Arbitrators as Advisors: Evidence from Changes in Investment Treaty Design

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Abstract

Existing research on international investment agreements (IIA) finds that states maintain dispute settlement procedure accessible to investors despite their previous involvement in investment disputes. Why do states maintain investor-friendly dispute settlement procedure regardless of their bitter experience? We argue that lawyers can advise their home states to retain accessible dispute settlement procedure at the stage of renegotiation. By tracing investment dispute cases and nationality of arbitrators at International Centre for Settlement of Investment Disputes (ICSID), we show that states' loss from investment disputes increases the supply of arbitrators from those states. We then show that the states with a higher number of arbitrators are more likely to retain dispute settlement procedures accessible to investors. Lawyers as experts maintain the investment regime behind the scene, and they can further judicialize investment treaties in favor of their preference.

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As treaties get old, states revise their treaties. Some states decide to withdraw from the treaties, while others decide to renegotiate the old treaties. States often renegotiate their international investment agreements (IIAs). As of November 2022, 186 countries are participating in IIAs, and a total of 2,220 IIAs are in force. Among those, 133 have already been renegotiated and it is highly likely that more treaties would be renegotiated in the future as many of the existing ones are about to expire.

Existing studies find that states during re-negotiations often modify auxiliary provisions, but not procedural provisions that are directly related to dispute settlements. The auxiliary provisions are substantive provisions that qualify their obligations with flexibility and carve-outs. Past research finds that losing from investor-state dispute settlement (ISDS) leads states to modify auxiliary provisions in favor of states, but the same experience does not lead states to modify procedural provisions. To this pattern, Thompson et al. (2019) wrote "Even in the aftermath of investment disputes, parties to international investment agreement renegotiations appear relatively content with the ISDS procedures but pursue greater regulatory space in substantive rules (p.875)."

Why do states maintain investor-friendly procedural provisions despite their previous loss from ISDS? We argue that from whom home states get their legal advice can explain why some states end up retaining investor-friendly procedural provisions despite losing from ISDS. We pay attention to the fact that international investment lawyers who either adjudicate or represent state or investors within arbitration often provide expert advice to their home states during re-negotiations. We theorize that these experts, taking advantage of the dual roles as a state representative and an arbitrator of an investment dispute, would be more likely to advise their home states to maintain investor-friendly procedural provisions. By advising their home states to maintain investor-friendly procedural provisions, they can justify their existence in international investment regime.

We trace the text of investment treaties before and after re-negotiations, and examine whether a dyad of states that have a larger number of arbitrators as advisors end up judicial-

izing dispute settlement provisions. We find that a dyad of states having a larger number or arbitrators judicialize their dispute settlement provisions. As a consequence, investors obtain a consistent channel to retrieve their loss from state expropriations. The pattern holds even after controlling for the number of ISDS cases in which states previously lost.

Our finding explains why the bitter experience from ISDS does not lead states to curtail dispute settlement provisions. The bitter experience from ISDS not only informs states that ISDS can compromise sovereignty, but also increases the internal demands for legal experts on ISDS. The legal experts arbitrate investment disputes, and later advise their home states on how to renegotiate their treaties. Going back to Thompson et al. (2019), the very reason why states maintain their investor-friendly ISDS despite losing from it might not be because the states are "relatively content with" dispute settlement procedures. Rather, the pattern can be explained by states' increasing reliance on legal experts. Legal experts can justify their importance by gatekeeping the institutions of ISDS.

Our study sheds light on lawyers as an epistemic community, and demonstrates the long-lasting consequence of an epistemic community. The 1992 special issue of *International Organization* established the concept of an epistemic community. Recent studies illuminate the political agency of international lawyers (Scott, 2007; Langford et al., 2017; Donaubauer et al., 2018), but scholars are yet to look into how international lawyers as an epistemic community can impact state engagement with international treaties. One reason that lawyers as an epistemic community have been understudied is the narrow matching of an epistemic community to scientists (Maia-K, 2013). Our study widens this scope of an epistemic community to legal experts, and focus on how lawyers influence the way in which states design their investment treaties. More broadly, the study helps to understand how an epistemic community can shape the design of international cooperation.

The Puzzle

As of November 2022, 133 IIAs have been either unilaterally terminated or denounced. As the number of unilaterally terminated or denounced IIAs are higher, it may seem as if countries are more likely to terminate IIAs. However, a closer look at the countries that terminate IIAs show that this number is a result of only a handful of countries, such as Bolivia, Ecuador, India, South Africa, Indonesia, Poland and Italy, terminating a majority of their IIAs. Only 8 IIAs that have naturally expired remain expired without any further negotiations. As such, treaties that have expired are mostly renegotiated or subsumed under preferential trade agreements (PTAs).

Existing studies use the learning mechanism to explain how states modify their treaty designs. States learn from past experience, and reflect the learning when they renegotiate treaties (Manger and Peinhardt, 2017; Haftel and Thompson, 2018). States that are frequently involved in investment settlement disputes tend to renegotiate their treaties (Haftel and Thompson, 2018), and they revise their treaties to increase state regulatory space and policy autonomy (Blake, 2013; Thompson et al., 2019; Broude et al., 2016). Increased state regulatory space helps states to protect their sovereignty. The learning is particularly apparent among developing countries. Developing countries that initially signed IIAs without recognizing the risks involved, learn about potential risks after investors accused them through the dispute settlement system (Poulsen and Aisbett, 2013; Poulsen, 2015).

If states indeed learn from their past experience, states that lost from a dispute settlement would design a treaty in a way that discourages accusations from investors. If states learn that a dispute settlement provision is risky, it would be in their interest to make a dispute settlement less dependent on tribunals. Contrary to this expectation, we see that states maintain or further judicialize their dispute settlement clauses. Figure 1 shows the anomaly. The x-axis in Figure 1A and 1B is the total number of ISDS cases signatories were involved in before re-negotiating their IIAs. The y-axis is the changes in the dispute settlement provisions and substantive provisions, respectively. The bigger the y-axis, the

states modify IIAs in a way that increase their domestic regulatory capacity (Thompson et al., 2019). States modify their substantive provisions in response to the backlash from dispute settlements (Figure 1B), but procedural provisions that regulate a dispute settlement system remains largely unresponsive to the sum of the ISDS cases.[1] What can explain this anomaly?

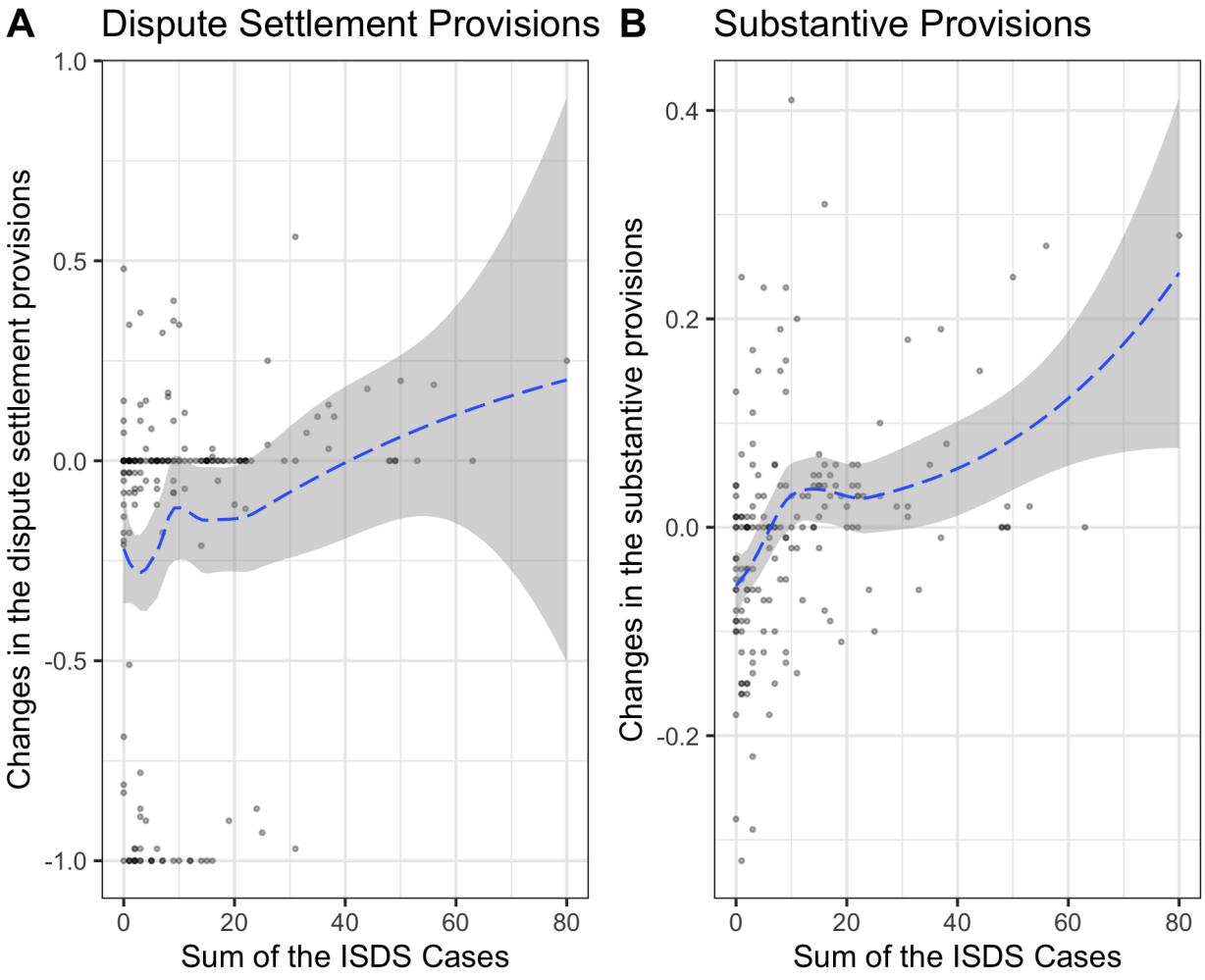


Figure 1: Past Involvement in ISDS and the Changes in Treaty Designs

[1]The state decision to renegotiate a treaty instead of withdrawing from it would partly explain the judicialization, but the withdrawal does not explain why the states still modify substantive provisions but not dispute settlement provisions.

Lawyers as an Actor

We pay attention to international lawyers as an actor to explain the puzzle. International lawyers develop and maintain international law. They are everywhere—they work as arbitrators, legal counsel, expert witnesses, and tribunal secretaries. These lawyers are both state and non-state actors. As state actors, they work at foreign ministries. Some of them work at universities and law firms as government consultants. As non-state actors, they work at international arbitration institutions and non-governmental organizations as arbitrators and *pro bono* consultants. As Cohen (2013) notes, lawyers in international law "maneuver between demands of citizenship in professional communities, communities of practice, and states."

Within the pool of international lawyers, those that focus on investment arbitration have expanded from a pool of 38 arbitrators in 1966 (ICSID First Annual Report, 1966), to 777 as of today (ICSID database, 2022). Considering that there are 1,327,910 licensed attorneys in the United States alone (American Bar Association), the number of available investment arbitrators world-wide are significantly lower. When looking at lawyers who have participated as an Arbitrator in ICSID for the first time, we can see that there is a drastic increase (figure 2)[2].

As such, lawyers in international investment law are a small number of individuals in a closed network. However, it seems that arbitrators have the opportunity to increase their expertise as their countries are more involved in ISDS cases. For instance, we find that countries such as Mexico, Canada, and Bulgaria show a drastic increase of its lawyers arbitrating at ICSID after their country experiences the very first case of ISDS as the respondent. For instance, Mexico's arbitrators listed in ICSID had zero cases of arbitration before Mexico became a respondent of ICSID, but within the 10 years after its first case as a respondent, Mexico's arbitrators in ICSID adjudicated 41 arbitration cases. Bulgaria's arbitrators in

[2]We are still in the process of coding data, however this shows the general trend of increase in the count of first-practice lawyers

ICSID had arbitrated 6 cases, but once Bulgaria became a respondent, within the span of 10 years, Bulgaria's ICSID arbitrators served on 41 arbitration cases. Canada shows one of the biggest increases. Before Canada became a respondent of an ICSID arbitration, there was only one case of arbitration overseen by a Canadian arbitrator in ICSID. However, after its first case, the number of arbitration cases overseen by Canadian arbitrators increased to 75 cases.

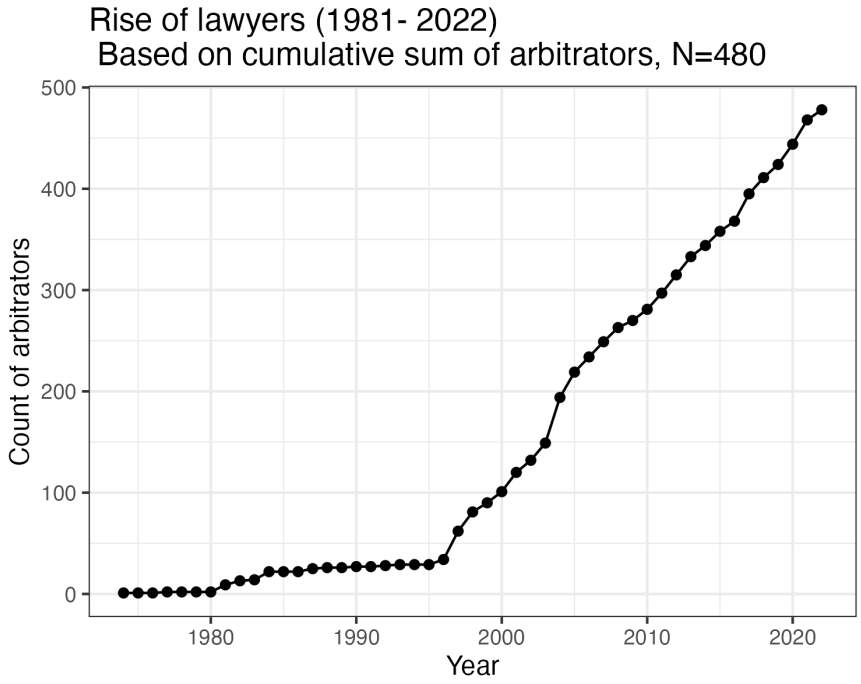


Figure 2: The Rise of Legal Experts

Many of the ICSID arbitrators are elite private lawyers or legal academics (Pauwelyn, 2015). The ICSID arbitrators from the United States, France, and United Kingdom comprise one third of all arbitrator appointments in investment disputes (Puig, 2014)[p.406]. For these closed-circle of lawyers, international investment arbitration is not a full time-job. Lawyers who arbitrate investment disputes assume diverse roles such as a witness to another arbitration, legal counsel to states, and tribunal secretary (Langford et al., 2017). Although not too common, powerful and influential lawyers are also observed to"double hat" (Langford et al., 2017). This means that lawyers who are currently arbitrating, also serves as a country

or investors' legal counsel in another arbitration under the same institution (Hranitzky and Romero, 2010). Similarly, in their role of counsel to states, there are cases in which arbitrators also serve as "treaty designers" when IIAs are being created or being re-negotiated. This IIA, which has been designed with the help of an arbitrator, may then be later used as basis for investment disputes at a later period in time in which the same arbitrator could potentially assume the role of a counsel, or an arbitrator.

Preference of Lawyers

International lawyers benefit from the increased availability of ISDS procedures in IIAs. The increased availability of ISDS procedures expand their career opportunities. As such, international lawyers specializing in investment arbitration are profound advocates of expanding the dispute settlement systems at the international level. For example, many of the influential and most sought-after arbitrators are a member, or in leadership positions at the International Council for Commercial Arbitration (ICCA), a non-government organization devoted to promote the use of arbitration.[3]

Only a specific group of international lawyers have the experience and knowledge to participate in international investment disputes. These lawyers would thus prefer the continuation of investment disputes through international adjudicatory bodies, as they are the only ones that have the professional capacity to engage in these processes. As such, the perpetuation of ISDS allows lawyers specializing in investment arbitrations to avoid competition with other lawyers at the national level who could be litigating investment related issues at a domestic court. In addition, becoming an arbitrator is also lucrative. At maximum, arbitrators can be paid USD 500 per hour (Aceris Law LLC). As the legal work required during an arbitration is between 1,500 hours to 4,500 hours, for one arbitration, a lawyer would be making a hefty some of USD 2,250,000.

[3]As of January 2023, 923 arbitrators are the members of ICCA.

It is therefore not surprising that arbitrators and international investment lawyers (1) pursue the continuation of adjudication of investment disputes through international venues, and that (2) these actors will try and safeguard the continuation of dispute settlement procedures so that ISDS procedures continue. An annecdotal example of this is arbitrator Gabrielle Kaufmann-Kohler, a Swedish national, who is currently one of the most prominent investment arbitrators who has participated in over 48 ICSID investment disputes. What is interesting is that while heavily participating in investment arbitrations, she has also served as a Swiss delegate to UNCITRAL working group on investment dispute settlement reform.[4]

In her report submitted to UNCITRAL, ethical and structural considerations of the composition of a new multilateral investment court, or an appeal mechanism for investment awards are discussed. The composition of this new body, she argues, should be "comprised of members possessing certain individual qualities and qualifications, among which the expertise and experience to discharge their functions, i.e. their competence, appear fundamental" (Kohler and Potesta 2017, 109). From the outset, choosing judges based on merit is nothing unusual. However, as the pool of merit-based judges would most likely be only a handful of arbitrators who have dealt with the majority of arbitration cases, access to this position would be limited to only a few prominent arbitrators, which includes Kaufmann-Kohler. During her position as the swiss delegation, Kaufmann-Kohler also served as President elect of the International Council for Commercial Arbitration, an NGO dedicated to advocating for the continued use of commercial arbitration.

Kaufmann-Kohler is not alone in this dual role of participating in the international arbitration process as a lawyer, while also using this expertise to advise states on reforming BITs and related investment treaties. Many lawyers who serve as counsel or arbitrators advise their governments on how to reform investment treaties, and many who assume this role also participate in NGOs such as the International Council for Commercial Arbitration that fosters continued use of ISDS procedures. These investment treaties which open up

[4]See https://lk-k.com/team/gabrielle-kaufmann-kohler-lawyer/ for her detailed CV.

the potential for arbitration are what prolongs these lawyers' careers in investment arbitration, and more broadly, international arbitration. Therefore, it is not surprising to see that many lawyers who are active in the field of investment arbitration also serve as counsel to states, advising on ways for investment treaty reform and also being part of negotiating these treaties.

For instance, lawyers such as Catherine Amirfar, Lee Caplan, Marney Cheek, Donald F. Donovan, Andrea Menaker, Patrick W. Pearsall are all investment and international arbitration professionals, who have served as counsel to the U.S. Department of State, or relevant government bodies. Their role was to counsel the U.S. during international arbitration's, or negotiate on behalf of the U.S. during negotiations of NAFTA, TPP, and other bilateral investment treaties.[5]

When arbitrators and international investment lawyers are asked to provide legal expertise during re-negotiations, it is therefore more likely that they advise states to retain the dispute settlement provisions. Also, this preference of lawyers are shared in both sides on renegotiation. Even if two states in re-negotiation have conflicting views about how to modify their International investment agreements, lawyers on both sides would generally agree on making investment arbitration more accessible in terms of procedures. By doing so, international investment lawyers have a better control over knowledge which will further empower them in international investment regime.

Investment Lawyers as an Epistemic Community

We see arbitrators and international investment lawyers as an epistemic community. An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and authoritative claim to policy-relevant knowledge within that

[5]For more detailed information related to the names of arbitrators who have served specific governmental positions related to international investment arbitration, please refer to figure 5 in the Appendix

domain or issue area (Haas, 1992b)[p.3]. Different from an interest group, an epistemic community has shared cause-and-effect understanding. An epistemic community is also different from a bureaucratic agency. Whereas a bureaucratic agency operates under a given mission, an epistemic community "applies its causal knowledge to a policy enterprise subject to its normative objectives" (Haas, 1992b)[p.2-p.15]. These professionals help states identify interests, frame issues, and formulate specific policies. States tend to rely more on epistemic communities in times of high uncertainty, following a shock or crisis.

The professionals in an epistemic community can impose views that are not initially envisioned by the states. An epistemic community facilitates international cooperation by successfully coordinating national policies. For instance, an ecological epistemic community persuaded states to ban chlorofluorocarbons (CFCs) to protect the stratospheric ozone layer. The scientists working at governments and corporations shared views about the way the atmosphere works, and they persuaded the US government and major corporations to ban production of CFCs (Haas, 1992a). Similarly, an American epistemic community composed of strategists and scientists introduced the idea of nuclear arms control. The idea was later embraced by both the US and Soviet Union, and the two governments signed the Anti-Ballistic Missile Treaty in 1972 (Adler, 1992).

Judicialization of IIAs

An epistemic community can facilitate international cooperation, but it can also generate an unintended consequence. We theorize that lawyers as an epistemic community can amplify judicialization in international policy coordination. Judicialization is the process by which courts and judges increasingly dominate politics and policy-making (Tate, 1995)[p.28]. Judicialization in international relations can diminish the sovereignty of states and autonomy of their leaders (Alter et al., 2019).

Specific to judicialization in international investment, we expect that lawyers as an epis-

temic community would gain power. Lawyers would be even more empowered when states rely on arbitration or adjudication to settle disputes. According to Alter et al. (2019), judicialization occurs when one or more actors brings–or threatens to bring–a complaint to an adjudicating institution. When investors claim their rights and sue states, the decisions by arbitrators can affect domestic politics. If such instances become more prevalent, states would invite arbitrators as advisors when they revise their treaty designs.

Judicialization can crowd out alternative approaches for dispute resolution such as reciprocity or log-rolling. Reciprocity, the norm of one country agreeing to reduce the level of protection in exchange of reciprocal concession from the other country, successfully lowered trade barriers of contracting parties in the General Agreement on Tariffs and Trade (GATT) (Bagwell and Staiger, 1999). Log-rolling, trading of mutual support across issue areas, can help member states reach consensus when parties have veto power (Moran and Ritov, 2002). Log-rolling within the Antarctic Treaty System (ATS) led to the parties' high compliance to the treaty despite their rare usage of formal dispute mechanism (McGee et al., 2020).

Different from reciprocity or log-rolling, judicialization generates 'less clear and accessible text to a larger audience' (Pauwelyn, 2015). Lawyers would benefit from judicialization as the necessity will increase for international lawyers who have expertise in interpreting related legal provisions. Recognizing the benefit of judicialization, lawyers would also be motivated in turn to advise their states to further judicialize their investment treaties.

As a consequence of judicialization, what follows after is the professionalization of lawyers. Weiler (2001) describes judicialization as 'a package deal.' Weiler says "It (judicialization) includes the Rule of Law but also the Rule of Lawyers ... It would be nice if one could take the rule of law without the rule of lawyers. But that is not possible. To have one, you get the other (191-207 at 194 and 197)." Cohen (2013) similarly illustrates the point as follows:

> "... Judicialization and professionalization reinforce one another. The more courts, tribunals, and expert bodies in international law, the more legal specialists needed to respond to them; the more lawyers in the practice of international

law, the more force the decisions of courts, tribunals, and expert bodies will have (p1038)."

In this broader trend of judicialization at the international level, we view investors' easy access to the ISDS procedures as one indicator of judicialization. Provisions that are embedded in IIAs allowing investors to gain easier access to ISDS procedures could potentially increase the likelihood of investors opting for investment settlement disputes at the international level, instead of attempting to work out the issue with states beforehand. Popular usage of the ISDS leads to accumulation of precedents in investment arbitration, and this drives up demands for legal experts who can interpret the precedents.[6]

Empirical Expectations

In this section, we present empirical expectations based on the preference and action of the lawyers. We expect that past involvement in investment disputes not only alarms states about the costs of losing from the disputes, but also leads states to hire an arbitrator and or an international investment lawyers as a designer of an investment treaty. These professionals would then advise states to further increase investor accessibility to dispute settlement procedures. Unlike substantive provisions that often have a conflict of interests between signatories, arbitrators and investment lawyers in both states would favor the idea of maintaining or strengthening dispute settlement provisions as it benefits the participants serving a professional role in these procedures.

First, we argue that a state's involvement in ISDS increases the supply of arbitrators from that state. Grasping the entire population of international investment lawyers is difficult. Yet, it is possible to identify the growth of legal experts by tracing the number of arbi-

[6]Although investment adjudication is not supposed to be bound by precedents, in many cases we do observe instances in which a ruling from one investment dispute settlement is echoed in subsequent cases (Norton, 2018).

trators registered at an international arbitration institution. Like many other international investment lawyers, arbitrators would want continuation of ISDS as an institution.

After validating the rise of lawyers through illustrative cases and data, we test its consequence in the design of investment treaties. Here, our hypothesis is that when states re-negotiate investment treaties, arbitrators are often invited to provide expert opinions. These arbitrators involved in renegotiation would then endorse the active usage of ISDS. Arbitrators would be more likely to be invited as advisors when states have high supply of experienced legal experts within their country, such as arbitrators. We measure the supply of legal experts by calculating the sum of arbitrators that the country-dyad has had by the year of a renegotiation.

In the following, we list the two-step process to examine the rise of co-national lawyers and its impact on the design of ISDS procedures.

1. *(The Rise of Lawyers)* The experience of being involved in an ISDS procedure increases the supply of legal experts from those states.

2. Hypothesis: *(Arbitrators as Advisors)* When states have a larger pool of co-national arbitrators, the states are more likely to retain accessible ISDS procedures.

The Rise of Lawyers

We first empirically expect that there is a rise in lawyers as countries lose from ISDS procedures. To this, we provide two interesting descriptive factors that support our assumption. First, we return to the graph shown above where we find that there is a drastic increase in the number of first-case investment lawyers that enter arbitration. As can be seen in the graph below, the cumulative sum of arbitrators from 1981 to 2022, have been steeply increasing. This graph shows the number of arbitrators that have entered the ICSID system as first-case arbitrators. What this shows is the every year, more arbitrators are entering the ICSID system to serve on ISDS cases.

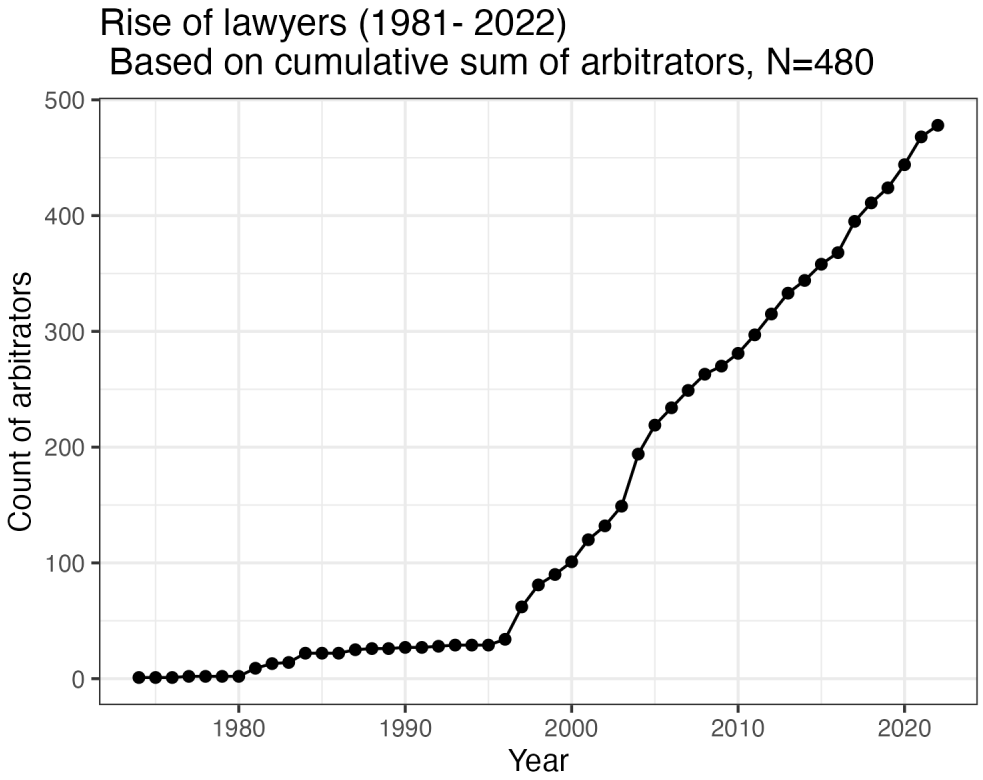


Figure 3: Cumulative number of lawyers in Arbitration

This however is not just a story of accumulation. We find that indeed, once a country experiences ISDS procedures as a respondent, the country increases in its expertise with handling arbitration cases. This is surprising considering that co-national arbitrators (arbitrators from the country which has experienced ISDS procedures) are generally unable to serve as arbitrators of cases in which their countries are involved for ethical reasons. This means that co-national arbitrators enter the ICSID system and serve as arbitrators on different ISDS cases that do not involve their own country.

The following table illustrates the drastic changes after a country experiences an ISDS as a respondent. In the table below, the second column shows the changes in the number of arbitrator cases that have been handled by the arbitrator from that country before and after 10 years since the country's initial ISDS procedure. The second column shows the number of cases arbitrators from the country has handled prior to the country being sued as a respondent. The third column indicates the number of arbitrators from that country

Country	Number of arbitrator cases leading up to the first ISDS experience	Number of arbitrator cases within 10 Years of first ISDS as respondent
Argentina	0	52
Australia	31	69
Bulgaria	6	41
Canada	1	75
Costa Rica	8	18
Germany	3	42
Iran, Islamic Republic of	9	14
Mexico	0	41
United Kingdom	60	159
United States of America	12	217

handling arbitration's within 10 years of the country experiencing its first ISDS as a respondent. For instance, while Argentininan arbitrators had handled 0 arbitrations in ICSID before Argentina became an ISDS respondent, Argentinian arbitrators handle 52 cases after Argentina first goes through ISDS procedures as a respondent. This drastic change is observed in many different countries, not just involving arbitrators from major countries such as the US, or other Western European countries, but elsewhere as well.

The reason this is interesting we reiterate, is that arbitrators for instance, from Argentina, are unable to serve on ISDS cases that involve Argentina. This means that arbitrators from Argentina are increasingly handling other cases of arbitration's involving other countries, after Argentina has been sued through ISDS procedures.

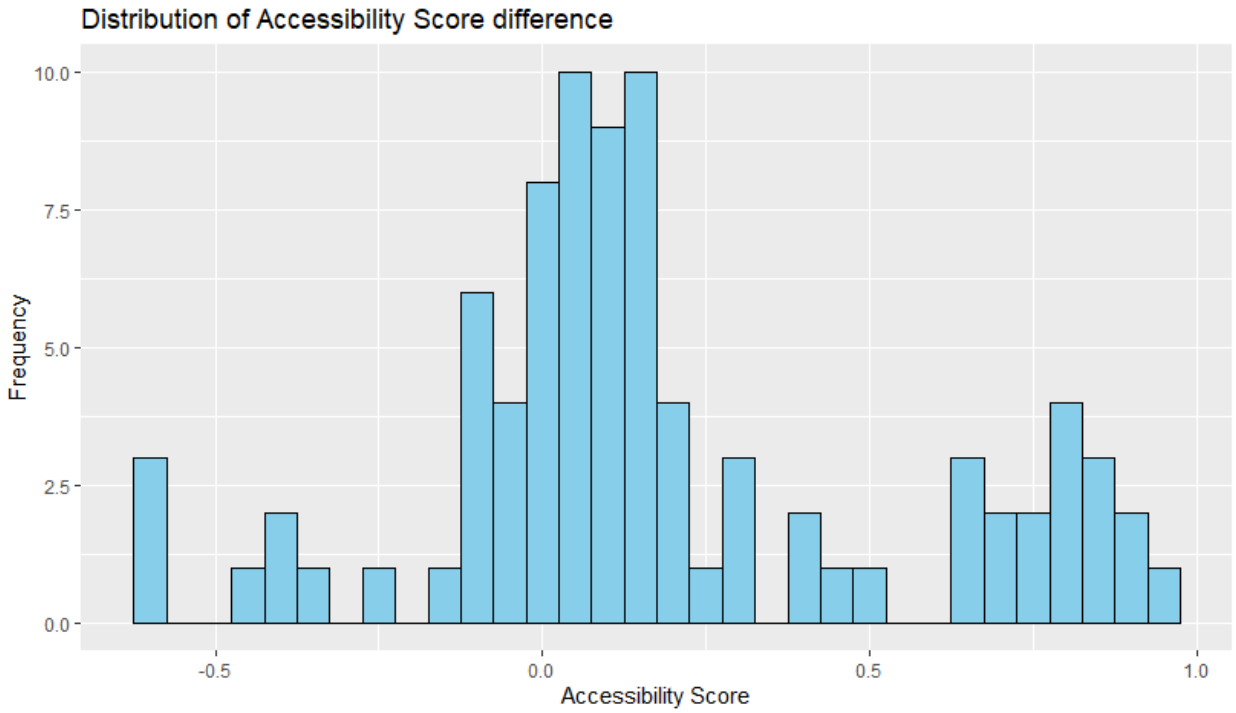
Data

We originally construct two different datasets. The first is the legal expert dataset from the International Centre for Settlement of Investment Disputes (ICSID) website. ICSID is a longstanding adjudication institution devoted to settling international investment disputes since 1972. Data collection and cross-checking has been complete and we have the information of 787 legal experts, the entire list of legal experts registered in ICSID as of July 2022. More specific information on the type of information collected for this specific dataset

is available in the Appendix.

Second, we construct an accessibility dataset. Accessibility is defined as the ease to which investors can resort to ISDS or related procedures through IIAs. This dataset codes different levels of accessibility where investors either have more or less access to ISDS procedures. The minimum score is -3 and the maximum score for accessibility is 26. This score is based on an addition of elements that expands the rights of investors to resort to means of arbitration or related remedies. We utilize the UNCTAD IIA website that has mapped out different elements of international treaties with the help of law school Research Assistants globally. Scholars such as Thompson et al. (2019) have used the same elements of coding available on this website to code the State Regulatory Space. While Thompson et al. (2019)'s SRS score includes all the elements that provide more regulatory space for states, we focus on coding more specific procedural elements that expand investor access to ISDS procedures. Specific elements which have been included in the scoring of accessibility is available in the Appendix.

Our accessibility score is different from Thompson et al. (2019) SRS score as we only capture specific elements of the IIA which enable investors to seek easier access to arbitration. Therefore SRS scores and accessibility scores are not correlated inversely as State Regulatory Space could be high because states are able to protect certain issues of sovereignty, but simultaneously it could be that accessibility for investors to seek arbitration through procedural rights could also be high in its level. To capture this specific change within IIAs, we feel that specifically capturing the changes of investor accessibility is important. Figure 3 shows the general distribution of accessibility scores and the scaled distribution of accessibility scores that have been altered to -1 to 1, including the difference of each accessibility score in renegotiated treaties.



(a)

Figure 4: Scaled from -1 to 1, this shows the distribution of accessibility score differences before and after renegotiation of an IIA.

Arbitrators as Advisors

In the previous section, we descriptively showed that the number of lawyers in the investment regime increases as the country from which these lawyers are from experience ISDS loss. We expect that the rise of legal experts can shape how investment treaties are renegotiated. More specifically, we expect the rise of lawyers would lead states to adopt ISDS provisions accessible to investors.

Our dependent variable is changes in accessibility of investors to ISDS and related procedures within IIA renegotiation. ($\Delta Accessibility$). Accessibility captures whether the IIA enables investors to access ISDS and related procedures with more ease. Positive $\Delta Accessibility$ means in comparison to the text of the initial investment treaty, states adopted more judicialized dispute settlement clauses after a re-negotiation.

The independent variable is the changes in the number of ICSID listed arbitrators that signatories have by the time of re-negotiations ($Sum\ of\ Arbitrators$). We count the number of co-national arbitrators who are listed as an ICSID arbitrator by the time the state has experienced its first ISDS case. For instance, Germany and Pakistan renegotiated their investment treaties in 2009. If two arbitrators from Germany and one arbitrator from Pakistan had adjudicated an investment dispute before 2009, $Sum\ of\ Arbitrators$ in the case of Germany-Pakistan IIA is three.

We include a number of covariates (X'). To disentangle the learning-based explanation, we include the sum of ISDS cases that two states were previously involved (*Respondent Sum of ISDS*). According to the learning-based explanation, the backlash from ISDS should affect the total number of arbitrators as well as the way states modify their dispute settlement provisions. Following Thompson et al. (2019), we control for the IIAs that were re-negotiated after 2005 (*Period*).[7] We also control for a treaty that was re-renegotiated under a free trade agreement (*FTA*), a treaty that involves a signatory that joined the European Union in

[7]Following the more neoliberal, pro-investor approach of the 1980s and 1990s, there was a shift toward more concern with state flexibility around the mid-2000s.

the 2000s (*New EU Member*), and a treaty that involves at least one UN Security Council member to see whether there are influences based on political power (*UN Security Council*). The model specification can be formally represented as follows where i denotes a dyad of states that signed and re-negotiated an IIA.

There are 82 dyads of states included in the analysis. We identify 133 dyads of states that re-negotiated IIAs as of July 2022. Among the 133 dyads, 50 dyads did not have information to code accessibility available on the UNCTAD website where elements of IIAs are mapped out. Accessibility information was available for a total of 83 dyads. Additionally, Czechia-Turkey BIT was excluded from the analysis as the initial treaty prior to renegotiation involved a BIT that was created by Czechoslovakia, which we considered was a different country and for a stricter analysis, exclusion seemed appropriate.

$$\Delta accessibility_i = \beta_1 Sum\ of\ Arbitrators_i + \Gamma * X_i' + \epsilon_{i,} \tag{1}$$

Results

We find that a dyad of states that have larger sum of arbitrators end up adopting accessible ISDS provisions after a renegotiation. Table 1 shows that having one more arbitrator leads a dyad of states to adopt an ISDS provision that is more accessible to investors by 0.31 points. Previous exposure to ISDS, measured with (1) sum of ISDS cases as a respondent and (2) sum of ISDS losses as a respondent, do not explain the degree to which a dyad of states modify ISDS provisions after a re-negotiation (Figure 5). The pattern is consistent with Thompson et al. (2019)'s analysis that even after investment disputes, states do not seem to pursue greater regulatory space in ISDS provisions.

Our finding indicates that the size of the legal expert pool can explain how states modify dispute settlement provisions. The previous explanation based on learning does not answer why states maintain procedural ISDS provisions that are investor-friendly, even after being

sued by investors. The finding, combined with the rise of lawyers documented in the previous section, can explain why investor-friendly ISDS provisions perpetuate.

Table 1: Arbitrators as Advisors

	Dependent variable:
	Δ Accessibility
Sum of Arbitrators	0.31^{**}
	(0.13)
Sum of ISDS Cases as a Respondent	-0.21
	(0.19)
Sum of ISDS Losses as a Respondent	-0.47
	(1.15)
Period	-4.58^{***}
	(1.67)
Chapter in FTA	-5.45^{*}
	(2.82)
New EU Member	-1.86
	(1.96)
UN Security Council	-3.60^{**}
	(1.70)
Constant	6.79^{***}
	(1.12)
Observations	82
R^2	0.28
Adjusted R^2	0.21
Residual Std. Error	5.84 (df = 74)
F Statistic	4.06^{***} (df = 7; 74)
Note:	*p<0.1; **p<0.05; ***p<0.01

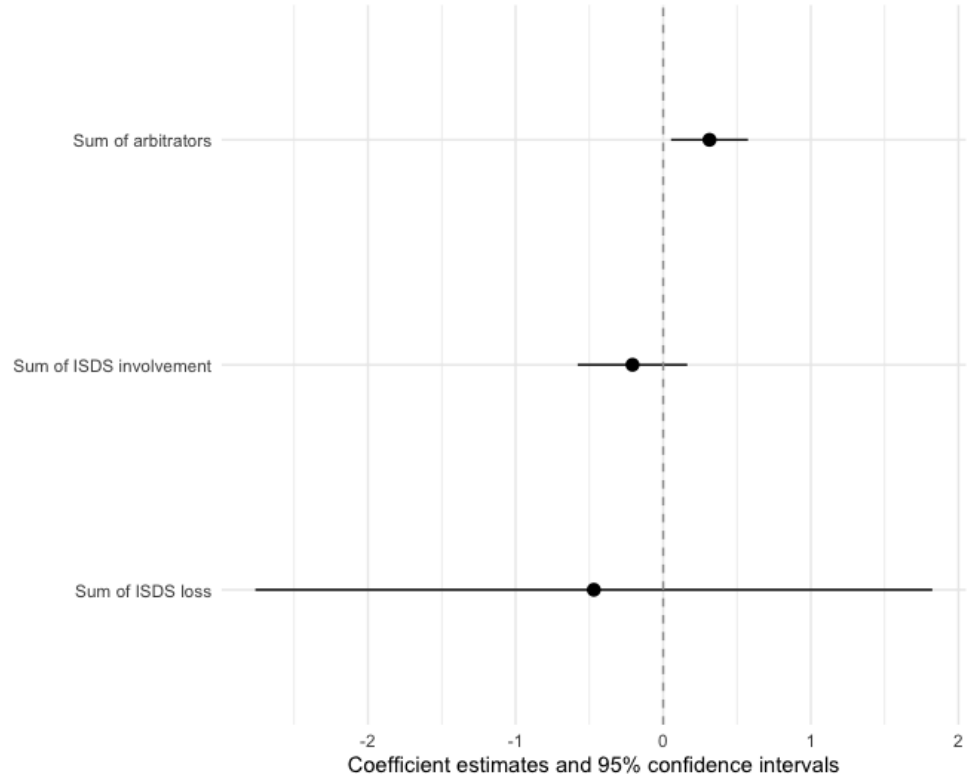


Figure 5: The Coefficient Plot

Discussion

Lawyers not only adjudicate disputes, but also advise states on how to modify treaties. Paying attention to the rise of lawyers can explain why investment treaties continue to preserve accessible ISDS procedures despite countries' bitter experience from investment disputes. Once-legalized, dispute settlement procedures are irreversible because of the experts who develop and maintain the system behind the scene. Unless there is intentional effort from states to stir up an expert pool[8] or create an alternative governance structure through which states can manage investment disputes without having to go through legal procedures, we would continue to observe the inclusion of accessible ISDS procedures in investment treaties.

An international treaty is not only a byproduct of an international negotiation, but also

[8]As a comparison, arbitrators in the World Trade Organization are less lawyer-based. Pauwelyn (2015) explains that this is because the WTO member states consider diversity and inclusion in appointing arbitrators.

a contestation of experts claiming their legitimacy through technical knowledge. Our study illuminates the consequence of states delegating the enforcement of international cooperation to a group of experts. Initially appointed experts can enlarge their presence by advising states to choose certain forms of institutions which favor and benefit these experts. As a consequence, initially appointed experts can successfully crowd out other potential experts by gate-keeping through specific forms of international cooperation. After crowding out other potential experts, it becomes extremely difficult for states to control already established network of experts that have a strong presence in a specific field.

Our findings can be applied in other issue areas or international cooperation that are in need of experts. We provide one explanation on how an existing experts can maintain or strengthen its status as experts and expand their influence. Future studies can look at how the power struggle among experts can shape treaty design in other issue areas.

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Appendix

The Measure of Arbitrators

We have collected the legal expert information from the ICSID website (Link). The collection of 787 experts have been completed from the ICSID website (Figure 6). The website releases the CV of each expert. We have extracting the information from the CVs with the help of two research assistants. Figure 7 presents an example of the CVs. The following variables have been collected:

- The ICSID Case Symbol
- Name of the Case
- Name of the Expert
- Nationality of the Expert
- Role in the Case (Arbitrator, President or Chairman, Counsel Lawyer)
- Tribunal Constitution Date
- Date of Conclusion
- Country that appointed the legal expert in case i
- Claimant (investors) that appointed the legal expert in case i
- The name of the lawfirm that the counsel lawyer is affiliated with

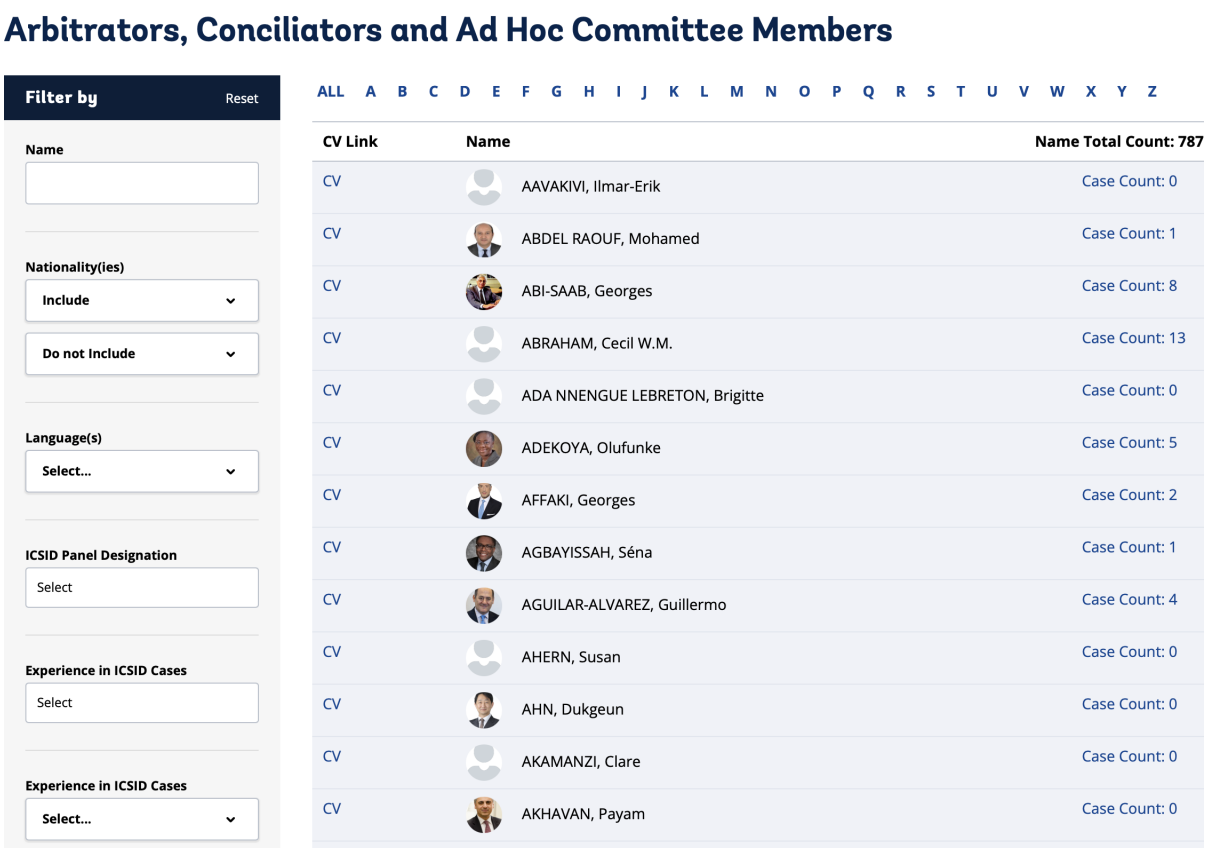


Figure 6: The List of the ICSID Experts

Mr. Henri C. Alvarez

Vancouver Arbitration Chambers,
1650-885 West Georgia Street,
Vancouver BC V6C 3E8 , Canada

Nationality: Canadian

Work: +1 604 558 7943

Email: halvarez@alvarezarbitration.com

Website: https://www.alvarezarbitration.com/new-page/

Languages

- English
- French
- Spanish

ICSID Panel Designation

Designation/Role	Designated By	Designation Date
No Records To Display		

Experience in ICSID Proceedings

Case Name	Type	Role (Appt'd by)
TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (ICSID Case No. ARB/21/63)	Arbitration	Co-arbitrator (Cl.)
Telefónica S.A. v. Republic of Peru (ICSID Case No. ARB/21/10)	Arbitration	Co-arbitrator (Cl.)
Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada (ICSID Case No. ARB/20/52)	Arbitration	Co-arbitrator (Cl.)

Figure 7: The Example of the CV

Accessibility Coding and the Note on State Regulatory Space (SRS)

To create a new score of accessibility for each international investment agreement, we have collected the following information. The next page includes the more specific definitions based on which UNCTAD has mapped these treaties, and our scoring based on the already mapped elements from the UNCTAD website.

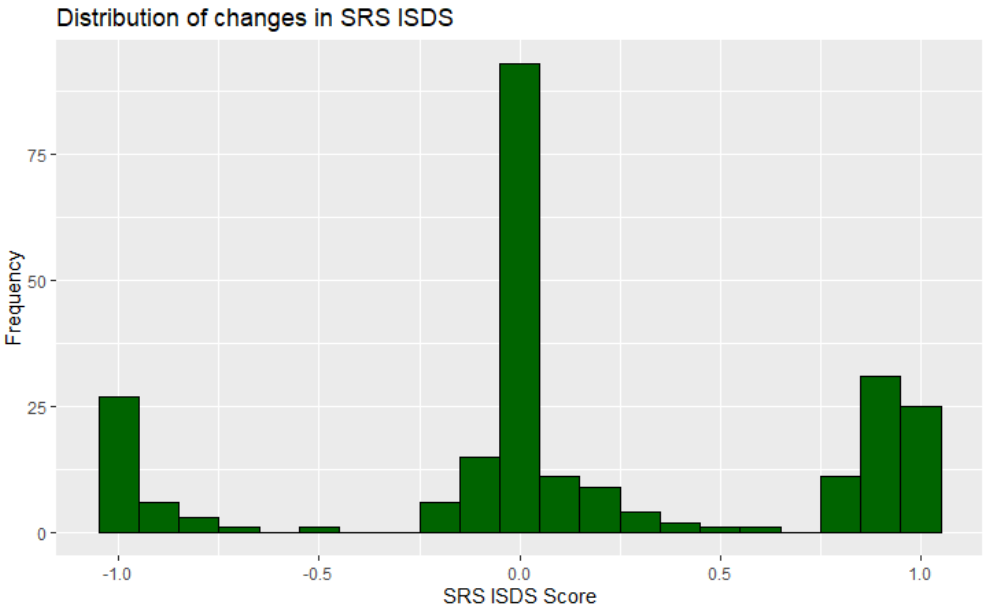
- Is ISDS included in IIA?
- Are there alternative forms of negotiation available?
- Are only specific provisions applicable to ISDS?
- Are there an exclusion of policy areas from ISDS?
- Are issues of taxation or prudential measures excluded?
- Is express consent required to enter arbitation?
- Are there limitations to how many different forums investors could seek for one case?
- Are there limitations on which venues arbitration could take place?
- Is there a limit on the period for submission of claims?
- Can arbitration's provide provisional measures before the proceedings?
- Does the IIA require consolidation of claims?
- Are remedies limited?
- How long is the duration of the treaty?
- Is unilateral termination possible?
- Are there survival clauses within the IIA?

The accessibility score is somewhat similar to the SRS scoring in that it includes procedural provisions. Therefore, we similarly include alternatives to arbitration, scope of claims, limitation on provisions subject to ISDS, limitation on Scope of ISDS, Type of Consent to Arbitration, ISDS Rules and Particular features of ISDS which are all considered procedural provisions within the SRS scoring system. [9] The SRS scoring here focuses on whether the ISDS provisions allow more regulatory space in terms of procedures.

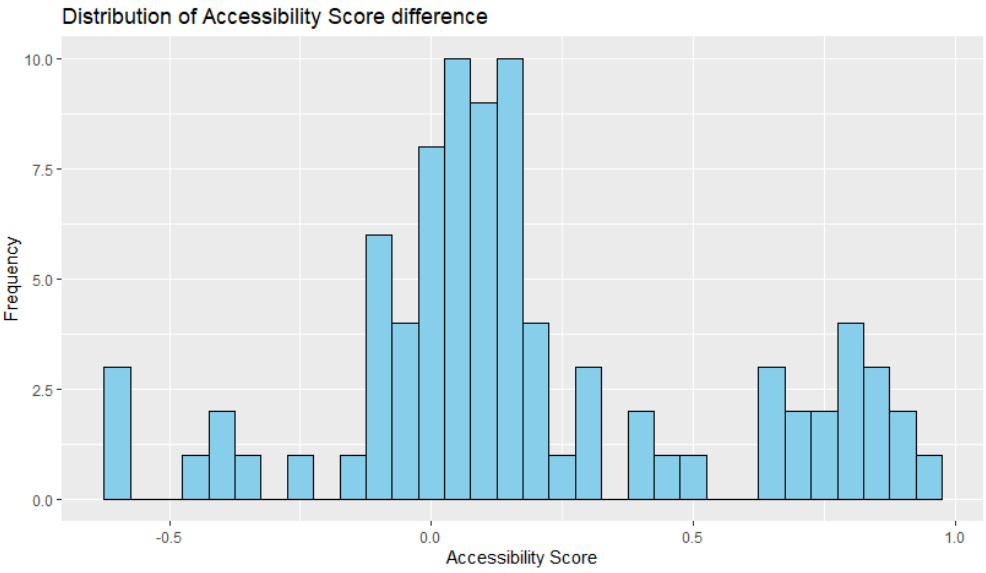
The difference from this scoring is that we include other elements of the IIA that we consider should be considered as procedural provisions which allowing investors more easy access ISDS procedures. First, we give more weight to IIAs that allow ISDS access. Some IIAs do not allow investors to seek ISDS at all, and so for these IIAs we provide a higher base-line when scoring. Next, we also include elements such as the duration of the treaty which expands the time for investor access to ISDS procedures, availability of unilateral termination, which could potentially prevent investors from further accessing ISDS procedures, and survival clauses to observe whether even after treaty exit, ISDS procedures can still be accessed by investors. We also exclude elements such as transparency in arbitral proceedings from the SRS ISDS scoring that we find is irrelevant to allowing investor access to ISDS procedures when seeking recourse.

We calculate a Pearson correlation coefficient to be transparent about the extent of similarity between the SRS measure and our scoring of accessibility. There is a negative correlation (-0.47, $p < 0.001$) between the SRS measure and our scoring of accessibility. The negative correlation is intuitive as the greater state regulatory space in the ISDS provisions would constrain investors to use the ISDS based on their needs. In Figure 8, we also attach the more specific coding schema for our accessibility data .

[9] Please refer more specifically to the Supplementary materials available from (Thompson et al., 2019) to see how SRS ISDS clauses were coded more in detail



(a)



(b)

Figure 8: (a)Histogram of SRS scores Distribution (Only procedural) (b) Histogram of Accessibility Score Distribution

Figure 9: Accessibility coding

Elements	Coding By UNCTAD (Direct Citation from the Codebook of UNCTAD IIA mapping)	Our Scoring Based on UNCTAD's coding
ISDS included	"Marked "Yes" if the treaty establishes a mechanism for the settlement of disputes between covered investors and the host State (arbitration and/or domestic courts of the host State)"	Yes = 10 No = 0
Alternatives	"Marked "Voluntary ADR (conciliation / mediation)" if the treaty mentions the possibility of such procedures (e.g. "non-binding, third-party procedures") but does not prescribe them as a necessary step. Marked "Compulsory ADR (conciliation / mediation)" if the treaty prescribes the use of conciliation or mediation (can be referred to as "non-binding third-party procedures", or ADR methods) as a mandatory procedure, i.e. that must be resorted to before adjudicatory proceedings (arbitration) can be commenced. Marked "None" if the treaty does not refer to alternative means of settling investor-State disputes (conciliation / mediation or similar non-binding procedures).	Voluntary ADR (Conciliation / mediation) = 1 Compulsory ADR (Conciliation / mediation) = 0.5 None = 0
Scope of Claims	Marked "Covers any dispute relating to investment" if the treaty allows to submit to ISDS "any dispute arising from / connected to / relating to / concerning an investment" or uses similar broad formulations. Marked "Lists specific bases of claim beyond treaty (e.g. contractual disputes)" if the treaty allows to submit to ISDS certain identified types of claim, which go beyond the alleged breaches of the treaty itself	Covers any dispute relating to investment = 1 Lists specific bases of claim beyond treaty (e.g. contractual disputes) = 0.75 Covers treaty claims only = 0.5 Other = 0

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Figure 10: Accessibility coding

	but are not as broad as "any dispute". For example, a treaty may claims arising out of the alleged breach of: (i) treaty obligations, (ii) an investment authorization, or (iii) an investment contract. Marked "Covers treaty claims only" if the treaty allows to submit to ISDS only claims alleging a breach of the treaty by the respondent State. Treaties that refer to disputes "concerning interpretation and application of this agreement" also fall into this category. Marked "Other" if the treaty's ISDS clause doesn't fall into any of the above categories.	
Limitation of provisions subject to ISDS	Marked "Yes" if the treaty provides that not all of its provisions are subject to ISDS. A treaty can do that either (i) by positively identifying those provisions, whose alleged violations can be submitted to ISDS (leaving some substantive provisions out), or (ii) by expressly excluding certain provisions from the scope of ISDS.	No = 1 Yes = 0
Exclusion of policy areas from ISDS	Marked "Yes" if the treaty excludes a particular policy area(s) or certain economic industries/sectors from the ISDS scope. Excluded policy areas and sectors may include, for example, host State's decisions concerning admission of foreign investments, claims relating investments in real estate, financial institutions, etc	No = 1 Yes = 0
Special mechanisms for taxation or prudential measures	Marked "Yes" if the treaty requires the disputing parties, or the tribunal, to refer certain matters (e.g. those concerning taxation, prudential measures, scheduled reservations) for joint determination by the contracting parties or their joint commission.	No = 1 Yes = 0

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Figure 11: Accessibility coding

Type of consent to arbitration	Marked "Provides express or implied consent" if the contracting parties give their prior consent to ISDS (arbitration) for investors' claims arising under the treaty. Such consent can be (i) express (e.g. "Each Party hereby gives its unconditional consent…", or (ii) implied (i.e. the text of the treaty is silent on the matter of consent but suggests that an investor does not need to obtain a separate consent to arbitration from the respondent State in order to initiate ISDS proceedings against it). Marked "Requires case-by-case consent" if the contracting parties do not provide their prior consent to ISDS (arbitration) for investors' claims arising under the treaty. A treaty may contain, for example, an explicit reservation of consent, or provide that the Parties shall give their consent in the future.	Provides express or implied consent = 1 Requires case-by-case consent = 0.5 Inconclusive = 0
Venue_relations	Marked "No reference" if the treaty, which lists more than one ISDS forum, does not contain rules on the relationship between various ISDS forums, i.e. on whether the same dispute can be submitted to several forums, either simultaneously or subsequently. Marked "Fork in the road" if the treaty contains a "fork-in-the-road" clause, i.e. a provision which requires the investor to choose between the domestic courts and international arbitration at the outset. Once an investor starts the domestic proceedings, it loses the right to resort to arbitration, and vice versa. This category captures any "finality of choice" provision including the selection between two arbitral forums. "No U turn" (waiver clause)	Local remedies first = -3 Preserving right to arbitration after domestic court proceedings = -3 Fork in the Road = -1 No U turn (waiver clause) = -1 No reference = 0

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Figure 12: Accessibility coding

	Marked "No U turn (waiver clause)" if the treaty contains a "no-U-turn" clause, which provides that once the investor has opted for international arbitration, it cannot shift back to domestic courts. It often requires a "waiver" from domestic litigation as a condition of submitting the dispute to arbitration. Preserving right to arbitration after domestic court proceedings Marked "Preserving right to arbitration after domestic court proceedings" if the treaty explicitly preserves the right of investors to submit a dispute to arbitration after they have initiated local court proceedings, but before these courts have rendered a judgment. P Local remedies first Marked "Local remedies first" if a treaty obliges an investor to go through (but not necessarily exhaust) local remedy procedures in the host State, be they of administrative or judicial kind, before submitting a claim to arbitration.	
Venue_choice	Marked "Yes" if the treaty explicitly provides an option to submit an investment dispute to the domestic courts of the host State, whether as an option alongside other ISDS forums, or as a mandatory step before submission of a claim to arbitration. Note: If the treaty refers to only domestic administrative review procedures, this is marked "No" in this section. ICSID Mapping options: Yes/No Marked "Yes" if the treaty provides an option to submit an	Domestic Courts of the Host State =1 ICSID = 1 Other forums = 1 Other or Inconclusive = 0

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Figure 13: Accessibility coding

	investment dispute to arbitration under the ICSID Convention. Note: If the treaty refers only to arbitration under the ICSID Additional Facility Rules, or to conciliation under the ICSID Convention, this is marked "No" in this section. UNCITRAL Mapping options: Yes/No Marked "Yes" if the treaty provides an option to submit an investment dispute to arbitration under the UNCITRAL Arbitration Rules. Marked "Yes" if the treaty provides an option to submit an investment dispute to arbitration under any other arbitral rules: e.g. Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC), Arab Investment Court, Cairo Regional Centre for International Commercial Arbitration, ICSID Additional Facility (if the treaty does not allow arbitration under the ICSID Convention) or other venue or arbitration rules	
Limitation period for submission of claims	Marked "Yes" if the treaty prohibits submission to ISDS of the claims that are outside of the limitation period (often 3 or 5 years from the date on which the claimant first acquired, or should have first acquired, knowledge of the treaty breach and damage)	No = 1 Yes = 0
Provisional Measures	Marked "Yes" if the treaty provides that arbitral tribunals may order provisional or interim measures in the interest of the investor or of the proceedings, for example to preserve the rights of the disputing investor or to preserve evidence in the possession or control of either of the disputing parties.	No = 1 Yes = 0

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Figure 14: Accessibility coding

Consolidation of claims	Marked "Yes" if the treaty contains a provision regarding consolidation of claims arising out of the same events or circumstances.	No = 1 Yes = 0
Limited remedies (specifying available types of remedies)	Marked "Yes" if the treaty specifies the types of remedy that a tribunal may award, for example payment of monetary damages and restitution of property (with the right to pay monetary damages in lieu of restitution).	No = 1 Yes = 0
Duration	This section records the initial treaty term, i.e. the length of time during which an agreement shall remain in force. The initial treaty term can be fixed (equal to a certain number of years) or indefinite, and is marked accordingly in this section.	Indefinite = 1 20 years = 0.75 15 years = 0.5 10 years = 0.25
Unilateral	Marked "Yes" if the treaty expressly provides that it can be unilaterally terminated by a contracting party, and sets out the procedure for such unilateral termination. This section records the length of the notice period necessary for a Contracting State to unilaterally denounce the treaty, if the treaty provides for such unilateral termination.	No = 1 Yes = 1
Survival	A "survival"/"sunset" clause guarantees that in case of unilateral termination of the treaty, the treaty will remain in effect for a certain number of years following the termination with respect to investments made prior to the termination. This section records such extra treaty duration specified in the "survival" clause. If the treaty does not include a "survival" clause, this is marked "None"	20 years = 1 15 years = 0.75 10 years = 0.5 Inconclusive or none = 0
Accessibility Total Score		Minimum = -3 Maximum = 26

Note: The second column is a direct citation from the UNCTAD IIA mapping project, where they describe how the BITs have been analyzed based on its design element.

Example List of Dual-Role Investment Lawyers

Figure 15: List of Double Hatters example

Name	Arbitration Venues	Government Related Positions
Catherine Amirfar (Partner at Debevoise & Plimpton)	(Unspecified in Bio)	Counselor on International Law to the Legal Adviser at U.S. Department of State Advised State Department on litigation matters involving international law and foreign relations. Represented the US before international bodies and advised the State department on international legal issues.
Christophe Bondy (Partner at Steptoe)	ICSID NAFTA UNCITRAL	Lead Counsel to Canada in multiple NAFTA Chapter Eleven Arbitrations Senior Counsel to Canada in the Negotiation of the Canada – European Union Comprehensive Economic and Trade Agreement
Lee Caplan (Partner at Arent Fox Schiff)	(Unspecified in Bio)	Represented United States in arbitrations before the Iran-US Claims Tribunal, and ad hoc arbitral tribunal in Ecuador V. US. Worked with the State Department's Investment Arbitration Team US delegate to the United Nations Commission on International Trade Law State Department's principal lawyer in negotiations to conclude investment treaties with China, Czech Republic and Investment Chapter of FTA with TPP countries. Contributed to the US Model Bilateral Investment Treaty during Obama Administration.
Marney Cheek (Partner at Covington)	(Unspecified in Bio)	Associate General Counsel at the Office of the U.S. Trade Representative Roster of Arbitrators for several U.S. FTAs.
Donald F. Donovan (Retired - Debevoise & Plimpton)	ICJ ICSID PCA ICC ICDR	Member of U.S. Department of State's Advisory Committee on International Law Member of the Advisory Committee of the American Law Institute for the Restatement (Fourth) of Foreign Relations Law of the US Restatement of the U.S. Law of International Commercial and Investor-State Arbitration
Andrea Menaker (White & Case)		Chief of NAFTA Arbitration Division for the US State Department Lead Counsel for the US investor-State arbitrations under the investment chapter of NAFTA Participated in the drafting of investment and dispute resolution provisions in US bilateral investment treaties
Patrick W. Pearsall	ICSID HKIAC (Hong Kong International Arbitration Centre) KCAB (Korean Commercial	US State Department, chief of investment arbitration Negotiation of the investment provisions in the TPP US China Bilateral Investment Treaty

Figure 16: List of Double Hatters example

	Arbitration Board)	
Gabrielle Kaufmann-Kohler	ICC ICSID AAA LCIA SIAC CIETAC	Swiss delegate to UNCITRAL (working group II on transparency, working group III on reform of investor-state arbitration)
Yves Fortier	ICC LCIA HKIAC SIAC CIETAC ICSID CAS SDRCC	The Government of Canada, as counsel before the International Court of Justice at The Hague in the Canada-US Gulf of Maine Maritime Boundary case (1984) The Government of Canada as its Chief Negotiator in the negotiation with France of a Maritime Boundary in the North Atlantic (1987-1989) The Government of Canada as its Chief Negotiator in the negotiation with the United States of the Pacific Salmon Treaty (1994-1998) Canada's Ambassador and Permanent Representative to the UN NY. Canada's Representative on the Security Council of the UN. World Bank's Sanctions Board. Security and Intelligence Review Committee of Canada and Privy Council of Canada

The Rise of Lawyers

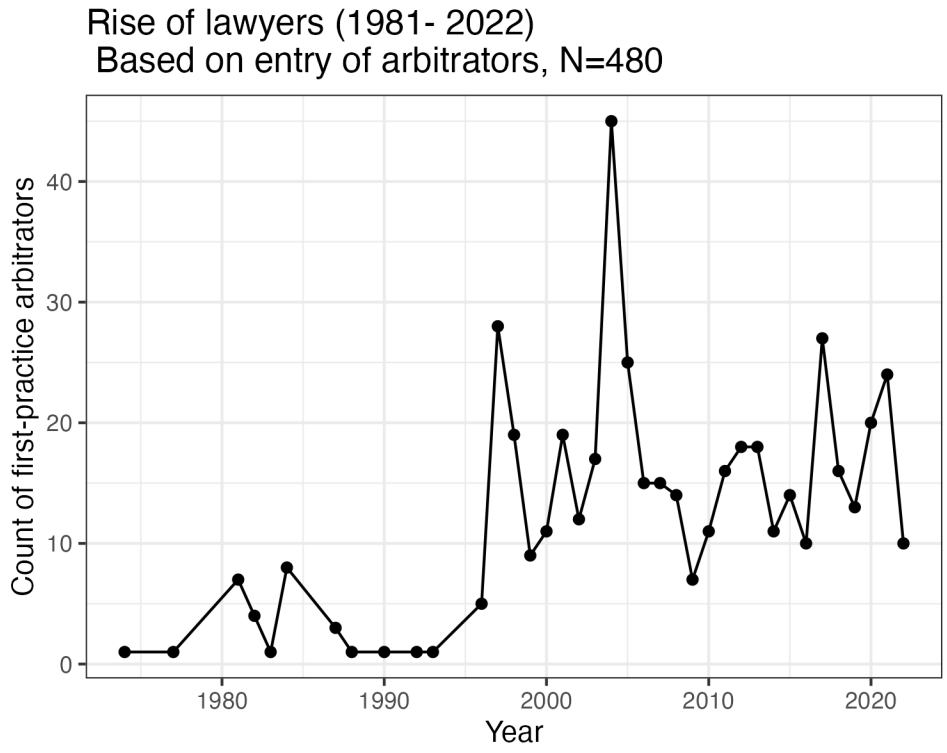


Figure 17: The Rise of Lawyers, based on entry of arbitrators

In this section, we show descriptive data related to the rise of lawyers. Figure 18 details the count of first-practice arbitrators that join the ICSID pool of arbitrators in a given year. We observe that there is a general pattern of increase in the number of newly entering ICSID arbitrators.

Figure 19 shows country examples of these changes. The bar-graph indicates the increase of cases that the co-national arbitrators handle in a given year, and the line graph shows the count of ISDS cases a country experiences.

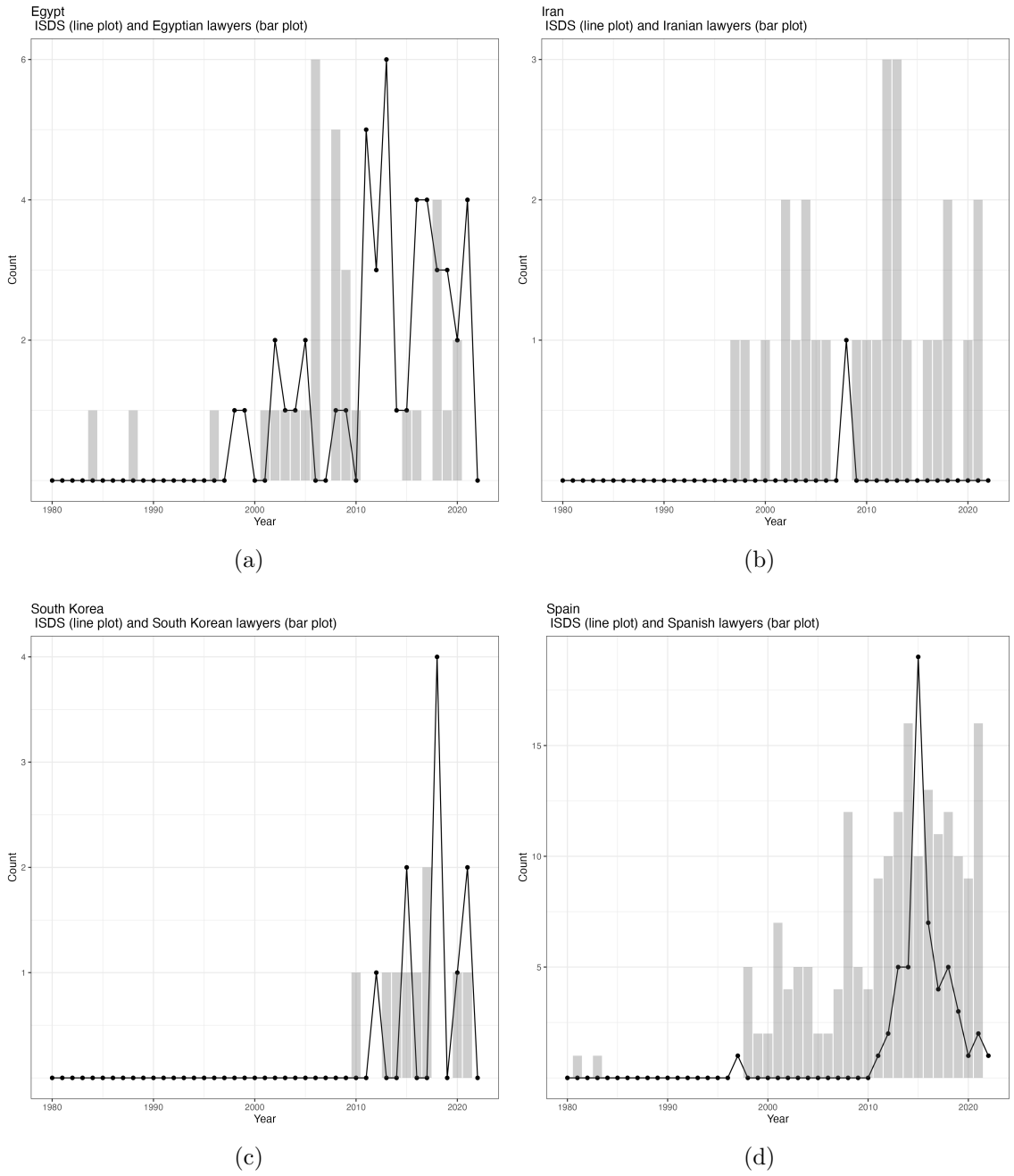
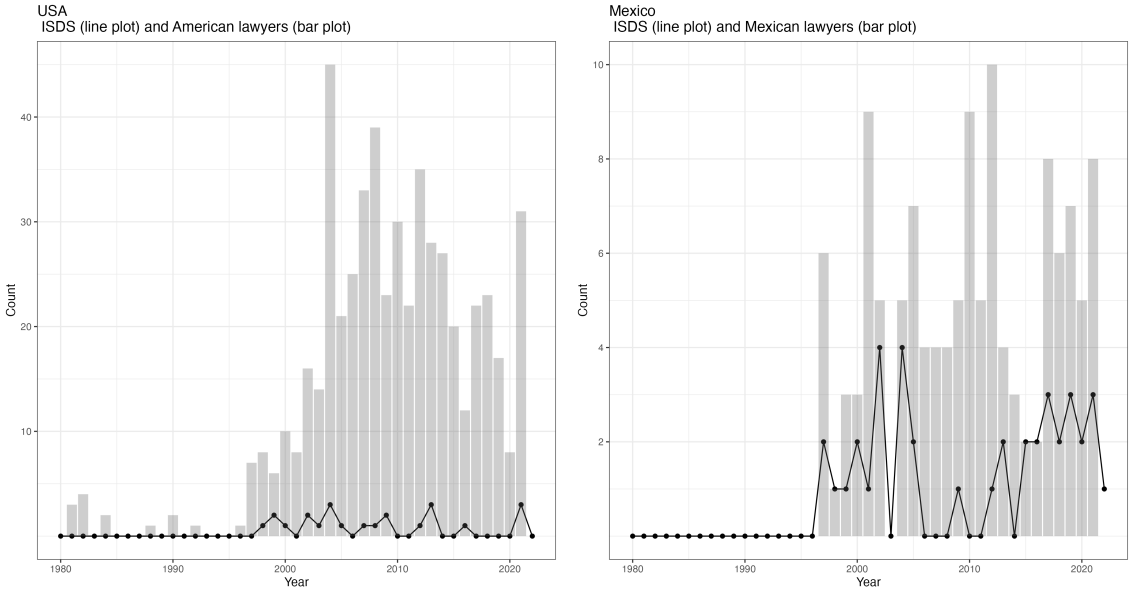
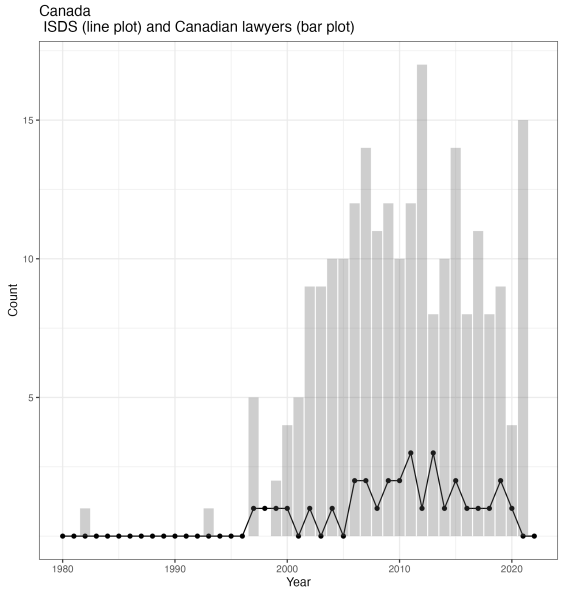


Figure 18: (a) Egypt, (b) Iran, (c) South Korea, (d) Spain



(a) (b)



(c)

Figure 19: (a) USA, (b) Mexico, (c) Canada