

International Investment Law and Foreign Direct Reinvestment*

Online Appendix

Rachel L. Wellhausen
University of Texas at Austin
rwellhausen@utexas.edu

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Abstract

One goal of the law is to provide a means to return disputing parties to cooperation. The prevailing expectation is that international investment law largely does not do this; rather, an aggrieved foreign investor sues the host state as a last resort and divests. I use a new database of Investor-State Dispute Settlement (ISDS) arbitrations and firm-level bilateral investment to show that, in fact, claimant investors reinvest in the host state at least 31% of the time (1990-2015). Among investors that file for arbitration, and controlling for sector, important correlates of reinvestment include the claimant's legal strategy; the extent of the claimant's grievance and success; and the incidence of post-arbitration litigation. Despite unique aspects of its institutional design, the de facto international investment regime can help solve host state time-inconsistency problems consistent with standard expectations of law. Whether the probability of reinvestment is high enough to reinforce host state commitments to this controversial regime is an open question.

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A Additional Results

A.1 Reinvestment by Region of Host State

Table 1: Reinvestment takes place in all regions of the world.

<i>Region</i>	<i>Reinvest</i>	<i>Cases</i>	<i>Pct</i>
OECD*	26	63	41%
Sub-Saharan Africa	20	67	30%
Americas	72	226	32%
Asia	25	63	40%
Eastern Europe and former Soviet Union	58	254	23%
Middle East and North Africa	21	56	38%
<i>Total</i>	<i>222</i>	<i>729</i>	<i>31%</i>

*Pre-1994 members and excluding Turkey.

A.2 Regressions Accounting for ICSID

Table 2: Reinvestment (Considering H1-5 separately, with ICSID)

	(1)	(2)	(3a)	(3b)	(4)	(5)
ICSID	0.79*** (0.22)	0.93*** (0.28)	0.82*** (0.25)	0.91*** (0.25)	0.70** (0.31)	0.870*** (0.27)
Contract	0.57 (0.35)					
No direct expropriation		0.80*** (0.24)				
No ruling (Settlement)			0.51** (0.20)			
Settlement/Investor win				0.75*** (0.22)		
% Claim won					1.27** (0.54)	
No enforcement proceedings						0.37* (0.20)
Years since end	0.01 (0.02)	-0.01 (0.02)	-0.01 (0.02)	-0.02 (0.02)	-0.03 (0.02)	-0.01 (0.02)
Constant	-2.50*** (0.55)	-2.86*** (0.62)	-2.55*** (0.65)	-2.90*** (0.67)	-2.29*** (0.74)	-2.585*** (0.61)
Sector	Yes	Yes	Yes	Yes	Yes	Yes
Region	Yes	Yes	Yes	Yes	Yes	Yes
Exclude incomplete?	No	No	Yes	Yes	Yes	Yes
Observations	714	425	573	573	325	552

Standard errors clustered by host state.

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

Table 3: Reinvestment (Considering H1-5 in combination, with ICSID)

	(1)	(2)	(3)	(4)	(5)
ICSID	0.90*** (0.28)	0.80** (0.33)	0.86*** (0.32)	0.92** (0.36)	0.10*** (0.34)
Contract	0.812 (0.70)			0.86 (1.46)	0.49 (1.41)
No direct expropriation	0.80*** (0.24)			1.33*** (0.42)	1.54*** (0.37)
No ruling (Settlement)		-0.14 (0.61)		-0.241 (0.73)	
Settlement/Investor win			0.54 (0.43)		0.63 (0.46)
% Claim won		1.54** (0.61)	1.01 (0.69)	2.16*** (0.83)	1.54* (0.91)
No enforcement proceedings		0.33 (0.28)	0.37 (0.27)	0.42 (0.35)	0.47 (0.34)
Years since end	-0.003 (0.02)	-0.03 (0.03)	-0.03 (0.02)	-0.05 (0.03)	-0.05 (0.03)
Constant	-2.85*** (0.62)	-2.61*** (0.71)	-2.87*** (0.74)	-3.89*** (0.82)	-4.39*** (0.86)
Sector	Yes	Yes	Yes	Yes	Yes
Region	Yes	Yes	Yes	Yes	Yes
Exclude incomplete?	No	Yes	Yes	Yes	Yes
Observations	425	318	318	262	262

Standard errors clustered by host state.

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

A.3 Sector Fixed Effects

While sector fixed effects are key controls in order to isolate effects of law, existing literature suggests that firms in sectors marked by more mobile assets would be less likely to reinvest. Table 4 reports coefficients on sector covariates, with oil and gas as the excluded category: compared to this canonical immobile sector, coefficients on other sectors should generally be negative. In Model 1, all sector coefficients are negative.¹ One can intuit that assets in finance and services would be relatively mobile. Agriculture—marked today by capital assets and not just by (immobile) land—also has a significant and negative coefficient, as does real estate—characterized by leasing services and not just (immobile) buildings. Coefficients are not significant for telecommunications, transportation, or utilities, several sectors more traditionally thought of as immobile. Unexpectedly, the coefficient on mining is negative and significant in Model 1, but this washes out once Model 2 includes legal covariates. In fact, in Model 2 all significance on sector disappears and some coefficients flip to positive.² Altogether, the evidence in Table 4 suggests that sector generally correlates with reinvestment in ways consistent with previous literature. However, the structural effects of sector are not sufficient to explain variation in reinvestment, specifically when considered alongside legal variables.

¹Note that the 5 instances in which sector is unknown are excluded.

²In this specification, replicating Table 9, Model 5, missing data on agriculture causes it to drop out.

Table 4: Reinvestment (Sector effects, relative to Oil/Gas)

	(1)	(2)
Agriculture	-1.11** (0.48)	
Finance	-1.43*** (0.51)	-1.25 (0.81)
Manufacturing	-0.39 (0.29)	0.19 (0.55)
Mining	-0.85** (0.42)	-0.39 (0.75)
Real Estate	-1.59** (0.67)	-1.09 (0.88)
Services	-0.79** (0.32)	-0.21 (0.52)
Telecommunications	-0.34 (0.35)	0.42 (0.88)
Transportation	-0.40 (0.38)	-0.30 (0.69)
Utilities	-0.21 (0.27)	-0.35 (0.48)
Contract		Yes
No direct expropriation		Yes
Settlement/Investor win		Yes
% Claim won		Yes
No enforcement proceedings		Yes
Years since end	0.01 (0.02)	-0.04 (0.03)
Constant	-0.44 (0.35)	-1.73** (0.82)
Region	Yes	Yes
Observations	724	265

Omitted sector: Oil/Gas.

Standard errors clustered by host state.

Model 2 replicates Table 9, Model 5.

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

A.4 Potential Host-state-level Correlates of Reinvestment

While the main results presented in the text include region dummies, it is possible that national-level factors influence the likelihood of reinvestment. Unfortunately, data constraints preclude identification off of within-country variation. Models 1-3 in Table 5 add several national-level economic and political covariates that could potentially be correlates of reinvestment. GDP PER CAPITA correlates positively and significantly with reinvestment (Models 1 and 2), consistent with the notion that market-seeking investors might, like resource-seeking investors, have limited exit options. Note that it is per capita GDP and not market size as measured by GDP that has a consistently positive correlation. Overall INWARD FDI PER GDP does not have a consistent relationship with reinvestment. Two variables likely relevant to political risk, VOICE AND ACCOUNTABILITY and CONTROL OF CORRUPTION, do not have consistent relationships with reinvestment (World Bank World Governance Indicators). Usefully, positive correlations on the variables of interest are robust.

Table 5: Reinvestment (Considering H1-5 in combination, with Host-country-level controls)

	(1)	(2)	(3)
Contract	1.29 (1.27)	1.31 (1.25)	1.120 (1.30)
No direct expropriation	1.47*** (0.38)	1.51*** (0.40)	1.34*** (0.41)
Settlement/Investor win	0.69 (0.47)	0.71 (0.49)	0.90* (0.48)
% Claim won	1.17 (0.81)	1.33 (0.90)	0.80 (0.91)
No enforcement proceedings	0.56 (0.37)	0.56 (0.37)	0.37 (0.36)
Years since end	-0.04 (0.04)	-0.04 (0.04)	-0.01 (0.05)
GDP per capita (ln)	0.68*** (0.23)	0.74*** (0.28)	0.55 (0.35)
GDP (USD millions, ln)		-0.04 (0.13)	-0.02 (0.14)
Inward FDI flows per GDP		0.004 (0.02)	-0.01 (0.03)
Voice and Accountability (WGI)			0.61 (0.58)
Control of Corruption (WGI)			-0.082 (0.63)
Constant	-9.67*** (2.40)	-9.29*** (2.95)	-8.47*** (3.28)
Sector	Yes	Yes	Yes
Region	Yes	Yes	Yes
Exclude incomplete?	Yes	Yes	Yes
Observations	262	261	238

Standard errors clustered by host state.

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

B Coding Procedures

B.1 General Guidelines

These reinvestment coding guidelines expand on the codebook for Wellhausen (2016).³ See replication files (including .csv with additional qualitative data described in 1.2 below).

- The variable REINVST indicates whether there is positive confirmation of any kind of reinvestment by the claimant investor in the host state. The variable is coded yes if there is an affirmative answer to any of these questions: Did the firm stay in the country during the arbitration? Did the firm leave during/after arbitration but reinvest later? Is the firm still operating in the country as of 1 January 2016? The variable is also coded as yes if there is positive confirmation that a subsidiary of the same parent firm reinvests in the host country. If the case has multiple investors, the search was conducted for all investors. The variable was coded yes for reinvestment if we found confirmation that any one of the investors reinvested, per the following three sub-variables:
 - The variable REINVST_STAY is one of the sub-variables that is used to assess the possible reinvestment of the investor by answering the question, did the firm stay in the country during the arbitration process? This variable is coded yes there is definitive evidence that the firm did not leave country despite the arbitration and stayed for at least one year afterward. The variable is coded missing otherwise. If the firm was 100% nationalized, the variable is coded as missing.
 - The variable REINVST_RETURN is one of the sub-variables that is used to assess the possible reinvestment of the investor by answering the question, did the firm leave during/after arbitration but reinvest later? This variable is coded yes if there is definitive evidence that the firm did not leave the country despite the arbitration (i.e., if REINVST_STAY is also coded yes). The variable is coded missing otherwise.
 - The variable REINVST_2015 is one of the sub-variables that is used to assess the possible reinvestment of the investor by answering the question, is the firm operating in the country on 1 January 2016? This variable is coded yes if there is definitive evidence

³Available at: http://www.rwellhausen.com/uploads/6/9/0/0/6900193/isds_codebook_-_wellhausen.pdf

that the firm is in the country as of that date. The variable is coded as missing otherwise. For example, the variable is coded as missing if the firm no longer existed, dissolved, or filed for bankruptcy by 2015 and no other subsidiary of the parent firm is present in the host country, to the best of our knowledge.

- *Coding procedure:* The main sources used were annual reports for the firms involved; Factiva searches of international and domestic news; LexisNexis searches of international and domestic news; IAREporter (<https://www.iareporter.com/>); legal case documents available on ITA Law (<https://www.italaw.com/>); English language newspapers in the host state involved (i.e., newspapers aimed at expat businesspeople); the Stockholm Chamber of Commerce ISDS Blog (<http://isdsblog.com/>); records of the legal tribunal where the arbitration was heard; the law firms that represented the host state and the investor; websites of the national governments involved, especially (1) ministries responsible for relations with foreign investors, (2) equivalents of an Attorney General’s office, and (3) investment promotion agencies.⁴ Coders ran through these sources and then continued with general searches for a time limit of 30 minutes per case. If they could not find dispositive evidence of reinvestment in that period, reinvestment is coded as no. Citation information for specific sources that indicate reinvestment are reported in the replication data. Two coders (graduate students and/or undergraduate students) independently coded each of the 729 cases. Faculty oversaw coding conflicts (initial intercoder reliability was 87%).
- *Undercounting:* Generally, coders’ perceptions are that reinvestment is undercounted. First, there are instances in which the claimant investor is involved in trade and direct investment; many of these claimants likely continued trade relationships with importers in the host state, with suggests continued or renewed cooperation of a kind that may be politically relevant but is not reinvestment. Second, many claimants have multiple nationality claims, such that the claimant investor (whether a firm or an individual) has significant ties to the host state and might even be a dual-national. Data on the onward activities of these claimant investors is often difficult to find, but it is highly likely that claimants that are in a sense “domestic” as well as “foreign” firms continue to reinvest. Third, many claimant investors

⁴A useful source describing how to find the date something was published online: <http://javascript.about.com/library/bllastmod.htm>.

no longer had any public business reporting under the name used in the arbitration after the arbitration completed. Subsidiaries were coded when they could be identified. However, it is likely that claimant investors dissolved and/or renamed companies in ways that we could not uncover through the coding procedure. For example, claimant investors that sue under their individual name, rather than under a corporate name, could have reinvested in the host state through other vehicles without it being clear to coders. These biases make it more difficult to identify positive correlates of reinvestment.

B.2 Uncovering Details on Reinvestment Levels and Narratives

An additional coder examined cases in which reinvestment is coded yes that were filed from 1990-2003. This amounted to 41 cases. The coder spent 1 hour per case to understand further details and the narrative around the reinvestment process, including any evidence on (1) actual sizes of the claimant’s investment pre-arbitration, immediately post-arbitration, and through the end of the study period (1 January 2016). Trends from this information are discussed in the paper; this information is included in full in the replication data as follows.

- `REINVST_AMT`: A figure (USD) that represents the best available information about the total of the firm’s investments in the country as close to the end of the study period as possible, as noted by the year in `REINVST_MOSTRECENT`. This is generally collected from SEC filings or annual reports intended for shareholders. `REINVST_NOTES` includes text explaining the origin of the figure in `REINVST_AMT` and how it was calculated, if calculations were necessary (summing annual investments over a period of years, for example).
- `ISDS_INVESTMENT_DESCRIPTION`: A description of the specific assets/investments that were involved in the relevant ISDS case. If the investment is a subsidiary/joint venture, its name is noted (i.e., Methanex USA); if not, the investment is described (i.e., Land purchased for construction of housing development).
- `ISDS_INVESTMENT_AFTER`: What was the status of the investment after the case?
 - No transfer: the claimant maintained ownership of the investment(s)
 - Expropriated by state: the investment was expropriated, and under state control (usually, this expropriation is what sparked the initial arbitration).

- Divested due to contract termination: the claimant was forced to divest/withdraw its assets due to the state’s revocation of its contract.
 - Divested due to () : the claimant divested for other reasons (hostile/unstable environment, loss of profitability, unfavorable legislation, etc).
 - Unclear: unable to verify the post-case status of the relevant investment.
- ALL_INVESTMENT_AFTER: What is the current status of the firm’s investments in the country?⁵
 - Still holds assets: the claimant firm still maintains some investment in the country (not necessarily the same investment from the ISDS case).
 - Divested in year XXXX: firm sold or liquidated all investments in the country as of year XXXX.
 - Divestment in progress: firm is in the process of selling/liquidating its remaining investments in the country. this info is typically found in firms’ annual shareholder reports.

⁵The ISDS_INVESTMENT_AFTER variable measures the status of the investment at the time of the case’s end, not as of the present like ALL_INVESTMENT_AFTER. For this reason, there are cases for which ISDS_INVESTMENT_AFTER variable is coded “No transfer” but the ALL_INVESTMENT_AFTER variable is coded “Divested in year XXXX.”