Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws

Tarald Laudal Berge [a] and Taylor St John[b]

[a] *Dept. of Political Science & PluriCourts, University of Oslo, Norway. E-mail: t.l.berge@stv.uio.no*

[b] *School of International Relations, University of St Andrews, United Kingdom. E-mail: taylor.stjohn@st-andrews.ac.uk*

Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws

Abstract

Globally, 74 countries have domestic investment laws that mention investor-state arbitration and 42 of these laws provide consent to it. That is, they give foreign investors the right to bypass national courts and bring claims directly to arbitration. What explains this variation, and why do any governments include investor-state arbitration in domestic legislation? We argue that governments incorporate arbitration into their domestic laws because doing so was labelled 'international best practice' by specialist units at the World Bank. We introduce the concept of asymmetric diffusion, which occurs when a policy is framed as international best practice but only recommended to a subset of states. No developed state consents to arbitration in their domestic law, nor does the World Bank recommend that they do so. Yet we show that governments who receive technical assistance from the World Bank's Foreign Investment Advisory Service are more likely to include arbitration in their laws. We first use event history analysis and find that receiving World Bank technical assistance is an exceptionally strong predictor of domestic investment laws with arbitration. Then we illustrate our argument with a case study of the Kyrgyz Republic's 2003 law.

Keywords: foreign direct investment; national investment laws; investor-state dispute settlement; World Bank; arbitration; technical assistance; templates

Word count: 11, 995

Introduction

In 2009, a tribunal of arbitrators in the World Bank's Paris office debated a few words of Venezuelan law at length, before deciding it did not give them jurisdiction to decide a claim brought by Mobil Corporation against Venezuela.[1] If the Venezuelan law had been clearer, the Mobil award and several others against Venezuela might have been larger, likely billions of dollars larger.[2] For governments deciding whether or not to include investor-state arbitration in their domestic investment laws, the stakes are high.

To date, 61 known investor-state arbitration cases have relied on domestic laws (Hepburn, 2018, p. 659) and there is potential for many more. At least 74 countries have domestic investment laws that mention investor-state arbitration (or have mentioned it), and 42 of these laws provide consent to this form of arbitration (or provided consent, before being rewritten). What explains this variation in domestic investment laws?

Governments' decisions to mention arbitration in their domestic laws are puzzling for several reasons. First, arbitration clauses can be extremely costly. If cases are brought and the investor wins, arbitrators can compel the government to pay large monetary awards. Legal costs for states are often substantial, averaging US$5 million per case, regardless of the outcome (Pelc, 2017, p. 566). Second, the benefits are uncertain. While governments may hope for additional investment, available evidence shows that giving investors access to investment arbitration does not necessarily lead to

---

[1] *Mobil and others v. Venezuela,* ICSID Case No. ARB/07/27, Decision on Jurisdiction (2010, pp. 19–33).

[2] ConocoPhillips and ExxonMobil routed their investment in Venezuela through Dutch subsidiaries and also brought claims under the Netherlands-Venezuela bilateral investment treaty. The arbitral tribunal found they had jurisdiction for all aspects of the disputes after the investments were incorporated through the Dutch subsidiary (in the case of ExxonMobil, after 21 February 2006) but not before that date. If the tribunal had found that the domestic law provided jurisdiction, the firms would likely have been awarded compensation for events before that date as well.

additional investment (Bonnitcha, Poulsen & Waibel, 2017, pp. 158–166). Third, no developed states have ever consented to arbitration in their domestic laws, so governments are not emulating successful examples (UNCTAD, 2016). Fourth, there are no domestic constituencies likely to lobby for investment arbitration, since it disadvantages domestic investors by giving foreigners a right that citizens do not have (Bonnitcha *et al.*, 2017, pp. 181–192; Betz & Pond, 2019). So why do any governments mention investor-state arbitration in their domestic laws?

We argue that governments incorporate arbitration into their domestic laws because doing so was labelled 'international best practice' by specialist units at the World Bank. To make our argument, we draw on literature about analytic institutions within international organizations (IOs)—the specialist units that design metrics to assess country performance, define international best practice, and write templates for policy reforms (Broome & Seabrooke, 2012; Broome, Homolar, & Kranke, 2018; Cooley & Snyder, 2015; Davis, Fisher, Kingsbury, & Merry, 2012; Kelley & Simmons, 2015, 2019; Merry, Davis, & Kingsbury, 2015; Sharman, 2012; Vetterlein, 2012).

This literature often highlights that IO legitimacy and influence rest on claims of universality; the very idea of international best practices asserts that a certain set of practices is best anywhere. Yet what we observe and explain is *asymmetric diffusion*—a policy is framed as universal best practice but only recommended to a subset of states. This is novel; even previous scholarship that considers how political contestation shapes IO policy recommendations (Chorev, 2013; Kentikelenis and Seabrooke, 2017) does not consider asymmetric diffusion.

Analytic institutions within the World Bank have framed references to investor-state arbitration in domestic law as a policy solution since the 1960s. These analytic institutions have collected domestic investment laws, defined best practice, and written

templates for domestic investment laws in the decades since then. Therefore we hypothesize that after a government receives advice on reforming its domestic investment law from a particular analytic institution within the World Bank Group, the Foreign Investment Advisory Service (FIAS), that government's law is more likely to mention arbitration.

We apply a mixed-methods framework to examine the extent to which our argument explains the variation in domestic laws, comparing it against three alternative explanations for why governments consent to arbitration: in order to make credible commitments, in response to coercion, and in response to bureaucratic incentives. We first test these arguments using event history analysis, with two unique datasets on World Bank technical assistance and domestic investment laws. We find that the presence of a FIAS mission is an exceptionally strong predictor of domestic investment laws with arbitration clauses, even when controlling for lending and other IO involvement. Second, we illustrate how the causal mechanism works in a case study of the Kyrgyz Republic's 2003 investment law, which we select as a typical case.

In the next section, we elaborate our argument and compare it with existing explanations for investor-state arbitration. Then we discuss our research design and findings, and finally, our conclusions.

Argument: IO Analytic Institutions and Asymmetric Diffusion

International organizations are often conceptualized as unitary actors, but in reality, many IOs are sprawling organizations composed of sub-units with different identities, purposes, and organizational cultures. Here we focus on analytic institutions, following Broome and Seabrooke (2012). Analytic institutions are specialist units within wider IOs that define policy problems and solutions, usually by defining indicators and best practices. Analytic institutions provide the tools through which IOs make states more

legible, by replacing idiosyncratic local arrangements with benchmarked, coherent, and compatible national systems (Scott, 1998; Broome & Seabrooke, 2007, 2012). Their work embodies the notion of bureaucratic universalism, that is, bureaucracies are supposed to generate universal rules because technical knowledge is transferable across circumstances (Barnett and Finnemore, 2004, p. 39).

IO analytic institutions are important actors in the current 'ratings craze' (Cooley & Snyder, 2015); many rankings, like the World Bank Doing Business indicators, emerge from IO analytic institutions. Therefore, analytic institutions have come under increased scrutiny in the growing research on rankings, indicators, and benchmarks (Best, 2017; Broome & Quirk, 2015; Broome *et al*., 2018; Clegg, 2010; Cooley & Snyder, 2015; Davis *et al.*, 2012; Kelley & Simmons, 2015, 2019; Merry *et al.*, 2015). Much of the literature on IOs and ranking-based benchmarking focuses on how states respond to the indicators. Rationalist approaches suggest states respond strategically, either by paying attention only to the rankings that might inflict economic damage, such as credit ratings, or by 'teaching to the test' and targeting indicators to improve their scores without adopting new behaviors (Cooley & Snyder, 2015, pp. 4–5). Approaches emphasizing socialization and reputational concerns find that ratings lead officials to internalize certain priorities or to exert influence through naming and shaming (Kelley & Simmons, 2015, 2019). IO analytic institutions do more than create benchmarks, and we focus on a policy that is defined by an IO analytic institution as best practice, but not included in any benchmark or ranking, in order to study other means of influence.

Instead of benchmarks, we focus on policy templates written by IO analytic institutions. Templates, or policy documents that define international best practices, come in several forms. One form of template is a public text that governments are

invited to use as the model for domestic legislation, like the model laws designed by the UN Commission on International Trade Law on issues like commercial arbitration (1985, updated 2006) and cross-border insolvency (1997).[3] IOs also issue model texts for international treaties, like the model tax convention issued by the OECD Committee on Fiscal Affairs, which is the basis for most double taxation treaties (Sharman, 2012, p. 27). Templates can also take the form of guidelines or handbooks issued by IOs. For instance, since 1979 the OECD has regularly updated guidelines on transfer pricing to encourage standardization (Sharman, 2012, p. 26). The core trait of a template is that it identifies best practices, as defined by the IO analytic institution.

The process of constructing a template usually starts with collecting information on national policies. Deciding what information to collect necessarily advances certain values at the expense of others, as Vetterlein (2012) illustrates in her examination of debates within the World Bank on how to measure poverty. Analytic institutions define best practice by identifying or articulating a policy and then labelling this policy as the preferred solution to a common problem facing member states (Broome & Seabrooke, 2012, p. 7). Deciding what counts as a policy problem and constructing policy solutions is the crux of analytic institutions' work. Examining how they diagnose problems and construct solutions can 'provide us with a stronger grasp of how IOs seek to influence and engineer change within their member states' (Broome & Seabrooke, 2012, p. 5).

The ability of IO analytic institutions to influence member states rests on the IO's reputation and expert authority, which, in turn, rest on claims of universal technical knowledge (Barnett & Finnemore, 2004; Halliday, Block-Lieb, & Carruthers, 2010). IO templates or scripts are strategic devices that work to build an IO's legitimacy through

[3] See:http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html and http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html, respectively.

rhetoric (Halliday *et al*., 2010). The effectiveness and legitimacy of a template or script is affected by its adoption, which can be thought of as 'a quantitative criterion (i.e. how many nations signed a convention) [and] a qualitative criterion (i.e. which nations have adopted global norms)' (Halliday *et al*., 2010, p. 82). An IO may use the adoption of a recommendation or template by many states or by particular states to bolster its legitimacy claims and validate its template.

An IO is not able to invoke the practice of powerful states or wide adoption in an instance of asymmetric diffusion. Asymmetric advice undermines an IO's rhetorical claims about *universal* best practice, which in turn undermines the credibility and legitimacy of an IO's recommendations. If it is damaging for an IO's legitimacy, why does asymmetric diffusion occur?

Examining the incentives and constraints produced by an IO's institutional environment can explain many puzzling aspects of IO behavior (Cooley and Ron, 2002, p. 6), including asymmetric diffusion. Cooley and Ron (2002, p. 6) argue that 'dysfunctional organizational behavior is likely to be a rational response to systematic and predictable institutional pressures'. They highlight how shifts in donor strategies toward competitive contract tenders, one-year renewable contracts, and increased reliance on consultants contribute to dysfunctional IO behavior (Cooley and Ron, 2002, pp. 6–13). When an IO or analytic institution faces contract or funding renewal pressure, it has incentives to be responsive to donor priorities and may not be designed with channels for feedback from recipient states or contestation over its policy recommendations; these characteristics enable asymmetric diffusion. Growing IO reliance on consultants also discourages change: 'the logic of consultancies is that there is a high premium on getting future contracts, which means that policy recommendations should not "rock the boat"' (Seabrooke and Sending, 2019, p. 4).

Identifying who participates in defining best practice, another aspect of an IO's institutional environment, can also help to explain the persistence of asymmetric diffusion. In their research on bankruptcy law, Block-Lieb and Halliday (2017, pp. 4, 10) find that '*how* international commercial law is made influences *what* law is made' and 'the *who* of lawmaking is inseparable from the *how*'. Similarly, Kentikelenis and Seabrooke (2017, p. 1071) 'zoom in on which scientific and political actors are included in, or excluded from, global normmaking processes'. They argue that focusing on power asymmetries can also 'explain instances of widespread script institutionalization, despite contention in the countries affected and from other international organizations involved' (Kentikelenis and Seabrooke, 2017, pp. 1083–4). Asymmetric diffusion is likeliest in contexts where policy feedback from weaker actors is limited.

Even when they contain 'contested policy ideas as best practices', the templates written by IOs 'achieve legitimacy — and thereby policy traction — by piggybacking on the status of the organizations that produce them as expert evaluators' (Broome *et al.*, 2018, p. 516). Templates can be tied to IO lending or structural power, but in this paper we seek to isolate the influence of templates from coercive means of influence available to IOs, such as future lending, loan conditionality, or blacklisting. We study a policy that has never been a condition for a loan or grounds for blacklisting, in order to focus on subtler means of influence. To examine how templates spread, we build on earlier scholarship that presents IOs as 'teachers' (Finnemore, 1993; Jacoby, 2001) and actors that validate and promote certain norms (Park & Vetterlein, 2010). We focus on one means of influence: technical assistance provided by IO analytic institutions. The next section outlines how the World Bank defined best practice in domestic investment laws and how a part of the World Bank disseminates those practices through technical assistance.

The World Bank's Definition of Best Practices in Domestic Investment Laws

The World Bank is the only IO that has ever recommended governments provide access to investor-state arbitration in their domestic investment laws. In 1965, the World Bank Executive Directors released a report that mentioned governments could provide access to investor-state arbitration in their domestic laws (Parra, 2017, p. 81). The Directors issued the 1965 report to increase awareness of a multilateral treaty drafted by the World Bank which creates a procedure and secretariat to administer investor-state arbitration proceedings.[4] In the 1960s and 1970s, this secretariat started collecting the domestic investment laws of developing countries (Parra, 2017, pp. 139–141).

In the mid-1980s, World Bank officials began working to define best practices for domestic investment laws. First a survey of domestic investment laws was conducted (Parra, 1992). Then Guidelines on the Treatment of Foreign Direct Investment were drafted; a purpose of these Guidelines was to serve as a template of best practices for domestic investment laws, and the Guidelines mention investor-state arbitration (Shihata, 1991, p. 499; Shihata, 1993).

Also during the 1980s, FIAS, a new agency within the World Bank Group, was created. FIAS, a small organization, has been renamed and restructured, but its mandate has remained the same: 'to provide advice on host country policies that affect the flow of productive private investment' (FIAS, 2006, p. 8). FIAS is the analytic institution that we focus on, and in particular, their domestic investment law advice. The purpose of FIAS's investment law reform work is to 'help countries attract and retain foreign investment by recommending legislative reforms' (FIAS, 2006, p. 20).

---

[4] The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which set up the International Centre for Settlement of Investment Disputes (ICSID).

The purpose and procedure of this technical assistance have remained the same over time. The 2006 Annual Report notes that 'FIAS advice on investment legislation starts with a review of existing or draft legislation, in which we identify eventual flaws and inconsistencies and offer concrete recommendations based on "international best practices"' (FIAS, 2006, p. 20). Officials also use best practice to describe their work: 'I think the value added of the World Bank is that we work all around the world […] so we can get all these good practices that have been working elsewhere'.[5]

The initial best practice template was the 1992 Guidelines, mentioned above. Poulsen (2015, p. 79), writing about the 1990s, argues that FIAS's 'main policy was to focus on enshrining the World Bank Guidelines into domestic laws'. Since then, the Guidelines have been extended into a longer handbook. The current FIAS template, the 2010 *Investment Law Reform Handbook*, states:

> Good practice is for the investment code to recognize/guarantee that disputes arising in connection with investment […] will be settled promptly through consultations and negotiations between the parties to the dispute, or through procedures for arbitration in accordance with the host country's international commitments or through other arbitration procedures acceptable to both parties. It is not advisable to include in the provision a mandatory period of negotiations before filing for arbitration (FIAS, 2010, p. 53).

The *Handbook* urges governments to provide access to arbitration. In interviews, FIAS officials provided further explanation, which was consistent with the *Handbook*:

[5] Interview, FIAS A, 2019.

> To put things in perspective I think we advocate for ISDS [investor-state dispute settlement] as a good international practice. Also to ensure alignment with IIAs [international investment agreements].[6]

> I think the broad idea regarding investor rights is to ensure [the law] either gives rights that are higher than those […] already available in IIAs or BITs [bilateral investment treaties], or to match them. That is the core message from our side. […] We say that it is always better to have your domestic law in alignment with your international laws that you have already accepted like 15–20 years ago in the form of a BIT.[7]

We are not arguing that FIAS officials instruct national officials to insert access to arbitration in their domestic laws; rather, that their framing of arbitration influences how national officials see it. National officials are likely to conclude that providing arbitration access is best practice and that its benefits will likely outweigh the risks. In fact, FIAS officials report that they often have to reassure states that are afraid of arbitration cases: 'we have to tell them that states have won more times in ISDS cases than have private investors.'[8] This leads to our hypothesis: *Receiving technical assistance on investment law reform from FIAS increases the probability that a state will consent to arbitration in its domestic investment laws.*

If our hypothesis is supported, we will observe a relationship between governments receiving advice from FIAS and laws that mention arbitration, across a range of countries. Yet, how do we know that governments receive technical assistance first, and then start remaking their investment laws? In the sections below, we explore possible selection effects and sequencing.

---

[6] Interview, FIAS A, 2019.
[7] Interview, FIAS B, 2019.
[8] Interview, FIAS B, 2019.

Selection: Who Asks for Technical Assistance?

Formally, governments must ask FIAS to provide technical assistance. This leads to concerns about endogeneity and selection bias. Have governments already decided to embark on reforms to their investment laws when they ask FIAS for assistance?

Our interviews with FIAS officials and country officials suggest that FIAS technical assistance missions are initiated for a variety of reasons, most of which do not relate to the government's willingness to undertake policy change in hopes of attracting foreign investment. In other words, countries rarely self-select into assistance; they are selected because the World Bank is operating other projects there or because a donor suggests funding a project in that country. In fact, we have not been able to identify a single instance in which a government started work on a new domestic investment law and then asked FIAS for assistance.

In practice, the idea for FIAS assistance emerges externally, often through suggestions by officials in other arms of the World Bank Group. As one official put it:

> We have other [World Bank] teams that are working on these areas, and then they say [to the government], 'Well now you have addressed this, you have to address the broader investment climate aspects, to ensure that you get the maximum benefit', and they refer us. The country makes the decisions though, to engage us.[9]

World Bank country offices also provide information to governments about the technical assistance services that the World Bank Group can provide:

> The approach is, or should be, demand-driven and not supply-driven. However, of course, as I mentioned, the World Bank has local offices all around the world. And these local offices, their work is to keep our relationship with the government. They produce reports and analysis, they go to meetings with the government, to workshops

[9] Interview, FIAS B, 2019.

> […] so the government, whenever they feel they need assistance on something, they can reach out to the World Bank colleagues in the region.[10]

Capacity-constrained governments face a complicated landscape with many donor agencies, IOs, and other actors; they are not necessarily aware of FIAS. World Bank country offices advertise or remind governments of available technical assistance. Moreover, FIAS advisory missions often overlap with World Bank lending operations. These countries do not embark on investment law reform and then contact FIAS; the assistance emerges as part of larger World Bank operations.

FIAS advisers are often invited to countries shortly after the end of armed conflict or in the early years after independence, as part of larger World Bank and donor programs in those countries. For instance, Sierra Leone's civil war raged until 2002, and by 2003, FIAS advisers were in-country. Similarly, FIAS began advisory work in Timor-Leste immediately after independence from Indonesia was restored in 2002 (See Table 1). FIAS strategy documents state that its 'priority clients' are 'fragile and conflict-affected situations, low-income countries, and Sub-Saharan Africa' (FIAS, 2014, p. 7).

Donors can also influence which countries receive assistance. FIAS is donor-funded and some donors earmark which countries they want the money to be used for; donors may even allocate funds for specific types of technical assistance, including FIAS investment law reform work. An official gave the following hypothetical example: 'They say I allocate 40 percent of this project to business regulations, and then I allocate 20 percent to investment policy and then another 30 percent to sectors'.[11] This

---

[10] Interview, FIAS A, 2019.
[11] Interview, FIAS B, 2019.

is further evidence that although governments do formally invite FIAS to provide assistance, the impetus for investment law reform often does not come from them.

The countries that receive FIAS assistance are characterized by capacity constraints that make robust scrutiny of an IO template less likely. Broome and Seabrooke (2015, pp. 960–1) observe that states differ along two dimensions, policy capacity, defined as the ability to implement a policy, and policy space, defined as the range of thinkable policy options. These dimensions create four types of states: (I) lower-capacity rogue states, (II) lower-capacity states that are ‘eager to embrace global “best practice” policies without the capacity to adapt them to the local environment’, (III) higher-capacity states innovating policies, and (IV) higher-capacity states involved in IO trainings (Broome and Seabrooke 2015, p. 961). When asymmetric diffusion occurs, the IO templates should appear most frequently (and perhaps only) in this second type of state, defined by eagerness to implement best practice and by capacity constraints that make scrutiny or adaptation less likely.

Sequence: Technical Assistance as a Process

We conceptualize technical assistance as a process; international actors bring with them a template of best practices, which are transmitted and translated in an iterative relationship.

FIAS projects on domestic law reform begin with the project being funded and an external consultant and local lawyer being hired. External consultants are often former ambassadors or retired trade negotiators, or they have worked for international organizations.[12] These consultants often work for FIAS repeatedly, and may work on drafting domestic investment laws in several countries.[13] The consultant and possibly

[12] Interview, FIAS B, 2019.
[13] Interview, Kyrgyz B, 2019.

FIAS officials travel to the country for initial scoping exercises. There is a related diagnostic stage in which FIAS officials or consultants review relevant national laws, administrative processes, and investment treaties agreed by the country. One official described this stage succinctly: 'We review the law up against best practices'.[14] Then there are consultations with 'stakeholders in the private and public sectors, to identify issues in the legal framework and build reform consensus'.[15]

The local lawyer usually writes the first draft of the new investment law, using the *Investment Law Reform Handbook* as a template as well as example clauses suggested by FIAS. Then, a draft of the law is sent to FIAS in Washington; FIAS reviews it and provides comments. FIAS officials emphasized that they do not write laws at any point, but they do provide detailed comments whenever there is a draft.[16]

In many governments, a working group is set up to discuss a new investment law. The timing, mandate, and composition of working groups vary, but international actors often participate. When FIAS is involved, the external consultant and local lawyer will participate. Officials from other IOs may participate, as well as representatives of foreign firms or industry groups, foreign law firms, and aid agency officials. For instance, the working group that drafted Kosovo's investment law (which did not include FIAS, because Kosovo is not a World Bank member) included representatives from the American aid agency USAID, the American Chamber of Commerce, and the Kosovo Chamber of Commerce.[17] When FIAS is involved, the working group may send drafts of the law to FIAS in Washington for review. FIAS

---

[14] Interview, FIAS B, 2019.
[15] Interview, FIAS B, 2019.
[16] Interview, FIAS A, 2019; Interview, FIAS B, 2019.
[17] Kosovo official, personal communication, December 19, 2018.

Annual Reports frequently report providing comments to a government in multiple years when a new investment law is being drafted.

The final step in most countries is parliamentary review and debate. Even in this step, external actors may have influence. For instance, the Bosnian investment law was preceded by a letter from the United Nations High Representative, who noted that the House of Representatives had 'removed the Draft Law from the proposed agenda' but that *he* believed doing so was 'against the best interest of Bosnia and Herzegovina'. Therefore, he wrote, 'I have decided to put into force the Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina'.[18] This extreme case is a reminder that FIAS and other providers of technical assistance often work in contexts in which domestic deliberation may be limited or curtailed.

Alternative Explanations

With one exception (Poulsen, 2015), existing research on domestic investment laws is limited to policy reviews of state practices (UNCTAD, 2016; Bonnitcha, 2017) and legal analysis (Parra, 1997; Caron, 2010; Potestà, 2011; Hepburn, 2018). Yet many of the arguments advanced to explain why governments sign investment treaties with arbitration clauses may be relevant for why governments enact domestic investment laws with the same arbitration provisions. Therefore, we review three explanations for why governments sign investment treaties with arbitration provisions.

The first explanation is that developing countries are engaged in a rational competition for capital, and governments provide access to arbitration in order to increase the credibility of their commitments to investors and to compensate for weak

[18] Letter from Carlos Westendorp, High Representative for Bosnia and Herzegovina, to Slobodan Bijelic and Avdo Campara, 'Decision imposing the Draft Law on the Policy of Foreign Direct Investment in BiH', 3 May 1998.

institutions (Guzman, 1998; Elkins, Guzman, & Simmons, 2006). If this explanation applies in the context of domestic investment laws, we should see a correlation between lower-quality domestic institutions and laws with arbitration access.

The second major explanation is power-based. Allee and Peinhardt (2014) find that access to arbitration in a bilateral treaty is determined by the degree of power asymmetry between the bargaining states. Since domestic laws do not emerge in bilateral bargaining contexts, we adapt this argument and identify two possible sources of coercion in domestic law drafting.

First, IOs may exert coercive influence. Gwynn (2016) argues that the structural power exercised by IOs is important to understand the spread of investor-state arbitration. We operationalize this type of coercive influence with explicit conditionality. If a new domestic investment law is a condition that must be met for a loan or loan disbursement from the World Bank, then coercion is at work. If we find a link between World Bank lending and domestic laws with arbitration, that would suggest our explanation needs to be revised for a more coercive one.

Second, foreign firms or other states may exert pressure on governments to change their laws. Some scholars find evidence that home states are lobbied by domestic firms who seek arbitration access (Allee & Peinhardt, 2014; Maurer, 2013; Wellhausen, 2015) while others find less evidence of lobbying (Gertz, 2018; Poulsen, 2015; St John, 2018). We think that if firms lobby their host governments for access to arbitration, they are more likely to lobby for access to be written into their contracts. This is much easier than pushing for an overhaul of domestic legislation. Similarly, if another state seeks access to arbitration for their investors, they are likely to negotiate a treaty instead of pushing for new domestic legislation. Nevertheless, if this explanation

is accurate, we should see a correlation between smaller markets and laws with arbitration access.

At first glance, these two alternate explanations, credible commitments and coercion, seem to have limited explanatory value regarding domestic investment laws. Figure 1 shows the distribution of states that have mentioned to arbitration in their domestic investment laws and those that have not, sorted on the quality of their domestic property rights institutions and their market size.[19] While it is striking that no OECD state has ever mentioned arbitration in its domestic laws, the countries that *have* consented to arbitration are not clustered in any obvious way, when ordered on these two dimensions.

[Figure 1 here]

The third major explanation focuses on officials' perceptions of investment treaties. Poulsen (2015) argues that government officials initially underestimated the costs and overestimated the benefits of investment treaties. Jandhyala, Henisz, & Mansfield (2011) argue that how government officials perceive treaties with arbitration changes over time. While in earlier decades officials signed investment treaties in hopes of attracting investment, by the 1990s, officials signed investment treaties because they had become an accepted norm.

We focus on the dynamic aspect of these explanations, that government officials can learn about investor-state arbitration and change their views over time. Poulsen and Aisbett (2013) show that once governments face their first investor-state arbitration claim, their propensity to sign investment treaties decreases significantly. If this

[19] To measure property rights institutions, we use the Property rights index from the Varieties of Democracy data project (Coppedge *et al.*, 2018, p. 237). For the GDP data, see Section 3. We use the average values for each variable over the period 1986–2015.

explanation applies to domestic investment laws, we should see a correlation between fewer treaties or fewer arbitration claims faced, and laws with arbitration clauses.

In our analysis, we include indicators that capture each of these alternative explanations. To account for domestic institutions, we use measures that capture the quality of regulatory agencies and of government accountability; to account for potential coercion, we use World Bank lending data and measures of states' overall market size; and to account for potential learning effects, we use measures of actual exposure to arbitration. We comment on the independent effect of all these variables, but our primary interest is the explanatory value of FIAS technical assistance.

Research design and analysis

Quantitative analysis – establishing a link between FIAS and arbitration clauses

Dependent variable: arbitration clauses in domestic investment laws

Our dependent variable is the time until adoption of a domestic investment law with access to arbitration, measured in days. We observe all World Bank member states, starting in 1986 when FIAS was established, or later if they joined the World Bank after 1986. Our event of interest is the passage of a domestic investment law with an arbitration clause.

We use two operationalizations: (I) laws that *mention* international arbitration at any arbitral fora, and (II) laws we are reasonably certain that tribunals would interpret as providing *consent and direct access* to arbitration, based on published legal interpretations and previous tribunal decisions on jurisdiction. All laws coded in category (II) will necessarily also be in category (I). The first measure is straightforward and replicable. The second is more meaningful because it attempts to isolate if a

government thought it was providing foreign investors with access to arbitration, but it is also more subjective. We discuss both operationalizations in Appendix A, including the legal scholarship and decisions we used to code category (II).[20]

Within our sample period (1986–2015), we identify 74 laws coming into force that mention international arbitration, of which 42 laws are coded as providing probable consent to arbitration at some point in time.[21] Figure 2 shows these developments over time.

[Figure 2 here]

Independent Variable: FIAS advice on reforming domestic investment laws

Our independent variable is a binary measure of the in-country presence of FIAS technical advisory missions. We coded the presence of a FIAS mission, using FIAS's annual reports, which list all advisory projects finalized in any given year.[22] The annual reports distinguish different types of advisory activity, which enables us to single out FIAS projects that gave advice on domestic investment laws. Since drafting and implementing legislation is a process that can take years, we employ two versions of our independent variable. The first measures whether FIAS finalized a project on that

---

[20] Appendix A reproduces the dispute resolution clause of each law we coded, with an explanation of our coding and the sources used.

[21] A few countries have domestic investment laws with arbitration clauses that came into force before 1986: Egypt (1974), Sri Lanka (1978) and the Republic of the Congo (1982). As discussed in Appendix A, we exclude these countries from our sample, even though we have anecdotal evidence connecting these provisions to the presence of external advisers, including World Bank officials. To the best of our knowledge, Egypt's law is the first investment law that provides consent to investor–state arbitration, but Fatouros (1962, p. 186–187) mentions that a handful of national petroleum laws included provisions on arbitration and notes a 1953 Greek law that outlines a procedure for investor–state arbitration.

[22] We used FIAS's annual reports to identify technical assistance missions going back to 1999, and an internal evaluation of FIAS's first 13 years of operation to identify technical assistance missions from 1986 to 1998 (World Bank, 1995; World Bank, 2004, pp. 33–36). The annual reports are available through the World Bank's document portal, for instance (World Bank, 2000b, 2001). Interviews with FIAS officials confirmed that *all* projects are listed in their annual reports (Interview, FIAS A, 2019; Interview, FIAS B, 2019).

country's investment law in any of the previous three years, and the second, in any of the previous five years. So, when FIAS reports to have concluded an advisory project on domestic legal reform in Afghanistan in 2004, the first version of our variable is coded as 1 from 2004–2006, while the second version is coded as 1 for 2004–2008.

Figure 3 shows the distribution of completed FIAS advisory projects on domestic investment laws over time. The peak of advisory activity occurred in the late 1990s, with 18 reform projects on domestic investment laws completed in 1998 and 13 projects in 2000. While the number of projects fluctuates, FIAS's advice to states has remained consistent over time: providing access to arbitration in domestic law is best practice.

[Figure 3 here]

Analysis

Before we present the results from our event history analysis, we present the bivariate link between FIAS technical assistance and arbitration clauses in domestic investment laws. Table 1 lists all countries that have received FIAS technical advice or passed an investment law that mentions or consents to arbitration between 1986 and 2015.[23]

The link between FIAS and investment-law-making is striking. Of the 74 World Bank member states that have passed an investment law mentioning or consenting to arbitration after 1986, 30 countries received investment law advice from FIAS prior to passing the law (grey rows). For the large majority of these countries (27 of 30), it took less than three years from FIAS's previous advisory project until they passed their investment laws. Moreover, almost 50 percent (30/65) of the states that received

[23] Table 1 shows a subset of the states we observe in our analysis, which includes all World Bank member states except the four that provided consent prior to 1986, as discussed in Appendix A.

investment law advice from FIAS included arbitration in their laws. That is remarkably high, given the potential for domestic opposition to arbitration clauses and given the administrative and political hurdles to passing legislation.

[Table 1 here]

Since our dependent variable is measured as time until law adoption, and many of the country spells we observe are right-censored (i.e., the country in question never mentioned or consented to arbitration in a domestic investment law), we use event history analysis (Box-Steffensmeier & Jones, 2004). Event history models estimate hazard rates, defined as the rate of occurrence of an event – in our case mention of or consent to arbitration – which is appropriate for making inferences about the duration of events in the face of right-censoring.

Moreover, using the event history framework is a good estimation strategy to incorporate time dependence in analyses of law adoption or diffusion (Strang, 1991). We estimate semi-parametric Cox proportional hazard models that leave the duration dependence unspecified, because we have no assumptions about the shape of the time baseline hazard (Box-Steffensmeier & Jones, 2004, p. 47), and because faulty specification of duration-dependency can bias inferences (Golub, 2008). The Cox model assumes that the effects of covariates do not vary with time (the proportional hazard assumption). Tests indicate that none of the covariates in our models violate this assumption.[24]

Our analysis begins in 1986, the year FIAS became operational within the World Bank, and includes investment laws passed until 2015. Our unit of analysis is country-year, and we observe all World Bank member states (except the three countries that

[24] We used Schoenfeld residuals (*stphtest* in STATA) to test the proportionality for each covariate.

passed domestic laws with arbitration clauses before 1986). Countries exit our sample on the day they pass a domestic investment law with an arbitration clause.[25] For countries that passed multiple laws between 1986 and 2015, we let them exit on the day they passed their first law with an arbitration clause. All models are estimated using robust standard errors clustered on countries and using the Efron method for handling tied events (Hertz-Picciotto & Rockhill, 1997).

As discussed in the alternative explanations section, there are other explanations for why states include arbitration clauses in their domestic laws. Some of these factors may also confound the relationship between FIAS advice and domestic investment laws.

First, because we expect countries with well-developed domestic institutions to be less likely both to seek technical assistance from FIAS and to enact domestic investment laws, we use the Rigorous and impartial public administration variable from the Varieties of Democracy (V-Dem) data project (Coppedge *et al.*, 2018, p. 159) to control for the quality of regulatory agencies. For similar reasons, we control for the strength of civil society and general government accountability. We use the Accountability index from V-Dem, which captures civil society's and the media's oversight over government processes, as well as vertical and horizontal checks on the executive (Coppedge *et al.*, 2018, pp. 223–224).

To control for the fact that larger, more developed economies should be less likely to solicit technical assistance from the World Bank and less likely to give foreign investors preferential treatment, we control for countries' market size (using the log of

[25] For laws where we have not found records of the exact date of passage, we use the year midpoint, July 1.

GDP) and level of development (using the log of GDP per capita).[26] Since newly independent countries and post-conflict countries are more likely both to seek technical assistance and to adapt their legislation to facilitate inflows of private capital, we introduce two controls: the log of the number of years since a country became independent,[27] and the log of regime durability.[28] To control for the learning effect associated with facing arbitration claims, we control for the cumulative number of arbitration claims a state has faced, and the cumulative number of investment agreements with arbitration clauses that a state has signed.[29] To control for the fact that enacting investment laws might be linked to structural power or coercion from the World Bank, we control for the log of annual International Bank for Reconstruction and Development (IBRD) loans.[30] Summary statistics for all variables, including bivariate correlations between the independent variables, are reported in Appendix B.

[Table 2 here]

A series of Cox regression models using our two dependent variables are presented in Table 2. Estimates are reported as hazard rates. A hazard rate of greater than one represents a positive effect on the odds of a country adopting a domestic law with arbitration, and a hazard rate of less than one represents a negative effect. Models

[26] These data are taken from the International Political Economy Data Resource (Graham & Tucker, 2019), who use Penn World Tables data to supplement missing values in the World Bank's economic data. See: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/X093TV.

[27] We used The World Factbook from the Central Intelligence Agency to identify year of independence. See: https://www.cia.gov/library/publications/resources/the-world-factbook/.

[28] To measure regime durability, we use data on the number of years since the most recent regime change from the Polity IV Project (Marshall, Gurr, & Jaggers, 2018, p. 17).

[29] We compute the cumulative count of arbitration cases and investment agreements by using the list of publicly known claims and agreements available on UNCTAD's investment policy hub, see: https://investmentpolicyhub.unctad.org. UNCTAD's IIA content mapping allows us to exclude agreements without arbitration clauses from our count.

[30] These data are taken from the World Bank's World Development Indicators. See: https://datacatalog.worldbank.org/dataset/world-development-indicators.

1–3 use time-to-mention of arbitration in domestic laws as their dependent variable, and models 4–6 use time-to-consent to arbitration.

Models 1 and 4 include only the control variable set. When looking at the effect of the variables that capture the three alternative explanations for arbitration clauses in these two models, only the two learning variables – the cumulative count of arbitration claims (model 1) and the cumulative count of investment agreements (models 4–6) – seem to be linked with the adoption rate of domestic laws with arbitration. Increases in both variables (more cases; more agreements) are associated with a decrease in the rate of law adoption. Variables related to the quality of domestic institutions (regulatory agencies; accountability) and IO coercion (market size; IBRD loans) have no independent effect on the adoption of domestic investment laws with access to arbitration.

When looking at the effects of FIAS technical assistance, the results are unequivocal. Receiving technical assistance on domestic investment law reform is strongly and significantly associated with an increase in the adoption rate of domestic investment laws that mention or consent to arbitration. Holding all other variables constant, moving from not receiving FIAS advice on domestic legal reform to receiving FIAS advice increases the rate of adoption of laws with arbitration clauses by between 650 and 800 percent. Interestingly, the effect of FIAS advice is strongest regarding laws that consent to arbitration.

[Figure 4 and 5 here]

Figures 4 and 5 illustrate this relationship by comparing the survivor functions for countries that have received FIAS advice on domestic legal reform in one of the previous 3 years with those that have not, while holding all other variables at their means. The diverging lines show the probability that a country in our sample that passed

a domestic investment law mentioning or consenting to arbitration is markedly different for those states that received FIAS advice.

We conduct a series of robustness checks, including controlling for additional confounders, conducting placebo tests, trying alternative estimation methods, and running sensitivity tests. These robustness checks are described in Appendix C. The general tendency is that our results are robust to a broad range of checks.

Qualitative analysis – the Kyrgyz Republic's 2003 Investment Law

We conducted one case study to illustrate our hypothesis. Since our purpose was confirmatory or illustrative, we selected a typical case (Seawright & Gerring, 2008, p. 297). A typical case is 'well explained by an existing model' and is used to better explore the causal mechanisms at work in the theorized relationship (Seawright & Gerring, 2008, p. 299). A number of cases are well explained by our model; Table 1 above lists 23 countries that passed a new law providing consent to arbitration within two years of receiving FIAS advice. Any of those countries could have been selected as typical cases. We selected the Kyrgyz Republic, which received technical assistance from FIAS in 1998, 1999, and 2001, and then passed an investment law with consent to arbitration in 2003.

Context

As we would expect of a typical case, the Kyrgyz government had low bureaucratic capacity, weak property rights institutions, and little experience dealing with foreign investors when this investment law was drafted. As the World Bank Country Assistance Strategy put it: 'Investment levels are low, and foreign investors are scarce. The Government is still establishing the institutional capacity to deal with the rapid changes in legislation that have been enacted to create a market economy' (World Bank, 1998, p.

1). The 1990s and 2000s were a period of political instability; the constitution was significantly reworked or rewritten nine times between 1993 and 2010 (Liebert & Tiulegenov, 2013, p. 71). Internal World Bank documents describing the Kyrgyz government in the 1990s mention insufficient bureaucratic capacity consistently:

> These delays are mainly attributable to the inexperience of the agencies involved and inadequate institutional capacity (World Bank, 1998 Annex B8 Attachment, p. 2).

> The [Kyrgyz Republic], as a newly independent country, was struggling to formulate a reform program with limited policymaking capacity, weak and inappropriate institutions, and little exposure to international institutions or the ways of market economies (World Bank, 2000a, p. 4).

Poorer and smaller than its Central Asian neighbors, the Kyrgyz Republic joined the World Trade Organization (WTO) in 1998 and Kyrgyz governments in this era were generally eager to implement market reforms.

Involvement of External Actors in Investment Policy Generally

External actors, including donor agencies and IOs, were heavily involved in the Kyrgyz Republic when this law was drafted. The World Bank played a particularly important role. The only major foreign investment in the Kyrgyz Republic at the time was the investment made in the Kumtor gold mine, which was insured by the World Bank's insurance arm (World Bank, 1998, p. 17). The World Bank's International Finance Corporation also provided a US$30 million loan for the mine (World Bank, 1998 Annex B8, p. 2). The Kumtor mine was run by a Canadian company, but the project was mediated by World Bank officials (World Bank, 1998 Private Sector Assessment, p. 6).

The World Bank and the American aid agency USAID were early providers of technical assistance for legal reform related to foreign investment (World Bank, 2000a,

p. 12). By 1998, other donors had joined them in working on reforming the investment climate in the Kyrgyz Republic, including the International Monetary Fund, the European Bank for Reconstruction and Development, Germany, Japan, and Switzerland (World Bank, 1998, p. 18). Many donors provided technical assistance related to drafting legislation (World Bank, 2009, p. 18). Fifty-five percent of all bills under consideration in the spring of 1998 were formulated by IOs or other technical assistance providers, a figure that rises to 65% in economic policy (Cooley and Ron, 2002, p. 19).

The Kyrgyz Republic's first investment law, passed in 1997, was drafted with considerable World Bank and USAID support. The enactment of this 1997 law was listed as a 'main achievement' in the World Bank report on a loan to the Kyrgyz Republic (World Bank, 1998 Annex B1, p. 4). This 1997 law does not include arbitration access.

The FIAS Project

The first formal FIAS mission on domestic law reform to the Kyrgyz Republic was undertaken in 1998. The FIAS project was initiated as part of the wider World Bank country assistance strategy for the Kyrgyz Republic, which included an adjustment credit 'to improve the environment for private sector investment', and noted that FIAS, along with two other World Bank agencies, would 'be active participants in formulating the policies' for this improvement (World Bank, 1998, p. ii). The formal invitation to FIAS advisers came from the State Committee on Foreign Investments (GOSKOMINVEST), which itself was created via technical assistance under the 1993–1996 World Bank loan (World Bank, 2000a, p. 4).

In 1998, FIAS officials undertook diagnostic exercises and consultations. The working group within GOSKOMINVEST that would be responsible for drafting the law

was created then.[31] To evaluate our alternative explanations, we probed if other actors advocated for arbitration in the law, but did not find evidence of that. Mining companies were the main foreign investors interested in the Kyrgyz Republic, and even World Bank documents note that these companies sought to negotiate contracts with the government instead of relying on the domestic law, for instance: 'many mining investors will still seek to negotiate separate investment agreements with the authorities, which can provide for better investment terms' (World Bank, 1998, p. 6).

The investment law was drafted and considered in parallel to a Law on Arbitration Courts, which is 'mostly based on the UNCITRAL Model Law' (Korobeinikov, 2017, p. 275). This demonstrates that an international template coming into the Kyrgyz Republic and being translated into domestic law was an established practice. Kyrgyz actors pointed out that international templates are not copied and pasted wholesale, and other models, such as Russian and Kazakh laws, are also often looked at, as well as older laws.[32] Similarly, Kyrgyz actors note that foreign advisers 'don't overpower' locals and that there is often contestation in working groups, but it does not take the form of 'foreign institutions pressuring and locals resisting', rather that the splits usually depend on whose ministries or jobs will be affected by the new law.[33] Yet this same individual noted that sometimes there are not splits within the Kyrgyz government. When asked to describe who would be for or against including arbitration in the law, they answered: 'I think the government did not deliberate much in 2003, we didn't have any cases. If we had, all of the Kyrgyz government would have been against it.'[34]

---

[31] Kyrgyz official, Interview A, 2019.
[32] Kyrgyz official, Interview B, 2019.
[33] Kyrgyz official, Interview B, 2019.
[34] Kyrgyz official, Interview B, 2019.

By 2000, there was an initial draft of the law, which FIAS officials reviewed (World Bank, 2000b). In 2001, FIAS officials undertook a third review, and provided comments on the latest draft (World Bank, 2001). The comments that FIAS provides are confidential, but based on the publicly available *Handbook*.

Pending World Bank Loan

The investment law passed in March 2003, just before the approval of a large concessional loan from the World Bank. The loan was approved May 15, 2003 and the first tranche of this loan was released July 31, after being delayed because the Kyrgyz Republic had not yet met the policy conditions for disbursement (World Bank, 2009, p. 4). This timing, and Kyrgyz officials' preparing progress reports on their implementation of 'legislative action plans' and timetables 'for further legal reform actions, satisfactory to [the World Bank]' at this time, suggest a role for structural power or coercion (World Bank, 2000a Annex D, p. 36). The World Bank was undoubtedly in a commanding position, but there was no formal conditionality: a new investment law was not one of the conditions the Kyrgyz government had to meet for the loan to be released (World Bank, 2009, p. 5). In contrast, passing other laws based on international templates were formal conditions for the loan, for instance, a procurement law based on an UNCITRAL model law (World Bank, 2009, p. 5). Since passing an investment law was not a formal condition for the loan, our alternative explanation about coercion does not hold.

Legislative Approval and Subsequent Events

In the late 1990s, World Bank officials started providing training for Kyrgyz parliamentarians about how to prepare and implement legislation related to World Bank work (World Bank, 1998, p. 16). Training for parliamentarians was seen as an important

way of addressing a widespread perception that 'neither the citizenry at large nor the Parliament in particular have been well informed about, much less feel themselves to be stakeholders in, the reform process' (World Bank, 2000a, p. 25). Procedurally, the Parliament (*Jogorku Kenesh*) must review draft laws multiple times, yet often falls short of robust scrutiny: 'by law they have to review, scrutinize and question the drafters. But often they do not, either because they are not interested or because they do not have enough time or capacity to do the full research'.[35]

Yet the Parliament was capable of unpicking or frustrating certain aspects of laws drafted with heavy World Bank involvement, when it sought to do so (Cooley and Ron 2002, p. 21–36). An internal World Bank document reports: 'The Parliament, which has passed an impressive body of market-oriented legislation, has on occasion undone key provisions through subsequent amendments' (World Bank, 1998, p. 4). That did not happen with the investment law, which was adopted in March 2003, and is often seen as a package with the Law on Arbitration Courts and the creation of the International Arbitration Court in the Kyrgyz Republic.

This case study illustrates our mechanism: FIAS technical assistance introduced a domestic law template with consent to arbitration. While there was no coercion from the World Bank, there was strong external involvement and little domestic deliberation. Since 2003, the Kyrgyz Republic has been a respondent in 14 known arbitration cases, and in at least five of these cases, the jurisdictional claim was based on the 2003 investment law.[36]

---

[35] Kyrgyz official, Interview B, 2019.

[36] *Sistem v. Kyrgyzstan* (2006); *Nadel. v. Kyrgyzstan* (2012); *Levitis v. Kyrgyzstan* (2012); *Stans Energy v. Kyrgyzstan* (II) (2015); and, *Consolidated Exploration v. Kyrgyzstan* (2013).

Conclusion

In this paper, we examine IO analytic institutions and the asymmetric diffusion of best practice. We focus on including arbitration in domestic law, a policy defined as best practice by the World Bank but only recommended to a subset of states. We find that FIAS technical assistance is an exceptionally strong predictor of arbitration clauses in domestic investment laws. We are relatively confident that there is a causal link between receiving FIAS technical assistance and consenting to arbitration in domestic investment laws. Our interviewees alleviated our endogeneity concerns and the strong relationship we found between FIAS involvement and arbitration clauses in domestic laws is robust to controlling for wider IO or donor community involvement and lending. Our placebo tests and the specificity of our findings increases our confidence in a causal link.

We see implications from these findings for scholars and for practitioners. Our interviews and findings suggest the drafting of these domestic laws is a strategic context permeated by international actors. Future research could probe how other types of international actors, including aid agencies, business associations, and foreign law firms, are involved in domestic investment law–making processes. In particular, analyzing technical assistance provided by national aid agencies, typically under the heading of commercial law reform, may help to explain investment laws with arbitration in countries that did not receive FIAS advice. Even in the cases we do not explain here, we think it is likely that governments were prompted by external actors to provide arbitration consent. Of all the available policies to encourage investment, arbitration in domestic law is an odd, little-known choice, unlikely to appeal within governments (as the interviewee quoted earlier noted, 'If we had [deliberated it], all of the Kyrgyz government would have been against it').

Our findings also have implications for practitioners. Domestic investment laws have not featured much in discussions about the backlash against investor-state arbitration, or how it might be reformed. Yet, after arbitration cases, several governments have rewritten their domestic investment laws to remove access to arbitration, including El Salvador and Egypt, as discussed in Appendix A. The increasing salience of investor-state arbitration means that recommendations to provide consent in domestic laws may trigger internal and external contestation. For instance, after Myanmar received advice from FIAS, drafts of a new law that included consent to arbitration were circulated for consultation; at that point, the consent provisions were contested, and eventually removed.[37] Despite these examples, there is still a disconnect: recommending arbitration in domestic investment laws is out of step with current government discussions in multilateral fora, which focus on replacing investor-state arbitration or undertaking systemic reform. FIAS could revisit its guidance on inserting arbitration into domestic laws in light of growing evidence about the costs and benefits of investor-state arbitration.

Our findings also have an implication for arbitrators who interpret these laws. Currently, if a domestic investment law is unclear, then 'arbitral practice, if anything, appears to incline toward a liberal interpretation' (Caron, 2010, p. 673). A liberal interpretation asserts that a government intended to give foreign investors consent to arbitration, if there is unclear language. Some arbitrators, like Caron, argue that a liberal interpretation is appropriate because of assumptions they make about 'the circumstances of a reasoned, debated, public law' (Caron, 2010, p. 674). In this paper, we find that

[37] We are grateful to Jonathan Bonnitcha for discussing this with us.

many domestic investment laws are drafted with heavy external input and relatively little deliberation, which suggests these assumptions need to be revisited.

Disclosure statement

No potential conflict of interests are reported by the authors.

Funding

Support for this project comes from the Research Council of Norway through its Centres of Excellence funding scheme, project number 223274 and through the FRIPRO scheme, project number 276009.

Acknowledgements

For constructive comments on earlier versions, we would like to thank Jonathan Bonnitcha, Julia Calvert, Ole Kristian Fauchald, Geoffrey Gertz, Yoram Haftel, Carl Henrik Knutsen, Mikael Rask Madsen, Daniel Naurin, Øyvind Stiansen, Henning Tamm, Kyla Tienhaara, Zoe Williams, as well as the anonymous reviewers. We thank Stein Arne Brekke, Hyewon Han, Karin Maria Svånå, and Maxim Usynin for excellent research assistance. Previous versions of the paper were presented at the LEGINVEST conference (2019), the International Studies Association Annual Conference (2019), at PluriCourts and at the Department of Political Science at the University of Oslo.

Notes on contributors

Tarald Laudal Berge is a PhD candidate in Political Science at the University of Oslo. His research examines power dynamics and state capacity in the investment treaty regime.

Taylor St John is a Lecturer in International Relations at the University of St Andrews. Her monograph, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences*, was published in 2018.

References

Allee, T., & Peinhardt, C. (2014). Evaluating three explanations for the design of bilateral investment treaties. *World Politics*, *66*(1), 47–87.

Barnett, M., & Finnemore, M. (2004). *Rules for the world: International organizations in global politics*. Ithaca: Cornell University Press.

Berge, T. L., & Berger, A. (2019). Does investor–state dispute settlement lead to regulatory chill of domestic environmental regulation? The role of respondent state capacity. Paper presented at the 2019 Political Economy of International Organizations Annual Conference.

Best, J. (2017). The rise of measurement-driven governance: The case of international development. *Global Governance*, *23*(2), 163–181.

Betz, T., & Pond, A. (2019). Foreign financing and the international sources of property rights. *World Politics*, *71*(3), 1–39.

Block-Lieb, S., & Halliday, T. C. (2017). *Global lawmakers: International organizations in the crafting of world markets.* Cambridge: Cambridge University Press.

Bonnitcha, J. (2017). Investment laws of ASEAN countries: A comparative review. Report written for the International Institute for Sustainable Development (IISD).

Bonnitcha, J., Poulsen, L. N. S., & Waibel, M. (2017). *The political economy of the investment treaty regime*. Oxford: Oxford University Press.

Box-Steffensmeier, J. M., & Jones, B. S. (2004). *Event history modelling: A guide for social scientists*. Cambridge: Cambridge University Press.

Broome, A., Homolar, A., & Kranke, M. (2018). Bad science: International organizations and the indirect power of global benchmarking. *European Journal of International Relations*, *24*(3), 514–539.

Broome, A., & Quirk, J. (2015). Governing the world at a distance: The practice of global benchmarking. *Review of International Studies*, *41*, 819–841.

Broome, A., & Seabrooke, L. (2007). Seeing like the IMF: Institutional change in small open economies. *Review of International Political Economy*, *14*(4), 576–601.

Broome, A., & Seabrooke, L. (2012). Seeing like an international organisation. *New Political Economy*, *17*(1), 1–16.

Broome, A., & Seabrooke, L. (2015). Shaping policy curves: Cognitive authority in transnational capacity building. *Public Administration, 93*(4), 956–972.

Caron, D. (2010). ‘The interpretation of national foreign investment laws as unilateral acts under international law’. In M. Arsanjani, J. Cogan, R. Sloane, & S. Wiessner (Eds.), *Looking to the future: Essays on international law in honor of W. Michael Reisman*. Leiden: Martinus Nijhoff Publishers, 649–674.

Chorev, N. (2013). Restructuring neoliberalism at the World Health Organization. *Review of International Political Economy, 20*(3), 627–666.

Clegg, L. (2010). Our dream is a world full of poverty indicators: The US, the World Bank, and the power of numbers. *New Political Economy*, *15*(4), 473–492.

Cooley, A., & Ron, J. (2002) The NGO scramble: Organizational insecurity and the political economy of transnational action. *International Security, 27*(1), 5–39.

Cooley, A., & Snyder, J. (Eds.) (2015). *Ranking the world: Grading states as a tool of global governance*. Cambridge, UK: Cambridge University Press.

Coppedge, M., Gerring, J., Knutsen, C. H., Lindberg, S. I., Skaaning, S-E., Teorell, J., Altman, D., Bernhard, M., Cornell, A., Fish, M. S., Gjerløw, H., Glynn, A., Hicken, A., Krusell, J., Lührmann, A., Marquardt, K. L., McMann, K., Mechkova, V., Olin, M., Paxton, P., Pemstein, D., Seim, B., Sigman, R., Staton, J., Sundström, A., Tzelgov, A., Uberti, L., Wang, Y-T., Wig, T., & Ziblatt, D. (2018). ‘V-Dem Codebook, v8’, Varieties of Democracy (V-Dem) Project.

Davis, K., Fisher, A., Kingsbury, B., & Merry, S. E. (Eds.) (2012). *Governance by indicators: Global power through quantification and rankings*. Oxford: Oxford University Press.

Elkins, Z., Guzman, A. T., & Simmons, B. A. (2006). Competing for capital: The diffusion of bilateral investment treaties, 1960–2000. *International Organization*, *60*(4), 811–846.

Fatouros, A. A. (1962). *Government guarantees to foreign investors*. New York: Columbia University Press.

FIAS. (2006). *FIAS, the facility for investment climate advisory services: 2006 annual report*. Washington DC: World Bank.

FIAS. (2010). *Investment law reform: A handbook for development practitioners*. Washington DC: World Bank.

FIAS. (2014). *FIAS, the facility for investment climate advisory services: 2014 annual review*. Washington DC: World Bank.

Finnemore, M. (1993). International organizations as teachers of norms: The United Nations Educational, Scientific, and Cultural Organization and science policy. *International Organization*, *47*(4), 565–597.

Gertz, G. (2018). Commercial diplomacy and political risk. *International Studies Quarterly*, *62*(1), 94–107.

Golub, J. (2008). ‘Survival analysis’. In J. M. Box-Steffensmeier, H. E. Brady, & D. Collier (Eds.), *The Oxford handbook of political methodology*. Oxford: Oxford University Press.

Graham, B., & Tucker, A. T. (2019). The international political economy data resource. *Review of International Organizations, 14*(1), 149–161.

Guzman, A. T. (1998). Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties. *Virginia Journal of International Law*, *38*, 639–688.

Gwynn, M. (2016). *Power in the international investment framework*. Basingstoke: Palgrave Macmillan.

Halliday, T. C., Block-Lieb, S., & Carruthers, B. G. (2010) Rhetorical legitimation: Global scripts as strategic devices of international organizations. *Socio-Economic Review, 8*(1), 77–112.

Hepburn, J. (2018). Domestic investment statutes in international law. *American Journal of International Law*, *112*(4), 658–706.

Hertz-Picciotto, I., & Rockhill, B. (1997). Validity and efficiency of approximation methods for tied survival times in Cox regression. *Biometrics*, *53*(3), 1151–1156.

Jacoby, W. (2001). Tutors and pupils: International organizations, Central European elites, and Western models. *Governance*, *14*(2), 169–200.

Jandhyala, S., Henisz, W. J., & Mansfield, E. D. (2011). Three waves of BITs: The global diffusion of foreign investment policy. *Journal of Conflict Resolution*, *55*(6), 1047–1073.

Kelley, J., & Simmons, B. (2015). Politics by number: Indicators as social pressure in international relations. *American Journal of Political Science*, *59*(1), 55–70.

Kelley, J., & Simmons, B. (2019). Introduction: The power of global performance indicators. *International Organization, 73*(3), 491–510.

Kentikelenis, A. E., & Seabrooke, L. (2017). The politics of world polity: Script-writing in international organizations. *American Sociological Review, 82*(5), 1065–1092.

Korobeinikov, A. (2017). Kyrgyzstan, in *The Baker McKenzie international arbitration yearbook 2016–2017*. London: Baker McKenzie.

Liebert, S., & Tiulegenov, M. (2013). 'Public administration in Kyrgyzstan', in *Public administration in post-communist countries: Former Soviet Union, Central and Eastern Europe, and Mongolia*, edited by S. Liebert, S. Condrey, & D. Goncharov. London: Routledge.

Marshall, M., Gurr, T. R., & Jaggers, K. (2018). Polity IV Project. Political Regime Characteristics and Transitions, 1800–2017. Dataset Users' Manual. Center for Systemic Peace.

Maurer, N. (2013). *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893–2013*. Princeton: Princeton University Press.

Merry, S. E., Davis, K. E., & Kingsbury, B. (Eds.) (2015). *The quiet power of indicators: Measuring governance, corruption, and rule of law*. Cambridge, UK: Cambridge University Press.

Park, S., & Vetterlein, A. (2010). *Owning development: Creating policy norms in the IMF and World Bank*. Cambridge, UK: Cambridge University Press.

Parra, A. (1992). Principles Governing Foreign Investment, as Reflected in National Investment Codes. *ICSID Review*, *7*(2), 428–452.

Parra, A. (1997). Provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments on investment. *ICSID Review*, *12*(2), 287–364.

Parra, A. (2017). *The History of ICSID. Second edition*. Oxford: Oxford University Press.

Pelc, K. J. (2017). What explains the low success rate of investor-state disputes? *International Organization*, *71*(3), 559–583.

Potestà, M. (2011). The interpretation of consent to ICSID arbitration contained in domestic investment laws. *Arbitration International*, *27*(2), 149–170.

Poulsen, L. N. S. (2015). *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries*. Cambridge: Cambridge University Press.

Poulsen, L. N. S., & Aisbett, E. (2013). When the claim hits: Bilateral investment treaties and bounded rational learning. *World Politics*, *65*(2), 273–313.

Scott, J. (1998). *Seeing like a state: How certain schemes to improve the human condition have failed*. New Haven: Yale University Press.

Seabrooke, L., & Sending, O. J. (2019). Contracting development: Managerialism and consultants in intergovernmental organizations. *Review of International Political Economy,* 1–26.

Seawright, J., & Gerring, J. (2008). Case selection techniques in case study research: A menu of qualitative and quantitative options. *Political Research Quarterly*, *61*(2), 294–308.

Sharman, J. (2012). Seeing like the OECD on tax. *New Political Economy*, *17*(1), 17–33.

Shihata, I. F. I. (1991). Promotion of foreign direct investment – A general account, with particular reference to the role of the World Bank. *ICSID Review*, *6*(2), 484–509.

Shihata, I. F. I. (1993). *Legal treatment of foreign investment: The World Bank Guidelines*. London: Martinus Nijhoff.

Strang, D. (1991). Adding social structure to diffusion models: An event history framework. *Sociological Methods & Research*, *19*(3), 324–353.

St John, T. (2018). *The rise of investor-state arbitration: Politics, law and unintended consequences*. Oxford: Oxford University Press.

UNCTAD. (2016). Investment laws: A widespread tool for the promotion and regulation of foreign investment. UNCTAD Investment Policy Monitor, Special Issue, November.

Vetterlein, A. (2012). Seeing like the World Bank on poverty. *New Political Economy*, *17*(1), 35–58.

Wellhausen, R. (2015). *The shield of nationality: When governments break contracts with foreign firms*. Cambridge: Cambridge University Press.

World Bank. (1995). The World Bank and legal technical assistance: Initial lessons. Policy research working paper 1414. Washington, DC: World Bank Legal Department.

World Bank. (1998). *Memorandum of the President of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation to the Executive Directors on a joint country assistance strategy of the World Bank Group for the Kyrgyz Republic*. Washington DC: World Bank.

World Bank. (2000a). *Performance audit report: The Kyrgyz Republic Rehabilitation Credit (RC) and Privatization and Enterprise Sector Adjustment Credit (PESAC)*. Washington DC: World Bank Operations Evaluations Department.

World Bank. (2000b). *Foreign Investment Advisory Service (FIAS) program bi-annual report for FY1999 and FY2000*. Washington DC: World Bank.

World Bank. (2001). *Foreign Investment Advisory Service - FIAS - program annual report for FY2001*. Washington DC: World Bank.

World Bank. (2004). *An evaluation of World Bank investment climate activities*. Washington DC: World Bank Operations Evaluation Department.

World Bank. (2009). *Implementation completion and results report on a IDA credit to the Kyrgyz Republic for a governance structural adjustment credit*. Washington DC: World Bank Poverty Reduction and Economic Management Unit.

Table 1. World Bank member states that have received FIAS advice and/or enacted laws with an arbitration clause between 1986–2015, authors' own coding

Country	FIAS advisory mission completed	Law mentioning arbitration	Law consenting to arbitration	Time from last FIAS mission to law
Afghanistan	2004	2005	2005	1 year
Albania		1993	1993	
Algeria		1993		
Armenia	1999; 2000; 2003			
Azerbaijan	2003; 2005	1992		
Belarus		2013	2013	
Benin		1990	1990	
Bhutan	2002; 2005			
Bolivia	2002	1990		
Bosnia and Herzegovina	1998; 2015	1998		0 years
Burkina Faso		1995	1995	
Burundi		2008	2008	
Cabo Verde		1993	1993	
Cambodia	1994; 2002; 2004	1994		0 years
Cameroon		1990	1990	
Central African Republic		2001		
Chad		2008		
China	1998	1988		
Colombia		2000		
Comoros	2006			
Costa Rica	1998			
Côte d'Ivoire		1995	1995	
Dem. People's Rep. of Korea				
Dem. Rep. of the Congo	2001; 2002	2002	2002	0 years
Dominican Republic	1998			
Ecuador		1997		
El Salvador	1994; 1998	1999	1999	1 year
Equatorial Guinea	1992; 1993			
Fiji	1998; 2004	2004		0 years
Gambia		2010	2010	
Georgia		1996	1996	
Ghana	1993	1994	1994	1 year
Guinea		1987	1987	
Guinea-Bissau	1997; 1998; 2006; 2010			
Guyana	2004	2004	2004	0 years
Honduras		2011	2011	
Hungary	1991			
Indonesia	2006; 2007	2007		0 years
Iran		2002		

Iraq		2006		
Jordan	2003	1994	1994	
Kazakhstan	1998	1994	1994	
Kenya	2000; 2005			
Kuwait	1998; 2000	2013		13 years
Kyrgyzstan	1998; 1999; 2001	2003	2003	2 years
Liberia	2010	2010	2010	0 years
Libya		2010		
Lithuania	1999	1999	1999	0 years
Macedonia	2000			
Madagascar	2007; 2008	2008	2008	0 years
Malawi	1992	1992		
Maldives	2003			
Mali	2012	1991	1991	
Marshall Islands	1998			
Mauritania	1999; 2002	2002	2002	0 years
Micronesia	2000			
Moldova	2004	2004		0 years
Mongolia	1998; 2001; 2003	2013	2013	10 years
Montenegro		2011		
Morocco	2001			
Mozambique		1993		
Namibia	1992	1990		
Nepal		1992	1992	
Nicaragua	1998	2000	2000	2 years
Niger		1989	1989	
Nigeria		1995	1995	
Oman		1994		
Palau	2001; 2003			
Panama	2002			
Papua New Guinea	1989	1992		3 years
Paraguay		1992		
Qatar	2000	2000		0 years
Romania	1998			
Russia	1994; 1998; 2000	1999		1 year
Rwanda	1998	2015		17 years
Sao Tome and Principe	2001			
Saudi Arabia	2001			
Sierra Leone	1997; 2003	2004	2004	1 year
Slovakia	2000			
Solomon Islands	1997; 2000; 2004; 2005; 2006	2005		0 years
Somalia		1987	1987	
South Sudan		2009	2009	
Sudan		2013		

Suriname	2005			
Swaziland	1997			
Syria	2004; 2007	2007	2007	0 years
Tajikistan		2007		
Tanzania	1999; 2000	1997		
Timor-Leste	2003; 2004	2005		1 year
Togo		1989	1989	
Tonga	2000	2002		2 years
Turkey	2000, 2003	2003		0 years
Uganda	1998; 2000	1991		
Ukraine	1998			
Uzbekistan		1998		
Venezuela		1999		
Vietnam	1993			
Yemen	2007	2010	2010	3 years
Zambia	1993; 2004	2006		2 years

Table 2. Cox regression models: Mention of or consent to arbitration in domestic investment laws

	DV: Time-to-mention			DV: Time-to-consent		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
FIAS, previous 3 yrs.		7.549***			7.971***	
		[4.267,13.355]			[3.828,16.594]	
FIAS, previous 5 yrs.			6.407***			6.703***
			[3.693,11.117]			[3.194,14.066]
Rigorous and imp. adm.	0.836	0.875	0.877	0.914	0.918	0.915
	[0.630,1.108]	[0.660,1.159]	[0.666,1.157]	[0.613,1.364]	[0.604,1.396]	[0.608,1.379]
Accountability	1.286	1.061	1.063	1.410	1.196	1.178
	[0.817,2.023]	[0.688,1.637]	[0.686,1.650]	[0.782,2.542]	[0.654,2.186]	[0.650,2.134]
GDP (log)	1.039	1.097	1.096	0.890	0.928	0.917
	[0.868,1.243]	[0.922,1.305]	[0.916,1.311]	[0.713,1.111]	[0.741,1.160]	[0.731,1.150]
GDP per capita (log)	0.665**	0.688*	0.680**	0.543**	0.582**	0.575**
	[0.448,0.985]	[0.473,1.001]	[0.462,1.000]	[0.309,0.955]	[0.359,0.945]	[0.346,0.956]
Time since indep. (log)	0.675**	0.778*	0.780*	0.831	0.947	0.963
	[0.494,0.923]	[0.583,1.037]	[0.582,1.044]	[0.583,1.187]	[0.679,1.322]	[0.688,1.347]
Regime durability (log)	1.026	1.039	1.046	1.117	1.165	1.172
	[0.830,1.268]	[0.839,1.285]	[0.844,1.297]	[0.834,1.495]	[0.858,1.582]	[0.862,1.594]
Arbitration claims, cum.	0.800*	0.864	0.867	1.011	1.038	1.043
	[0.637,1.005]	[0.703,1.061]	[0.702,1.071]	[0.915,1.118]	[0.972,1.107]	[0.976,1.115]
IIAs signed, cum.	0.991	0.989	0.989	0.977*	0.974*	0.974*
	[0.978,1.004]	[0.975,1.004]	[0.975,1.004]	[0.953,1.001]	[0.947,1.002]	[0.947,1.002]
IBRD loans (log)	1.006	1.007	1.006	0.994	1.007	1.003
	[0.958,1.055]	[0.968,1.048]	[0.965,1.049]	[0.918,1.075]	[0.948,1.069]	[0.942,1.068]
Spells (# of countries)	156	156	156	156	156	156
Events (# of consents)	70	70	70	35	35	35
Obs. (country-years)	3475	3475	3475	3989	3989	3989
AIC	623.258	582.661	586.743	321.059	298.594	301.742

Note: Cox proportional hazard models, estimates in hazard rates. 95 percent confidence intervals in brackets. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

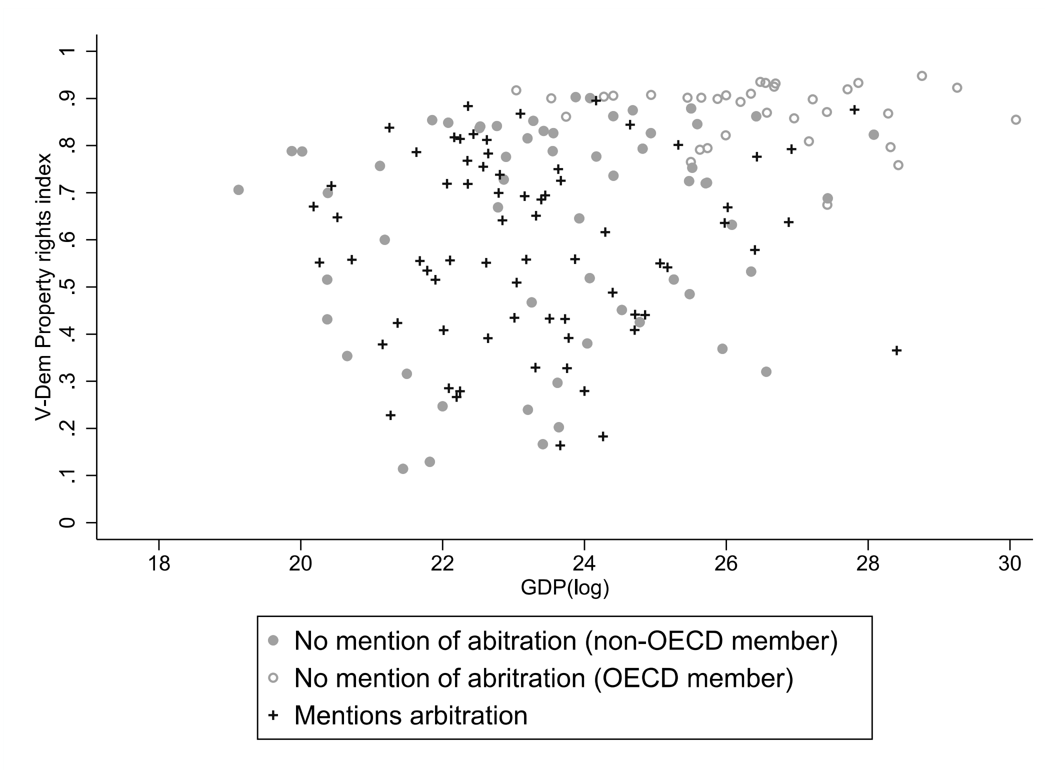

Figure 1. Mention of arbitration in domestic laws, property rights institutions, and GDP (average values 1986-2015)

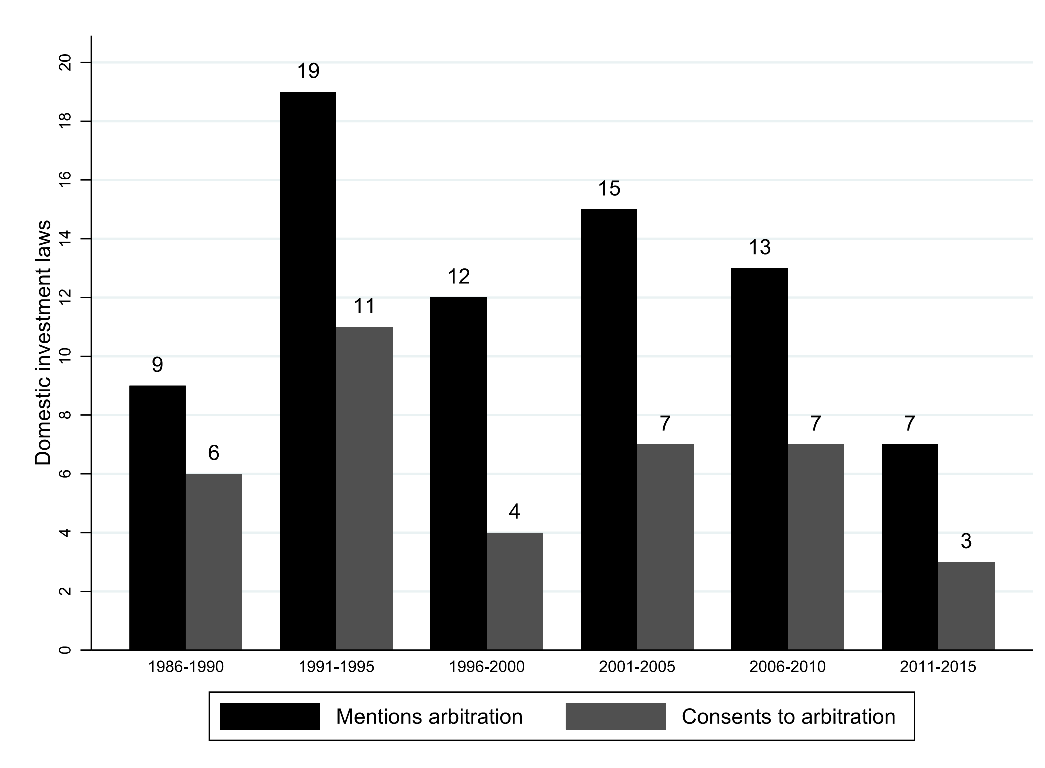

Figure 2. Developments in domestic investment laws enacted, five-year intervals, authors' own coding

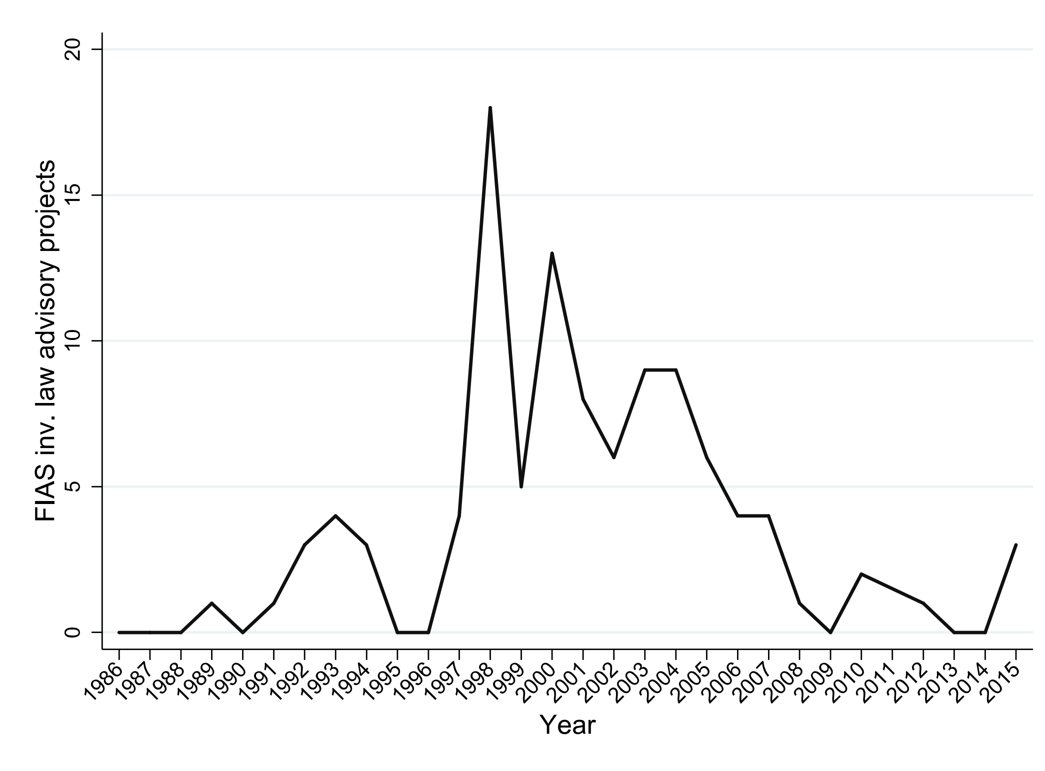

Figure 3. Completed FIAS advisory projects on domestic investment law reform, authors' own coding

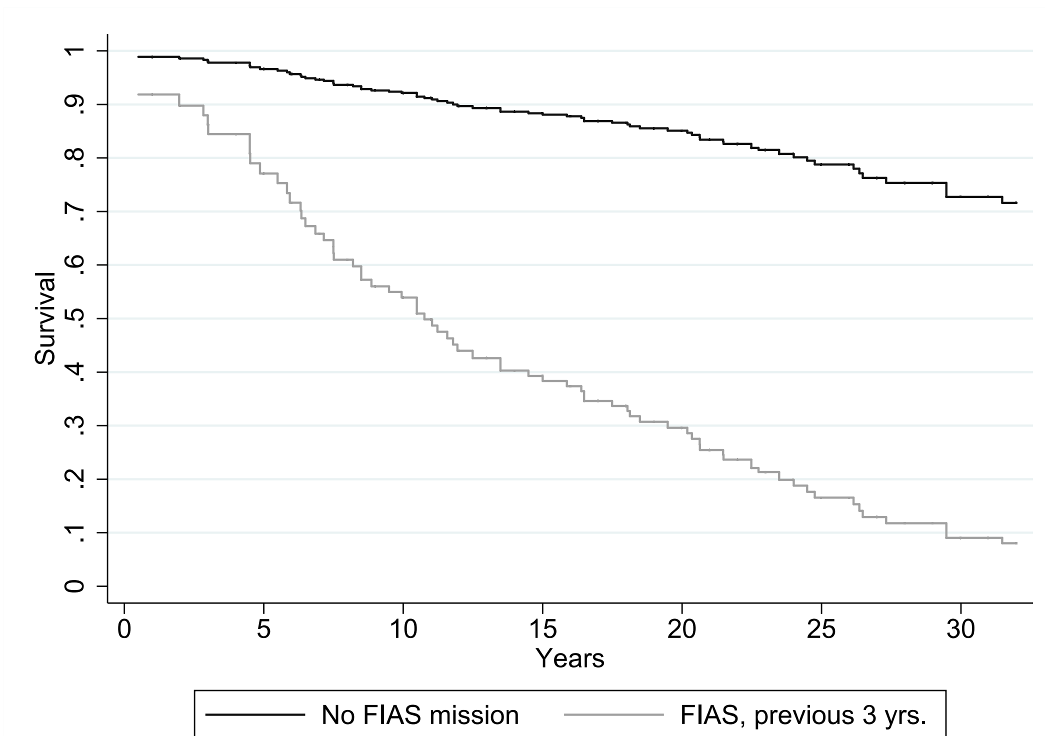

Figure 4. Survivor function, mention of arbitration in domestic investment law (model 2 in Table 2)

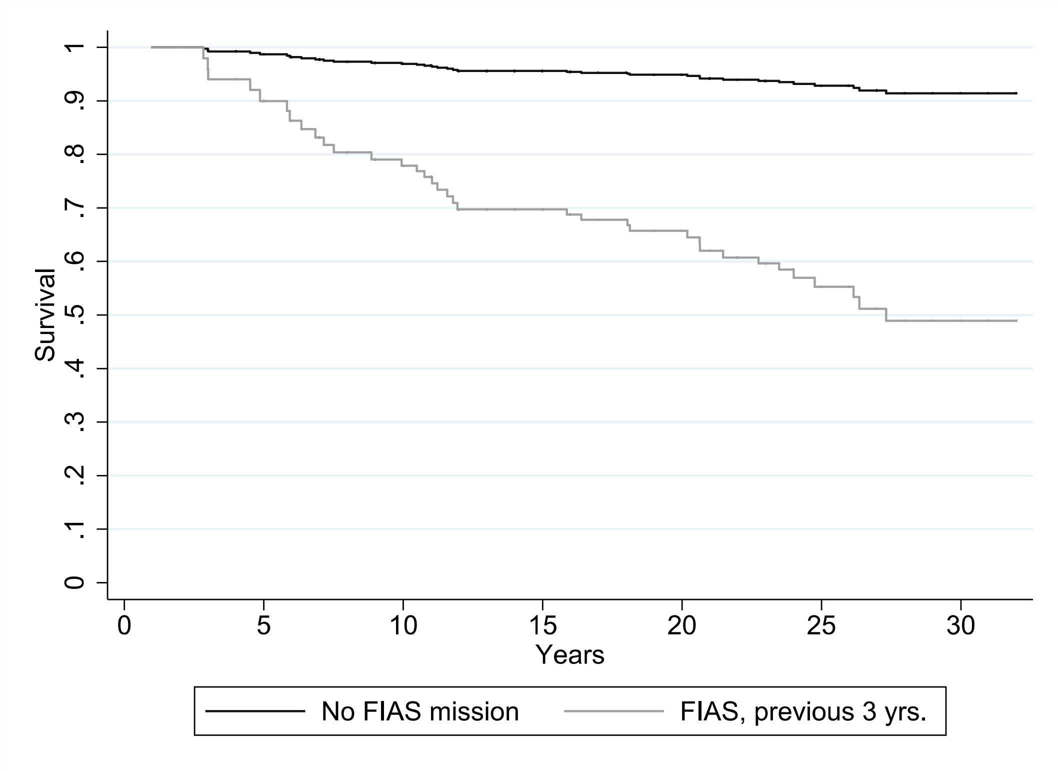

Figure 5. Survivor function, consent to arbitration in domestic investment laws (model 4 in Table 2)