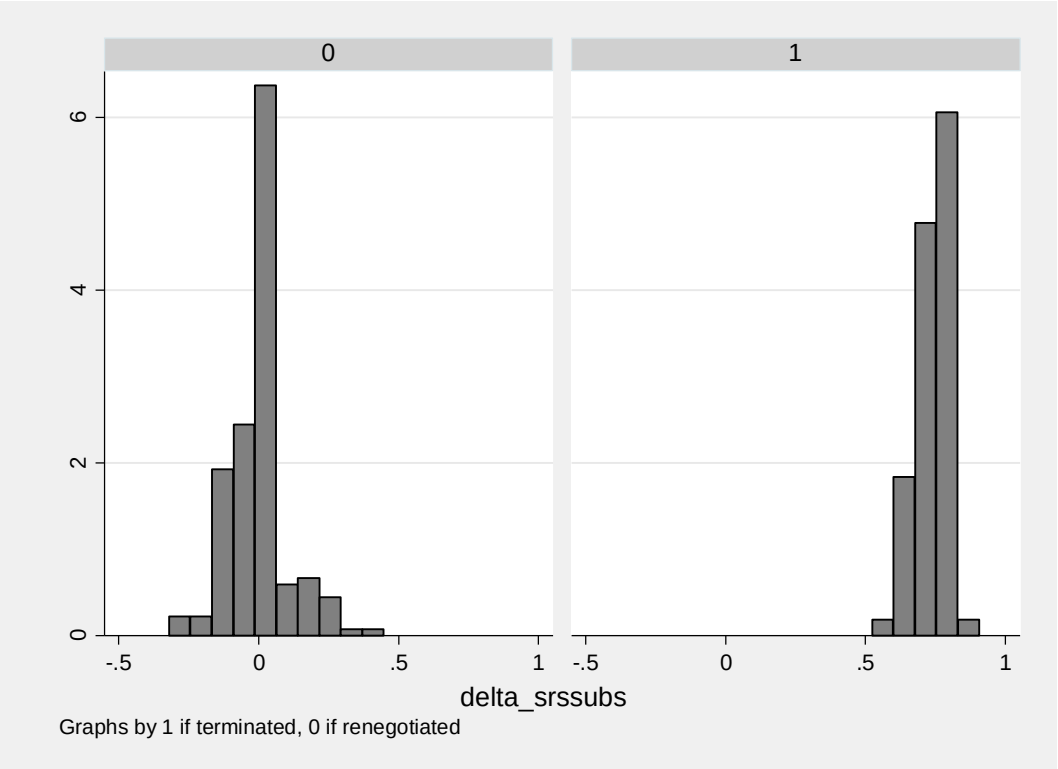

Figure 2: Histogram of Delta SRS ISDS, by Type of Change

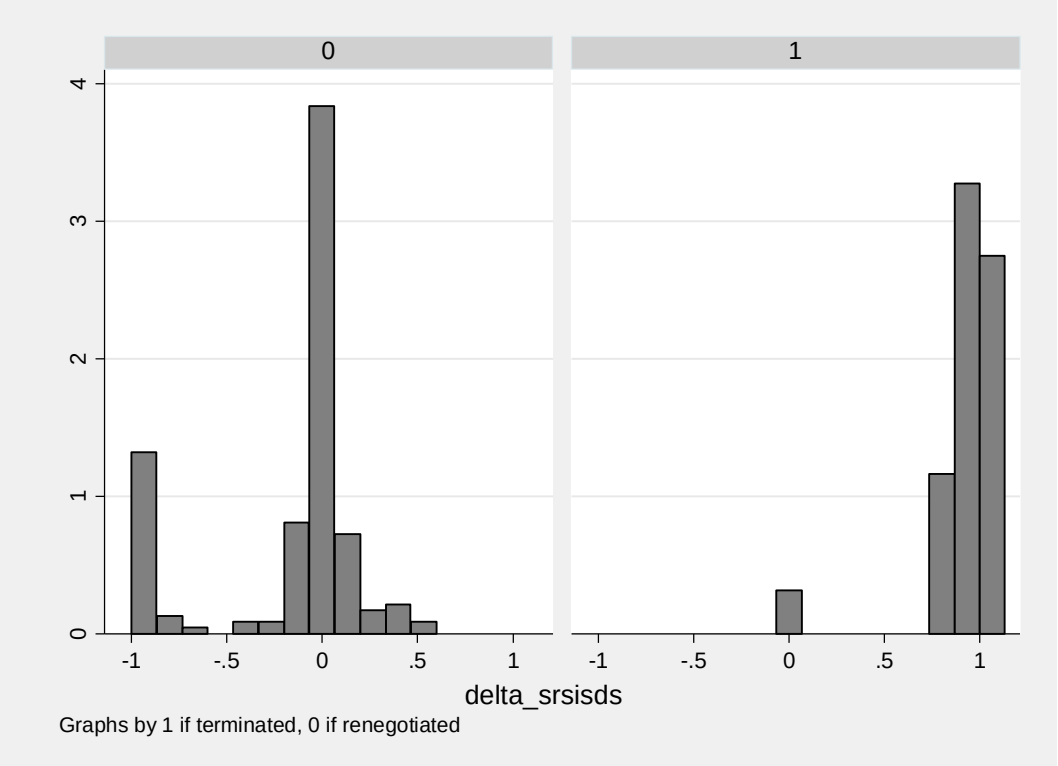

Table 1: The Sources of Delta SRS IIA, OLS with Dispute Dyad Variable

	Model 1 SRS Substantive No Terminated IIAs	Model 2 SRS Substantive With Terminated IIAs	Model 3 SRS ISDS No Terminated IIAs	Model 4 SRS ISDS With Terminated IIAs
Dispute Dyad	-.004 (-0.12)	.099*** (2.82)	.004 (0.05)	.164*** (2.91)
Period	.038*** (2.63)	.371*** (8.79)	.031 (0.42)	.534*** (6.06)
FTA	.189*** (5.54)	-.171*** (-2.95)	.359*** (3.92)	-.202** (-2.16)
Western Hemisphere	.048** (2.29)	.101** (2.29)	.178** (2.47)	.259*** (3.61)
North South IIA	-.002 (-0.12)	.071 (1.42)	-.147** (-2.11)	-.038 (-0.46)
New EU	.047*** (2.71)	-.128*** (-2.65)	.265*** (4.14)	-.045 (-0.60)
Constant	-.072*** (-3.25)	-.087* (-1.71)	-.292*** (-3.37)	-.295*** (-2.97)
R^2	0.46	0.26	0.30	0.21
N	176	247	176	247

Note: *p<.1; **p<.05; ***p<.01 (two-tailed test). Figures in parentheses are *t* statistics.

Table 2: The Sources of Delta SRS IIA, OLS with Monadic Dispute Variables

	Model 5 SRS Substantive No Terminated IIAs	**Model 6** SRS Substantive With Terminated IIAs	**Model 7** SRS ISDS No Terminated IIAs	**Model 8** SRS ISDS With Terminated IIAs
Dispute Respond	.003*** (3.40)	.010*** (6.40)	.004 (1.24)	.014*** (5.72)
Dispute Claimant	.001* (1.86)	.005*** (4.39)	.000 (0.10)	.008*** (4.05)
Period	.024 (1.64)	.265*** (6.06)	.015 (0.20)	.379*** (4.21)
FTA	.183*** (5.65)	-.098* (-1.84)	.356*** (3.82)	-.100 (-1.08)
Western Hemisphere	.027 (1.17)	.023 (0.54)	.168** (2.04)	.147** (2.06)
North South IIA	-.013 (-0.62)	.050 (0.95)	-.148* (-1.84)	-.076 (-0.85)
New EU	.016 (0.94)	-.147*** (-3.13)	.234*** (3.31)	-.074 (-1.01)
Constant	-.066*** (-2.92)	-.097* (-1.87)	-.291*** (-3.29)	-.305*** (-3.06)
R^2	0.51	0.38	0.34	0.29
N	176	247	176	247

Note: *p<.1; **p<.05; ***p<.01 (two-tailed test). Figures in parentheses are *t* statistics.

Table 3: The Sources of Delta SRS IIA, OLS with Pro Investor Ruling Variable

	Model 9 SRS Substantive No Terminated IIAs	**Model 10** SRS Substantive With Terminated IIAs	**Model 11** SRS ISDS No Terminated IIAs	**Model 12** SRS ISDS With Terminated IIAs
Pro Investor Ruling	.007** (2.10)	.012* (1.93)	.023 (1.43)	.020** (2.18)
Period	.030** (2.04)	.375*** (8.70)	.008 (0.11)	.540*** (6.03)
FTA	.194*** (5.69)	-.156*** (-2.63)	.376*** (4.11)	-.180* (-1.90)
Western Hemisphere	.040** (1.98)	.102** (2.30)	.159** (2.28)	.261*** (3.49)
North South IIA	-.001 (-0.07)	.100** (1.98)	-.144** (-2.04)	.008 (0.10)
New EU	.040** (2.45)	-.135*** (-2.86)	.243*** (3.85)	-.057 (-0.78)
Constant	-.073*** (-3.24)	-.108** (-2.10)	-.293*** (-3.34)	-.330*** (-3.31)
R^2	0.47	0.25	0.30	0.20
N	176	247	176	247

Note: *p<.1; **p<.05; ***p<.01 (two-tailed test). Figures in parentheses are *t* statistics**.**

Appendix: Coding State Regulatory Space (SRS)

Preamble

1. Preamble – cumulative
    a. Right to Regulate = 0.25
    b. Sustainable Development = 0.25
    c. Social Investment Policy = 0.25
    d. Environmental Investment Aspects = 0.25

Scope and Definition

2. Definition of investment
    a. Asset vs. enterprise based – ordinal
        i. Asset based = 0
        ii. Enterprise based = 1
    b. Limitations – cumulative
        i. Excluding portfolio investment = 0.2
        ii. Excluding other specific assets = 0.2
        iii. Characteristics of investment = 0.2
        iv. Host state laws = 0.2
        v. Closed list = 0.2
3. Definition of investor
    a. Specifying a natural person – cumulative
        i. *Exclusion* (no mention of) of Permanent Resident = 0.25
        ii. Exclusion of dual nationality = 0.25
        iii. Substantial business activity required = 0.25
        iv. Owner and Control defined = 0.25
4. Limiting substantive scope of the treaty – cumulative
    a. Taxation = 0.25
    b. Subsidies & grants = 0.25
    c. Government procurement = 0.25
    d. Other subject matters = 0.25

Non Discrimination and other Standards of Treatment

5. Most Favored Nation
    a. Establishment – ordinal
        i. Pre and post establishment = 0
        ii. Post Establishment = 0.5
        iii. No MFN = 1
    b. Exceptions – cumulative
        i. REIOs = 0.25
        ii. Taxation = 0.25
        iii. Procedural ISDS = 0.25
        iv. No MFN = 1
6. National Treatment
    a. Establishment – ordinal
        i. Pre and post establishment = 0
        ii. Post Establishment = 0.5
        iii. No NT = 1
    b. Like Circumstances – ordinal
        i. No = 0
        ii. Yes = 0.5
        iii. No NT = 1
7. Fair and Equitable Treatment
    a. International law qualification – ordinal
        i. Non-qualified FET = 0

ii. International law = 0.25
iii. Customary IL = 0.5
iv. CIL + minimum standard of treatment = 0.75
v. No FET = 1

b. FET elements listed – ordinal
i. No = 0
ii. Yes = 0.5
iii. No FET = 1

8. Full protection and security – ordinal
   a. Unqualified FPS = 0
   b. FPS with reference to domestic laws = 0.5
   c. No FPS = 1
9. Prohibition on unreasonable, arbitrary, discriminatory measures – ordinal
   a. Yes = 0
   b. No = 1

Expropriation and other Substantive Obligations

10. Expropriation
    a. Scope of expropriation clause – ordinal
       i. Direct and indirect expropriation = 0
       ii. Only direct expropriation = 0.5
       iii. No expropriation clause = 1
    b. Limitations on expropriation – cumulative
       i. Indirect expropriation defined = 0.25
       ii. General regulatory measures = 0.25
       iii. Compulsory licenses = 0.25
       iv. No expropriation clause = 1
11. Compensation
    a. Relative rights to compensation – ordinal
       i. MFN & NT = 0
       ii. MFN or NT = 0.5
       iii. No Compensation clause = 1
    b. Absolute right to compensation in certain circumstances – ordinal
       i. Absolute rights to compensation = 0
       ii. No Compensation clause = 1
12. Prohibition on Performance Requirements – ordinal
    a. Clause exists (TRIMs or list) = 0
    b. No clause = 1
13. Umbrella Clause – ordinal
    a. Clause exists = 0
    b. No clause = 1
14. Entry and sojourn of Personnel – ordinal
    a. Clause exists = 0
    b. No clause = 1
15. Senior Management and/or Boards mandatory clause – ordinal
    a. Clause exists = 0
    b. No clause = 1
16. Free Transfers – cumulative
    a. BOP exception = 0.25
    b. REIO/BOP exception = 0.25
    c. Other specific exceptions = 0.25
    d. No free transfers clause = 1
17. Subrogation clause – ordinal
    a. Clause exists = 0
    b. No clause = 1

18. Non-derogation clause – ordinal
    a. Clause exists = 0
    b. No clause = 1

Good Governance

19. Good governance – cumulative
    a. No good governance provisions = 0
    b. *NO* transparency clauses directed at States = 0.15
    c. Transparency clauses directed at investors = 0.15
    d. Health & Environment = 0.14
    e. Labor Standards = 0.14
    f. Corporate Social Responsibility = 0.14
    g. Corruption = 0.14
    h. Not lowering standards = 0.14

Flexibility

20. Denial of Benefits – cumulative
    a. Substantive business operations = 0.33
    b. Diplomatic relations = 0.33
    c. *Unilaterally* discretionary DoB = 0.33
21. Scheduling & Reservations – ordinal
    a. No S & R = 0
    b. Reservations (negative list) = 1
22. Essential security exception – cumulative
    a. ESE clause exists = 0.20
    b. ESE defined = 0.20
    c. ESE self-judging = 0.40
    d. ESE derived from REIO = 0.20
23. Public policy exceptions – cumulative
    a. Public Health and environment = 0.5
    b. Other = 0.5
24. Prudential carve-out – ordinal
    a. No clause = 0
    b. Clause exists = 1
25. Right to regulate – ordinal
    a. No clause = 0
    b. Clause exists = 1

Institutional Issues and Final Provisions

26. Mechanism for consultations between State parties - ordinal
    a. No = 0
    b. Yes =1
27. Institutional framework (Committee) – ordinal
    a. No = 0
    b. Yes =1
28. Limiting temporal scope of BIT – ordinal
    a. Silence or pre-existing investment = 0
    b. Post-BIT investment only = 1
29. Preexisting disputes covered - ordinal
    a. Silence = 0
    b. No = 1
30. Treaty duration – ordinal
    a. No duration specified = 0
    b. 15 years or more = 0.33
    c. 10 years = 0.66

d. Less than 10 years = 1

31. Automatic renewal – ordinal
    a. Yes, indefinite = 0 (or if initial duration is indefinite)
    b. Yes, fixed term = 0.5
    c. No = 1
32. Modalities for denunciation – ordinal
    a. No = 0
    b. A year or more = 0.5
    c. Less than a year = 1
33. Survival Clause Length – ordinal
    a. 15 years or more = 0
    b. 10 years = 0.33
    c. Less than 10 years = 0.66
    d. No survival clause = 1

Procedural provisions (ISDS)

34. Alternatives to Arbitration –ordinal
    a. No clause (compulsory ISDS) = 0
    b. Clause exists – voluntary recourse to alternatives = 0.25
    c. Clause exists – mandatory recourse to alternatives = 0.75
    d. No ISDS = 1
35. Scope of claims – ordinal
    a. Any dispute relating to investment = 0
    b. Listing specific basis of claim beyond treaty (e.g. contractual disputes) = 0.33
    c. Limited to treaty claims = 0.66
    d. No ISDS = 1
36. Limitation on provisions subject to ISDS – ordinal
    e. No Limitations = 0
    f. Limitation of provisions subject to ISDS = 0.75
    g. No ISDS = 1
37. Limitation on scope on ISDS – cumulative
    h. No Limitations = 0
    i. Exclusion of policy areas from ISDS = 0.33
    j. Special mechanism for taxation or prudential measures = 0.33
    k. No ISDS = 1
38. Type of Consent to Arbitration – ordinal
    l. Expressed or implied consent = 0
    m. Case-by-case consent or no ISDS at all = 1
39. ISDS rules: domestic courts forum selection – ordinal
    n. No mention of domestic courts or investor option = 0 (*collapsed two categories*)
    o. Yes, pre-condition for international arbitration = 0.5
    p. No ISDS = 1
40. Particular Features of Investor-State Dispute Settlement – cumulative
    q. None = 0
    r. Limitation period = 0.25
    s. Provisional measures = 0.25
    t. Limited remedies = 0.25
    u. o ISDS = 1
41. Interpretation – cumulative
    v. None = 0
    w. Binding interpretation = 0.25
    x. Renvoi = 0.25
    y. Rights of non-disputing contracting party = 0.25
    z. No ISDS = 1
42. Transparency in Arbitral Proceedings – cumulative

aa. Making documents publicly available = 0.25
bb. Making hearings publicly available = 0.25
cc. Amicus Curiae = 0.25
dd. No ISDS = 1

Appendix

Table A1: Summary Statistics

Variable	N	Mean	Std. Dev.	Min	Max
Delta SRS Substantive	247	.21	.34	-.32	.83
Delta SRS ISDS	247	.13	.60	-1	1
Delta SRS All_01	247	.58	.49	0	1
Delta SRS ISDS_01	247	.41	.49	0	1
Dispute Dyad	247	.14	.50	0	5
Dispute Respond	247	8.24	10.68	0	65
Dispute Claimant	247	9.52	16.11	0	112
Pro Investor Ruling	247	1.39	2.55	0	21
Period Renegotiate	247	.74	.43	0	1
FTA	247	.07	.26	0	1
Western Hemisphere	247	.21	.41	0	1
North South IIA	247	.57	.49	0	1
New EU Member	247	.34	.47	0	1

Table A2: Correlation Matrix

	D.SRS. Subs	*D.SRS. ISDS*	*D.SRS. Subs.01*	*D.SRS. ISDS.01*	*Disp. Dyad*	*Disp. Respond*	*Disp. Claim*	*Pro.Invest Rul*	*Period. Reneg*	*FTA*	*WH*	*NS. IIA*
D.SRS.ISDS	.85											
D.SRS.Subs.01	.64	.63										
D.SRS.ISDS.01	.78	.76	.63									
Disp.Dyad	.24	.21	.16	.23								
Disp.Respond	.41	.41	.39	.33	.11							
Disp.Claim	.38	.29	.21	.32	.48	.15						
Pro.Invest.Rul	.19	.23	.24	.18	.03	.79	-.05					
Period.Reneg	.39	.38	.42	.39	.08	.36	.09	.24				
FTA	-.02	.01	.19	.27	.01	-.08	.01	-.07	.09			
WH	.12	.18	.20	.28	.24	.16	.24	.30	-.01	.27		
NS.IIA	.05	-.10	-.16	-.03	.13	-.30	.40	-.26	-.33	-.10	.05	
New.EU	-.12	.04	.04	-.23	-.10	.20	-.12	.15	.19	-.20	-.06	-.41