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Once Bitten, Twice Shy?
Investment Disputes, State Sovereignty and Change in Treaty Design
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Table of Contents

	Page
Part 1: Coding and Justification of State Regulatory Space	1
A. Conceptualizing SRS	1
B. Measuring SRS	2
C. Sample of Renegotiated and Terminated IIAs	3
D. Justification of Eight Dimensions	4
E. SRS Coding Rules	9
Part 2: Supportive Information and Robustness Checks	16
Table OA1: Summary Statistics	16
Table OA2: Correlation Matrix	17
Table OA3: Binary Dependent Variables	18
Table OA4: Factored Dependent Variables	18
Table OA5: Weighted Delta SRS ISDS	19
Table OA6: Alternative Operationalization of the Main Independent Variables (Min/Max, GDP/GDPpc)	20
Table OA7: Alternative measures Temporal Dynamics	21
Table OA8: Selection Models	22

Part 1: Coding and Justification of State Regulatory Space

This appendix elaborates on our approach to the concept of State Regulatory Space (SRS). First, it offers a general description of the methods and data with which we constructed and operationalized this variable. Next, it describes our sample. It then goes through the main components of this variable and justifies their inclusion. Finally, it outlines the coding rules in detail.

A. Conceptualizing SRS

- SRS refers to the extent of the ability of governments to freely legislate and implement regulations in given public policy domains. Conceiving of SRS as a continuum, at one extreme states have a great deal of flexibility to pursue policies they see fit, and are relatively insulated from external obligations and the threat of arbitration from foreign investors. At the other extreme, governments have little room to maneuver and are highly constrained by international rules and the ability of foreign investors to challenge their policies under international investment agreements (IIAs) and ISDS, even if not challenged in practice, or even if actual challenges are ultimately unsuccessful (a phenomenon sometimes labeled “regulatory chill”).
- In general, for states there is a tradeoff between preserving regulatory space and providing better treatment or greater protection to foreign investors. These goals are not always in tension. In some situations, foreign investors may prefer increased SRS in the host state, for example, if they are innovation-based or if SRS enables the host state to make regulatory decisions that grant them an advantage in the market with respect to foreign or domestic competitors.¹ However, our focus here is on governmental positions on SRS as reflected in IIAs.
- Each IIA can range from low to high SRS, with zero (0) indicating minimum SRS and one (1) indicating maximum regulatory space. We note that SRS is measured only in the context of a given IIA, and we make no claims about SRS that may emanate from other IIAs.² We also do not take into account domestic legislation or other types of international agreements impacting on investments (e.g., WTO GATS, TRIMs or non-IIA provisions in free trade agreements) that might affect SRS. These other international investment rules are generally much narrower and/or shallower and do not come with the threat of ISDS.

¹ As an illustration, in the Eli Lilly dispute with Canada (Final Award in 2017), foreign investors in the generic pharmaceutical sector stood to gain from the Governmental position and final award that increased SRS, whereas the patent-based industry lost – in addition to the economic gains to government through reduced health insurance costs.

² One concern might be the impact of MFN provisions in IIAs and the extent to which they can ‘import’ more SRS-restrictive rules from other IIAs. With respect to the exclusion of MFN on procedural issues, there have been a few cases in which such a possibility was entertained (*Maffezini v. Spain*, ICSID, 2000), leading even to the idea that MFN can provide a basis for jurisdiction where none exists under the terms of the IIA in question. We can say, with some certainty, that the application of MFN to procedural issues in general, and certainly with respect to jurisdiction, is a limited notion at most (see, e.g., Douglas 2011).

B. Measuring SRS

- 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.³ 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.
- We have classified all relevant provisions in ninety-one separate indicators subsumed under forty-two categories,⁴ which in turn are grouped under eight broader dimensions of IIAs that are central to SRS. Some categories, e.g. those related to FET, are “ordinal” in that the value of SRS is determined according to whether one or more thresholds have been met. Other categories, e.g. Good Governance, are “cumulative” in that the SRS value is determined by the presence of multiple provisions, which are added together to determine the value. All categories and indicators, as well as whether they are ordinal or cumulative, are described below.
- The coding of each category, as well as the cumulative measures, ranges from zero for limited SRS to one for greater SRS (more policy space). Terminated IIAs reflect maximum policy space and therefore score a value of one on all aspects of SRS. The scores within each category are not uniform and depend on the number of indicators. Thus, binary categories can score either zero or one. In a category with four indicators, such as the Preamble, each indicator can score either zero or 0.25, such that if all indicators equal 0.25 the score on this category will be one. In categories with three indicators, e.g. denial of benefits, two indicators will equal 0.33 and the third one equals 0.34 (so their sum equals one).
- Without clear theory to guide us on the *relative* importance of different provisions for SRS, the various indicators are weighted equally. In our view, one cannot predetermine which provision would carry more weight in actual arbitral proceedings or in legal advice, either specifically or generally, and a fortiori, what the weight of a particular provision is in practice in preventing such proceedings. Thus, for example, the exclusion of dual nationals from the definition of “investor” may be perceived to carry little weight regarding SRS because of the dearth of disputes that have dealt with such exclusion; however, this could alternatively be understood as an indication of great (positive) weight for SRS, because of

³ UNCTAD, “IIA Mapping Project.” We used an early version published in 2014. For a slightly modified and publically available version, see <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> (visited 30 September 2017).

⁴ Six categories (e.g. definition of investment and MFN) have two sub-categories, so the maximum absolute score (that is, if all categories score 1) is forty-eight rather than forty-two.

numerous complaints that never reach ISDS because of this exclusion. We therefore contend that any relative weighting scheme would risk being more arbitrary than equal weighting of the various categories and provisions, which themselves could be of greater or lower resolution.⁵

- The coding of complex legal texts such as IIAs requires precision and judgment. In order to reduce the risk of coding errors, the authors coded several treaties and arrived at a consensual coding baseline. Each coder then coded the same treaties and compared and reconciled her or his coding with the baseline. Only upon completing this training did she or he start coding additional texts. Furthermore, the treaties were coded by two research assistants, who later compared and converged on an agreed-upon coding. In cases of remaining disagreements, the coding was reviewed by the authors, who made the final decision.

C. Sample of Renegotiated and Terminated IIAs

- Renegotiated IIAs: 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. We identified 209 IIAs that meet these criteria up to 2016. Coding these agreements on SRS requires the texts of all original and renegotiated treaties. Using UNCTAD's database and additional resources, such as the UN Treaty Series and data bases of national governments, we were able to collect and code both texts for 177 IIAs in our dataset (about 85% of the entire sample). These treaties come in a variety of languages. We tackled this coding challenge by employing coders proficient in at least one of five languages: English, French, Spanish, Arabic, and Russian. With respect to the remaining thirty-two IIAs, we were not able to find at least one of the two agreements in twenty-three instances. Nine instances included at least one agreement text in languages we were not able to translate. These were in German (2), Finnish (1), Italian (1), Slovak (2), Croatian (2), and Romanian (1).
- For terminated IIAs, we relied on UNCTAD's records and mapping. As of the end of 2017, Eighty-nine IIAs are listed as terminated, of which seventy (78%) were mapped by UNCTAD's research collaborators and are thus included in our analysis. Twenty-four out of eighty-nine IIAs (27%) were terminated by mutual consent. Most of the IIAs terminated by consent (75%) involve two members of the European Union, and likely terminated in anticipation of a common EU investment policy. Eleven out of the seventy mapped IIAs (i.e., those included in the analysis), or 15%, were terminated by mutual consent. Hence, most of the terminated IIAs included in the statistical analysis are unilateral denunciations.

⁵ We nevertheless acknowledge the possibility that some provisions are more important than others. We addressed this issue in several ways, such as factor analysis and disaggregation of overarching measures. They are discussed elsewhere in the Article and the Online Appendix.

D. Justification of Eight Dimensions

- I. **Preamble:** We contend that inclusion of Preambular language, explicitly referring to the elements listed below, including the right to regulate, increase SRS. The more detailed the references to public policy interests, the greater their potential impact in ISDS. Preambular language is an important component of legal interpretation of all treaties, including IIAs, in accordance with international customary law and Article 31 of the Vienna Convention on the Law of Treaties (1969). Parties to investment disputes regularly refer to IIA Preambles in their argumentation, and tribunals employ Preambular language in their Awards, as either context or evidence of the object and purpose of the treaty. For example, in the 2015 Award in the Permanent Court of Arbitration (under UNCITRAL Rules) between Philip Morris Asia Limited (a Hong Kong corporation) and Australia (the plain packaging/tobacco control dispute), the tribunal referred to “the object and purpose of the Treaty as stated in the preamble, including the creation of favorable conditions for greater investment and the promotion of economic relations,” as one of its rationales for finding that the relevant IIA should not cover – as a matter of jurisdiction – disputes that pre-exist a transfer of rights between one corporation established in a territory without access to an effective IIA, to another related corporation in a territory with such access. Importantly, the IIA in question (Hong Kong-Australia) did not include Preambular language relating to public policy interests, and nevertheless, it played a role in the tribunal’s analysis. Where such references do exist, they can contribute to interpretation that supports SRS. The classic case in this respect is in the related field of international trade, the 1998 *US-Shrimp* dispute decision, in which the WTO Appellate Body used the WTO Agreement Preamble’s reference to sustainable development to shore up its ruling that the Article XX GATT exception relating to “exhaustible natural resources” applied to both living and non-living resources. The inclusion of explicit public policy language in IIA Preambles is relatively new; as our data shows, one can infer that such inclusion is an indication that governments regard it as potentially very useful in defending SRS in ISDS, as is the position of legal scholars who have written on the topic (Newcombe 2007; Titi 2014).
- II. **Scope and Definitions:** Broadly construed, the definition of investment can be broad or narrow, thereby increasing or reducing SRS. It is common to distinguish between an asset-based definition, which is considered broad, and an enterprise-based definition, which limits investment to assets associated with enterprises (UNCTAD 2014). Next, there are several ways to further specify the definition of investment. The general rationale of the coding in this category tracks personal jurisdiction and subject-matter jurisdiction of IIAs. The broader the range of legal persons who may gain substantive rights under an IIA as well as the right to file notices of arbitration, the greater the exposure of host states to international investment law claims, which may be costly even if eventually dismissed, e.g., through regulatory “chilling effects” (which may impact not only the respondent state but others as well, including the home state of the investor). Thus, any

limiting specification of covered investments, covered investors, or limitations on substantive scope, has a positive effect on SRS. One example is exclusions of dual nationals, i.e., claimants who as natural persons hold nationality of both the host and home states (3.b. in the Coding Rules). Such a dual national who is resident in one of the treaty states and economically active there would almost by definition be considered a foreign investor if not for such exclusion provisions; moreover, the investor would also have a homegrown interest in the regulatory environment of the state of economic activity. *Phoenix Action Ltd. v. The Czech Republic* (ICSID, 2009) brings this point home, although the formal claimant was not a natural person. A Czech national was charged with tax evasion in the Czech Republic, fled to Israel, established an Israeli corporation with Czech subsidiaries, and then had the Israeli corporation file a complaint under the Israel-Czech BIT (1997), which excludes dual nationals from the definition of investor. This was found by the tribunal to be abusive “treaty shopping”, but it demonstrates the goal of the dual nationality exclusion: preventing the scenario of a government being taken to ISDS by its own nationals. With respect to the scope of the treaty, exclusions (distinguished by UNCTAD from exceptions) of subject matter areas clearly expand SRS, e.g., with respect to taxation or government procurement (4.a. and 4.c. in the Coding Rules, respectively).

III. Non Discrimination and other Standards of Treatment: The standards of treatment (5-9 in the Coding Rules) form the substantive core of IIAs, beyond expropriation. With respect to these, our coding generally follows a rationale similar to that explained above. The greater the potential exposure to ISDS claims, as manifested in the text of the standard of treatment clauses, the greater the restriction on SRS. Thus, with respect to National Treatment (NT), a treaty that includes this central non-discrimination clause on both a pre- and post-establishment basis (6.a.i.) may present governments with difficulties in conducting foreign investment review on a national security basis, regardless of the existence/non-existence of an essential security exception. With respect to NT, again, the inclusion of the qualification “in like circumstances” (6.b.) can increase SRS, by providing additional limits to discrimination claims.⁶ The definitions of Fair and Equitable Treatment (FET), Full Protection and Security (FPS) and the prohibition on unreasonable, arbitrary, or discriminatory measures are similar in their logic: the more qualified the standard as defined in the IIA, e.g., in FET through limiting to customary international law and the additional definition of a minimum standard of treatment, the less such a provision may provide an investor with legal basis for challenging regulatory policies in the host state.

With respect to Most Favored Nation (MFN), we generally maintain the same framework, i.e., pre- and post-establishment MFN would be more restrictive of SRS than post-establishment only (consider, again, the foreign investment review on a security basis mentioned above), and any qualification or exception to MFN

⁶ Kurtz (2009) and others have dealt with the problematic lack of consistency in the interpretation of this term in earlier NAFTA cases, but there is no question that its inclusion reduces exposure to ISDS.

would increase SRS by excluding potential claims and providing additional legal grounds to dismissing actual claims, where relevant.

IV. Expropriation and other Substantive Obligations: The coding with respect to expropriation and additional related substantive obligations follows the same logic. We consider whether the inclusion/exclusion of a particular substantive obligation increases/decreases host state exposure to claims. This is very straightforward with respect to expropriation. A treaty whose text allows claims regarding indirect expropriation or “regulatory takings” will be more restrictive on government policies than one that does not (10.a. in the Coding Rules), and the same rationale will apply to all the additional factors that relate to expropriation terms, including compensation, etc.

Beyond expropriation, provisions related to, first, “senior management and/or Boards mandatory clause” (category 15 in the Coding Rules) restrict or otherwise regulate the ability of IIA parties to determine the nationality of senior management or board of directors’ composition, with respect to foreign investors. This is a binary variable: many IIAs do not even address this issue, while some include detailed requirements (such as the 2003 US-Singapore IIA) that dovetail with public policy issues, such as the environment and security. If an IIA does not engage directly with management nationality, we consider SRS to be higher than for an IIA that does.

Second, the “free transfers” provision category is quite different. Free transfers may be a significant consideration for foreign investors insofar as international transfers of profits are concerned, but in principle states may restrict such transfers, or at the very least not guarantee them. If an IIA commits to free transfers at a general level, this may provide foreign investors with a basis for challenging measures relating, e.g., to financial regulation or corporate rights, while exceptions to such free transfers, such as balance of payments measures, or other specific exceptions, would regain some SRS, with an absence of any commitment in this area providing the full SRS value.

V. Good Governance: This is one of the trickier components to deal with in defining SRS changes, because in general, as the UNCTAD codebook explains, “In contrast to IIA flexibilities, these clauses typically take the form of obligations rather than exceptions” (2014, 41). Nevertheless, most such provisions are inserted to increase a host state’s capacity to pursue regulatory good governance measures without ISDS exposure. For example, the coded Good Governance provisions in the areas of Health & Environment, Labor Standards, Corporate Social Responsibility, and Corruption do function this way. With respect to transparency clauses directed to governments, e.g., requirements to publish measures that affect investments, we take the view that such publication requirements, with all their merits, may restrict regulatory space, which is why we code positively for the absence of such requirements. We acknowledge that this choice may create some normative controversy, but it would be difficult to argue that transparency clauses increase regulatory space as a general matter. With respect to transparency clauses directed at investors (e.g., 2007 Croatia-

Azerbaijan BIT, Article 3.1: “Host Contracting Party has the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor, including in its home state.”), captured in 19.c. in the Coding Rules, these may have positive effects on SRS, for example by increasing the host state’s capacity to exclude investors with a negative history of compliance with regulatory requirements.

VI. Flexibility: Such provisions are by definition SRS-enhancing, indeed, the UNCTAD codebook category is entitled “Flexibilities, Public Policy and Right to Regulate Issues”. These are mainly exceptions, such as the essential security exception (category 22 in the Coding Rules), public health exceptions (23.a.), or other exceptions such as public morals (23.b.). Other forms of flexibility-enhancing provisions include, for example, scheduling and reservations (21), are techniques for carving-out specific measures or types of measures from the IIA coverage.⁷ Each of these types of provisions in this category contributes to SRS when present in an IIA.

VII. Institutional Issues and Final Provisions: This category includes two types of provisions. The first relates to the existence of an institutional framework for consultation between the contracting parties regarding the implementation of the IIA. We consider the existence of such an institutional framework, whether mere consultation (category 26 in the Coding Rules), or a joint committee (27), as an avenue through which parties can address concerns about claims against regulatory measures. For example, the NAFTA Free Trade Committee (FTC) constitutes the institutional framework envisaged in that agreement for state-to-state consultation, including the power to adopt interpretations of the agreement (Article 1131(2) NAFTA) that are binding on investment tribunals. In 2001, following a series of NAFTA claims that expanded the interpretation of FET to the detriment of regulatory space, the FTC adopted such a binding interpretation that essentially clarified that in NAFTA the principle is limited to the customary international minimum standard of treatment (Kaufmann-Kohler 2011), in a manner that is favorable to SRS. Such explicit interpretations are rare, but the potential contribution to SRS is clear. As interpretative statements such as this one fall short of an amendment or renegotiation of an IIA, we prefer to take them into account in the institutional context.

The second type of provision covered in this category relates to the duration, modes of renewal and modes of denunciation and survival of an IIA. Our general rationale in coding these provisions is that the contribution of such “final provisions” to relative restrictions on SRS stems from their impact on legal exposure. Thus, for example, the shorter a survival clause – a provision that extends protections to existing investors after a treaty is no longer in force – the lower its restrictive effect on SRS. We believe this logic is borne out in all sub-categories.

⁷ See UNCTAD, *Preserving Flexibility in IIAs: The Use of Reservations*, 2006.

VIII. Procedural Provisions (ISDS): This category includes a diverse range of procedural provisions relating to ISDS. Most of them relate to jurisdiction, e.g., mandatory recourse to alternatives, scope of claims, and limitations on provisions or policy areas covered by ISDS (34.c., 35, 36 and 37 in the Coding Rules, respectively). Here, our coding of SRS follows the rationale explained above regarding other categories. The more limited jurisdiction is, the less exposure to claims that may have detrimental effects on SRS.

Two types of provisions in this category may require special justification of their coding. First, alternatives to arbitration (34). Our assumption here is that alternatives such as mediation or conciliation will have softer procedures and results in dispute resolution that will potentially be more amenable to the regulatory concerns of a host state. A state may reach understandings with a foreign investor through such alternative procedures that will not have wider-reaching effects on its regulatory system. Moreover, if recourse to alternative procedures is mandatory as a prerequisite before turning to arbitration, this potential is greater than when such recourse is voluntary (i.e., by mutual agreement).

Second, Transparency in arbitral proceedings, including Amicus Curiae briefs. Our rationale with respect to this type of provisions is that increased transparency is SRS-enhancing, in that enables the public to be aware of the dispute's elements, encourages the host state to address public policy issues, and, moreover, Amicus Briefs will tend to be in support of the regulatory policy that the host state is defending.

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E. State Regulatory Space (SRS) – Coding Rules

I. 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

II. 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 – Specifying a Natural Person (Cumulative)
 - a. *Exclusion* (no mention of) of permanent resident = 0.25
 - b. Exclusion of dual nationality = 0.25
 - c. Substantial business activity required = 0.25
 - d. 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

III. Non Discrimination and other Standards of Treatment

5. Most Favored Nation (MFN)
 - 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 (NT)
 - 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 (FET)
 - 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

IV. 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 = 0.33
 - b. Other specific exceptions = 0.33
 - c. 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

V. 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

VI. Flexibility

20. Denial of Benefits (DoB) (Cumulative)

- a. Substantive business operations = 0.34
- 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 (ESE) (Cumulative)

- a. ESE clause exists = 0.25
- b. ESE defined = 0.25
- c. ESE self-judging = 0.50

23. Public Policy Exceptions (Cumulative)

- a. Public health and environment = 0.5
- b. Other = 0.5

24. Prudential Carve-Outs (Ordinal)

- a. No clause = 0
- b. Clause exists = 1

25. Right to Regulate (Ordinal)

- a. No clause = 0
- b. Clause exists = 1

VII. 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 IIA (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

VIII. 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)

- a. No limitations = 0
- b. Limitation of provisions subject to ISDS = 0.75
- c. No ISDS = 1

37. Limitation on Scope of ISDS (Cumulative)

- a. No limitations = 0
- b. Exclusion of policy areas from ISDS = 0.33
- c. Special mechanism for taxation or prudential measures = 0.33
- d. No ISDS = 1

38. Type of Consent to Arbitration (Ordinal)

- a. Expressed or implied consent = 0
- b. Case-by-case consent or no ISDS at all = 1

39. ISDS Rules: Domestic Courts Forum Selection (Ordinal)

- a. No mention of domestic courts or investor option = 0 (*collapsed two categories*)
- b. Yes, pre-condition for international arbitration = 0.5
- c. No ISDS = 1

40. Particular Features of ISDS (Cumulative)

- a. None = 0
- b. Limitation period = 0.25
- c. Provisional measures = 0.25
- d. Limited remedies = 0.25
- e. No ISDS = 1

41. Interpretation (Cumulative)

- a. None = 0
- b. Binding interpretation = 0.25
- c. Renvoi = 0.25
- d. Rights of non-disputing contracting party = 0.25
- e. No ISDS = 1

42. Transparency in Arbitral Proceedings (Cumulative)

- a. None = 0
- b. Making documents publicly available = 0.25
- c. Making hearings publicly available = 0.25
- d. Amicus curiae = 0.25
- e. No ISDS = 1

Part 2: Supportive Information and Robustness Checks⁸

Table OA1: Summary Statistics of Variables Reported in the Article

Variable	N	Mean	Std. Dev.	Min	Max
<i>Delta SRS Substantive</i>	247	0.209	0.348	-0.320	0.830
<i>Delta SRS ISDS</i>	247	0.121	0.609	-1.000	1.000
<i>Delta SRS Subs (No Preamble)</i>	247	0.200	0.338	-0.306	0.808
<i>Delta SRS Definitions</i>	247	0.263	0.382	-0.333	1.000
<i>Delta SRS Standards</i>	247	0.119	0.398	-0.719	0.906
<i>Delta SRS Expro & Compensation</i>	247	0.161	0.473	-1.000	1.000
<i>Delta SRS Flexibility</i>	247	0.359	0.418	-0.167	1.000
<i>Dispute Respond</i>	247	8.243	10.678	0.000	65.000
<i>Dispute Claimant</i>	247	9.425	16.098	0.000	112.000
<i>Pro-Investor Ruling</i>	247	1.393	2.548	0.000	21.000
<i>North-South IIA</i>	247	0.567	0.497	0.000	1.000
<i>Period</i>	247	0.745	0.437	0.000	1.000
<i>Western Hemisphere</i>	247	0.215	0.411	0.000	1.000
<i>Chapter in FTA</i>	247	0.073	0.260	0.000	1.000
<i>New EU Member</i>	247	0.344	0.476	0.000	1.000

⁸ All statistical models reported in the tables below include the set of control variables presented in the Article, unless noted otherwise. Their estimates are similar to the ones reported in the Article and are not presented here for the sake of a clearer presentation.

Table OA2: Correlation Matrix of Variables Reported in the Article

	<i>Delta SRS Substantive</i>	<i>Delta SRS ISDS</i>	<i>Delta SRS Subs (No Preamble)</i>	<i>Delta SRS Definitions</i>	<i>Delta SRS Standards</i>	<i>Delta SRS Expro & Compensation</i>	<i>Delta SRS Flexibility</i>	<i>Dispute Respond</i>	<i>Dispute Claimant</i>	<i>Pro-Investor Ruling</i>	<i>North-South IIA</i>	<i>Period</i>	<i>Western Hemisphere</i>	<i>Chapter in FTA</i>
<i>Delta SRS ISDS</i>	0.85													
<i>Delta SRS Subs (No Preamble)</i>	0.99	0.85												
<i>Delta SRS Definitions</i>	0.94	0.76	0.94											
<i>Delta SRS Standards</i>	0.93	0.78	0.93	0.84										
<i>Delta SRS Expro & Compensation</i>	0.94	0.84	0.94	0.85	0.86									
<i>Delta SRS Flexibility</i>	0.94	0.81	0.94	0.89	0.82	0.84								
<i>Dispute Respond</i>	0.41	0.41	0.41	0.36	0.36	0.44	0.39							
<i>Dispute Claimant</i>	0.38	0.29	0.38	0.35	0.38	0.36	0.30	0.15						
<i>Pro-Investor Ruling</i>	0.18	0.23	0.18	0.14	0.16	0.20	0.17	0.79	-0.06					
<i>North-South IIA</i>	0.06	-0.12	0.06	0.10	0.07	-0.02	0.03	-0.31	0.40	-0.27				
<i>Period</i>	0.39	0.39	0.40	0.33	0.34	0.41	0.41	0.35	0.09	0.24	-0.32			
<i>Western Hemisphere</i>	0.13	0.19	0.13	0.07	0.19	0.14	0.13	0.16	0.25	0.31	0.06	-0.01		
<i>Chapter in FTA</i>	-0.02	0.01	-0.03	-0.13	-0.05	-0.03	0.10	-0.08	0.01	-0.07	-0.10	0.09	0.27	
<i>New EU Member</i>	-0.12	0.05	-0.11	-0.21	-0.05	-0.03	-0.16	0.20	-0.13	0.16	-0.42	0.19	-0.07	-0.20

Table OA3: The Sources of Delta SRS IIA – Binary Dependent Variables, Logit

	SRS_SUBS No terminated IIAs	SRS_SUBS With terminated IIAs	SRS_ISDS No terminated IIAs	SRS_ISDS With terminated IIAs
Model	1	2	3	4
<i>Dispute Respond</i>	0.141*** (3.22)	0.140*** (4.05)	0.105* (1.79)	0.0913*** (3.69)
<i>Dispute Claimant</i>	-0.00680 (-0.33)	0.0253* (1.90)	0.105*** (3.24)	0.0583*** (3.31)
Model	5	6	7	8
<i>Pro-Investor Ruling</i>	0.431*** (2.89)	0.335** (2.24)	0.345* (1.96)	0.111 (1.09)

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table OA4: The Sources of Delta SRS IIA – Factor Analysis, OLS

	SRS_SUBS No terminated IIAs	SRS_SUBS With terminated IIAs	SRS_ISDS No terminated IIAs	SRS_ISDS With terminated IIAs
Model	1	2	3	4
<i>Dispute Respond</i>	0.0186** (2.26)	0.0289*** (6.58)	0.0112 (1.48)	0.0253*** (6.00)
<i>Dispute Claimant</i>	-0.0002 (-0.04)	0.0130*** (3.58)	0.0019 (0.26)	0.0136*** (4.09)
Model	5	6	7	8
<i>Pro-Investor Ruling</i>	0.0475 (1.47)	0.0360* (1.85)	0.0584* (1.68)	0.0340** (2.04)

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

TableOA5: The Sources of Delta SRS ISDS, Weighted Dependent Variables

	Model 1	Model 2	Model 3	Model 4
	ISDS Participation	ISDS Participation	Pro-Investor Ruling	Pro-Investor Ruling
	No Terminated IIAs	With Terminated IIAs	No Terminated IIAs	With Terminated IIAs
Dispute Respond	0.00365 (1.08)	0.0145*** (5.66)		
Dispute Claimant	-0.0000262 (-0.01)	0.00830*** (3.97)		
Pro-Investor Ruling			0.0196 (1.21)	0.0181* (1.92)
North-South IIA	-0.154** (-1.98)	-0.0884 (-0.98)	-0.154** (-2.24)	-0.00892 (-0.11)
Period	0.0344 (0.46)	0.397*** (4.47)	0.0295 (0.38)	0.558*** (6.29)
Western Hemisphere	0.168** (2.02)	0.152** (2.06)	0.158** (2.26)	0.272*** (3.50)
Chapter in FTA	0.362*** (3.89)	-0.108 (-1.12)	0.378*** (4.18)	-0.193* (-1.96)
New EU	0.252*** (3.63)	-0.0662 (-0.89)	0.259*** (4.15)	-0.0476 (-0.63)
Constant	-0.322*** (-3.82)	-0.328*** (-3.32)	-0.323*** (-3.86)	-0.346*** (-3.51)
<i>N</i>	177	247	177	247
<i>R</i> ²	0.324	0.303	0.325	0.206

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Note: the specific weights of the categories on the dependent variable are as follows: Alternatives to Arbitration: 0.05; Scope of Claims: 0.1; Limitation on Provisions Subject to ISDS: 0.15; Limitation on Scope of ISDS: 0.15; Type of Consent to Arbitration: 0.15; Domestic Courts Forum Selection: 0.15; Particular Features of ISDS: 0.1; Interpretation: 0.1; Transparency in Arbitral Proceedings: 0.05.

Table OA6: The Sources of Delta SRS IIA – Alternative Operationalization of the Main Independent Variables, OLS

	SRS_SUBS No terminated IIAs	SRS_SUBS With terminated IIAs	SRS_ISDS No terminated IIAs	SRS_ISDS With terminated IIAs
Model	1	2	3	4
<i>Dispute Respond</i> (Max)	0.00389*** (3.71)	0.0121*** (5.92)	0.00560 (1.28)	0.0178*** (5.42)
<i>Dispute Claimant</i> (Max)	0.00118* (1.83)	0.00551*** (4.63)	-0.00002 (-0.01)	0.00854*** (4.20)
Model	5	6	7	8
<i>Pro-Investor Ruling</i> (Max)	0.00768* (1.92)	0.0156** (2.28)	0.0272 (1.34)	0.0242** (2.50)
Model	9	10	11	12
<i>Dispute Respond</i> (Min)	0.00536* (1.74)	0.0235*** (3.43)	-0.0005 (-0.10)	0.0293*** (2.72)
<i>Dispute Claimant</i> (Min)	0.0463*** (2.71)	0.113*** (5.82)	0.0602 (1.11)	0.169*** (5.11)
Model	13	14	15	16
<i>Pro-Investor Ruling</i> (Min)	0.0206* (1.71)	-0.0289 (-0.80)	0.0276 (1.24)	-0.0563 (-1.15)
Model	17	18	19	20
<i>Dispute Respond</i> (Max GDP)	0.00234*** (2.80)	0.00804*** (3.38)	-0.00198 (-0.96)	0.00861*** (2.80)
<i>Dispute Claimant</i> (Max GDP)	0.000654 (0.89)	0.00524*** (3.71)	0.000998 (0.46)	0.00680*** (3.29)
Model	21	22	23	24
<i>Pro-Investor Ruling</i> (Max GDP)	0.00831 (1.60)	-0.000865 (-0.07)	-0.0157 (-0.88)	-0.00580 (-0.27)
Model	25	26	27	28
<i>Dispute Respond</i> (Max GDPpc)	0.00147* (1.66)	0.00468*** (2.92)	-0.00179 (-0.84)	0.00587*** (2.62)
<i>Dispute Claimant</i> (Max GDPpc)	0.000707 (0.92)	0.00563*** (4.35)	0.000974 (0.44)	0.00699*** (3.62)
Model	29	30	31	32
<i>Pro-Investor Ruling</i> (Max GDPpc)	0.00698 (1.21)	0.0110* (1.94)	-0.0168 (-0.86)	0.0130 (1.60)

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Table OA7: The Sources of Delta SRS IIA – Alternative Operationalization of Time, OLS

	SRS_SUBS No terminated IIAs	SRS_SUBS With terminated IIAs	SRS_ISDS No terminated IIAs	SRS_ISDS With terminated IIAs
Models including IIA Signing Year				
Model	1	2	3	4
<i>Dispute Respond</i>	0.00351*** (3.73)	0.00959*** (6.80)	0.00114 (0.50)	0.0097*** (4.80)
<i>Dispute Claimant</i>	0.00142** (2.17)	0.00492*** (3.97)	0.00254 (1.11)	0.0053*** (3.06)
Model	5	6	7	8
<i>Pro-Investor Ruling</i>	0.00895** (2.44)	0.0179*** (2.99)	0.0085 (0.93)	0.0211** (2.51)
Models including Renegotiation or Termination Year				
Model	9	10	11	12
<i>Dispute Respond</i>	0.00300*** (3.02)	0.00382*** (2.64)	0.0044 (1.31)	0.00515** (2.11)
<i>Dispute Claimant</i>	0.000948 (1.51)	0.00185* (1.89)	0.0007 (0.03)	0.00318* (1.87)
Model	13	14	15	16
<i>Pro-Investor Ruling</i>	0.00660* (1.97)	0.00191 (0.32)	0.0235 (1.54)	0.00337 (0.42)

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Table OA8: The Sources of Delta SRS IIA – Heckman Selection Models

	SRS_SUBS No terminated IIAs	SRS_SUBS With terminated IIAs	SRS_ISDS No terminated IIAs	SRS_ISDS With terminated IIAs
Model	1	2	3	4
<i>Dispute Respond</i>	0.00315*** (3.33)	0.00882*** (7.01)	0.00205 (0.74)	0.0118*** (6.03)
<i>Dispute Claimant</i>	0.00148** (2.29)	0.00528*** (4.97)	0.00314 (1.22)	0.00791*** (4.59)
Model	5	6	7	8
<i>Pro-Investor Ruling</i>	0.00753** (2.07)	0.0114* (1.66)	0.0152 (1.31)	0.0183** (2.04)

t statistics in parentheses. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Note: the selection equation includes three variables previously found to affect the probability of renegotiation: common legal tradition, the number of years since the signing of the IIA, and whether one of the parties joined the EU after 2000 (Haftel and Thompson 2018).