

# Spillover Effects in International Law: The Case of Tax Planning and Investor-State Dispute Settlement\*

Calvin Thrall<sup>†</sup>

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## Abstract

Even if their home state has no investment treaty with the host state, investors can gain access to ISDS by investing “indirectly” through a subsidiary located in a third state. It has been claimed that this practice of “proxy arbitration”, which expands the scope of the investment treaty regime as well as the potential legal liabilities faced by capital-importing states, is driven by investors’ strategic investment treaty-shopping behavior. In this paper, I argue that proxy arbitration is actually a *spillover effect* from the international tax treaty regime: firms and individuals are motivated to invest indirectly through third state subsidiaries in order to reduce their tax burden by gaining access to the bilateral tax treaty network. Once the subsidiaries are created, they can be repurposed as ISDS claimants if a dispute arises. Using novel data on the ownership structures of ISDS claimants as well as several detailed tax data sources, I find support for this theory. The results highlight the extent of the interdependence between different regimes for regulating global business: firm behaviors incentivized by one regime may have unintended downstream consequences for other regimes. The potential for such spillover effects is magnified by the primacy of the bilateral treaty as a tool for regulating international commerce, as well as private actors’ ability to choose their own nationality (or nationalities).

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<sup>†</sup>PhD Student in Government, University of Texas at Austin. E-mail: cthrall@utexas.edu.

# 1 Introduction

The modern regime for the regulation and protection of foreign investment – composed mainly of thousands of bilateral investment treaties (BITs) – is undergoing a legitimacy crisis, with states terminating or renegotiating their investment treaties increasingly frequently (Haftel and Thompson, 2018; Peinhardt and Wellhausen, 2016; Thompson, Broude and Haftel, 2019). Capital-importing states thought that BITs would allow them to make a calculated bilateral exchange: in return for offering access to costly investor-state dispute settlement (ISDS) to investors from the partner state, they would receive greater foreign direct investment. However, the returns to BITs have been modest at best,<sup>1</sup> and host states have faced greater legal liabilities than they signed up for (See e.g. Poulsen, 2014).

The latter is true in large part due to the *indirect* structure of modern foreign direct investment: firms and individuals who invest abroad often route their investments through intermediate subsidiaries incorporated in other states, fragmenting ownership across multiple national jurisdictions (Kerner, 2014). As each subsidiary is legally considered to be a national of the state in which it is incorporated, it has access to all of that state’s BITs, and the ultimate owner of the subsidiary can thus file ISDS against the host state using a legal agreement to which its own home state is not a party. Host states can therefore face legal liabilities from third-party investors under bilateral investment treaties, and evidence suggests that they often do so (Betz, Pond and Yin, 2020). In a recent example, British telecom giant Vodafone Plc won a USD \$3B arbitration against India; however, the case was actually filed not by Vodafone Plc itself but rather by one of Vodafone’s Dutch holding companies under the Netherlands-India BIT.<sup>2</sup> Just two years after the case was filed, India unilaterally terminated its BIT with the Netherlands.<sup>3</sup>

Why do some foreign investors invest indirectly via third-party subsidiaries? And why

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<sup>1</sup>See Brada, Drabek and Iwasaki (2020) for a meta-analysis of BITs and FDI.

<sup>2</sup>Upmanyu Trivedi and Ragini Saxena, “Vodafone Scores a Victory in \$3 Billion Tax Spat With India”, *Bloomberg*, 25 September 2020.

<sup>3</sup>Kavaljit Singh and Burghard Ilge, “Remodeling India’s Investment Treaty Regime”, *The Wire*, 16 July 2016.

do some indirect investors choose to file ISDS via their subsidiaries, engaging in a process that I call proxy arbitration? Scholars of international law (Skinner, Miles and Luttrell, 2010; van Os and Knottnerus, 2012) and more recently political science (Betz, Pond and Yin, 2020; Gray, 2020) have posited that investors structure their investments in order to ensure that their foreign assets are protected under an investment treaty. According to this treaty shopping hypothesis, investors take the investment treaty network into account when planning their investment; if their home state does not have a treaty with the potential host state, they route their investment through a holding company in a third state that does have a treaty with the host state.

In this paper, I argue that the investment treaty shopping explanation overlooks the dynamics that arise when treaty networks overlap with one another. The network of BITs exists alongside an equally large network of bilateral tax treaties (BTTs, sometimes referred to as double taxation treaties) that set the rates levied on transfers of capital between pairs of states. Originally intended as a technical fix for the problem of double taxation, BTTs have created opportunities for legal tax avoidance (or “tax planning,” in the parlance of the business world): because BTTs create low-tax “paths” between certain pairs of states, firms can lower their overall tax bill by investing indirectly through third-state subsidiaries in a way that allows them to take advantage of these paths (Arel-Bundock, 2017; Rixen, 2011; Van ’t Riet and Lejour, 2018). I argue that the decision to invest indirectly is motivated by tax concerns, and that the location of intermediate subsidiaries is determined by the BTT network rather than the BIT network. However, the BIT and BTT networks are highly correlated: 55% of the dyads that have an active BTT also have an active BIT.<sup>4</sup> Intermediate subsidiaries that were created for tax purposes can therefore be repurposed as ISDS claimants in the event that a dispute arises with the host government. In this way, the tax avoidant behaviors induced by the tax treaty network create *spillover effects* on the investment treaty regime.

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<sup>4</sup>Source: author’s calculations based on BIT/tax treaty data from 2007.

In order to evaluate predictions drawn from my argument, I introduce a new dataset on the corporate ownership structures of over 1,000 claimant firms that have filed ISDS cases between 1987 (the year of the first modern ISDS case) and 2015. Consulting a wide range of sources – including case filings, business databases such as Orbis, SEC filings, national corporate registries, and offshore data leaks such as the Panama and Paradise Papers – I determine whether or not each of the claimants involved in 726 distinct ISDS cases was the direct and/or the ultimate owner of the disputed assets, and if not I determine who *was*. This allows me to categorize the investment and arbitration strategies of each parent firm: I find that 41% of ISDS cases contain at least one claimant that is investing indirectly through one or more third party-incorporated subsidiaries, and that 27% of all cases are proxy arbitrations in which the claimants are themselves subsidiaries of a third party-incorporated parent.

I present a range of descriptive and observational evidence in support of the tax planning hypothesis. First, I establish a tax-based motivation for indirect investment: when comparing direct vs. indirect investors, the latter are much less likely to have direct access to a BTT with the host state and they face higher withholding tax rates on direct host-home transfers. Second, I show that conditional on making the decision to invest indirectly, investors incorporate their intermediate subsidiaries in the states that expand their BTT coverage and lower their withholding tax rates rather than those that expand their BIT/IIA coverage. This result holds even when the sample is limited to most-likely cases of investment treaty shopping: instances of proxy arbitration in which the parent investor’s home state did not have a BIT with the host state, precluding the possibility of filing ISDS directly. Taken together, the findings suggest that proxy arbitration is not the result of *ex ante* investment treaty shopping, but rather that it is a spillover effect from investors’ tax treaty shopping.

These findings contribute to the literature on strategic investor behavior in the ISDS regime (Moehlecke, 2019; Pelc, 2017), as well as recent work on corporate arbitrage in international law more generally (Arel-Bundock, 2017; Betz, Pond and Yin, 2020; Chapman et al., 2020). More broadly, though, the case of tax planning and ISDS is merely one ex-

ample of the spillover effects that can occur when the same multinational firms are affected by multiple overlapping regulatory regimes. Multinationals are affected by several overlapping treaty networks in the areas of investment, trade, taxation, labor and human rights, environmental protection, and more. Corporate behaviors of interest such as foreign direct investment, trade, and arbitration are therefore influenced by multiple regulatory regimes. However, overlapping regimes may have interactive rather than additive effects of firm behavior; in the example given in this paper, states hoped that both BITs and BTTs would help them compete for FDI,<sup>5</sup> but the combination of the two opened the door to additional legal liabilities through proxy arbitration. Future studies of treaty-based regimes would thus be well-served by adopting a “general equilibrium” approach, considering how the efficacy of one type of treaty may be conditional on the presence of others.

The paper is organized as follows: first, I review literature on states and firms in the international investment regime. Next, I introduce a theory of tax planning, ownership fragmentation, and proxy arbitration, and draw from it testable hypotheses. I then describe the original dataset of ISDS claimant ownership structure and provide some graphical intuition. Finally, I proceed to test the hypotheses econometrically using a combination of my original data and detailed tax/BIT data from a variety of sources.

## 2 BITs, states, and firms

The first BITs were signed in the late 1950s and early 1960s in order to solve a problem: MNCs from the developed world wanted to invest in developing states but feared expropriation or mistreatment by host governments, developing state governments wanted foreign direct investment (FDI) but could not credibly commit not to expropriate, and attempts to regulate international investment multilaterally had failed ([Allee and Peinhardt, 2014](#)).<sup>6</sup> Substantively, BITs provide formal regulations for investors (e.g., which types of inward

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<sup>5</sup>See [Elkins, Guzman and Simmons \(2006\)](#) and [Barthel and Neumayer \(2012\)](#), respectively.

<sup>6</sup>There is also evidence to suggest that capital-exporting states like France and the UK put substantial pressure on their former colonies to sign BITs and ratify the ICSID Convention; see [St John \(2020\)](#).

investment are allowed) as well as standards for the treatment of foreign investors (e.g., investors must be allowed to repatriate profits back to their home country), and often they also allow firms access to arbitration in the event that the standards are violated. These bilateral treaties diminish the risk to firms of investing in developing states in two primary ways: first, the potential for arbitration raises the cost to the host government of expropriating foreign investors (Simmons, 2014). Second, BITs' formal investment protections can serve as legal focal points in diplomatic negotiations, diffusing developed state standards of property rights protection to the developing world (Poulsen, 2019).

Bilateral contracting has many advantages: first, fewer members means lower bargaining costs (Koremenos, Lipson and Snidal, 2001). Second, bilateralism allows states to choose their partners *a la carte*. States may choose partners in order to compete for investment from their partner's firms (Elkins, Guzman and Simmons, 2006), or to advance their foreign policy interests (Gertz, 2018; Poulsen and Aisbett, 2016). In any case, states who sign a BIT together make a calculated tradeoff: in exchange for the prospect of increased foreign investment, signatory states extend a set of special protections to each other's firms and open themselves up to costly investor-state arbitration in the event that these protections are violated.

However, there is evidence that states did not fully understand the nature of this tradeoff during the early decades of the bilateral investment treaty regime (1959-1987). Poulsen (2014) argues that, while states knew that their BITs left them liable to be sued by foreign investors in a process called investor-state dispute settlement (ISDS), they did not foresee how costly ISDS would prove to be. Other research suggests that only once states face arbitration themselves do they begin to question the utility of their treaties, deciding not to sign further BITs (Poulsen and Aisbett, 2013) or even renegotiating or terminating their current treaties (Haftel and Thompson, 2018; Peinhardt and Wellhausen, 2016). States who are taken to arbitration may cease to receive the increased inward FDI flows that BITs bring, making reevaluation a rational decision (Aisbett, Busse and Nunnenkamp, 2018; Allee and

Peinhardt, 2011).<sup>7</sup>

Not only did states underestimate the frequency and intensity with which firms would file ISDS cases, they also failed to predict the variety of different ways that firms would use arbitration. Moehlecke (2019) demonstrates that firms can use arbitration in order to suppress the global diffusion of a regulatory measure, targeting early adopters in order to “chill” other potential adopters. Similarly, Pelc (2017) points to investors’ lack of success in arbitration as evidence that firms file low-quality cases not in order to win, but merely in order to make adopting unfavorable regulations more expensive for host governments.<sup>8</sup> Gray (2020) highlights the phenomenon of proxy arbitration, in which a parent firm gains access to arbitration against a host state via a foreign subsidiary. Gray posits that proxy arbitration is the result of treaty shopping, defined as the practice in which “nonstate actors such as firms structure their ownership to take advantage of other countries’ arrangements” (Gray, 2020, 1). Betz, Pond and Yin (2020) provide support for the BIT/IIA-shopping hypothesis using fine-grained data on MNCs’ subsidiary location decisions.

Extant work has argued that firms strategically tailor their ownership structures in order to ensure that their foreign assets are protected under at least one IIA. I posit that this is not a sufficient explanation for firms’ decisions to invest indirectly through conduit subsidiaries and to use these subsidiaries to file ISDS. First, the BIT-shopping hypothesis makes a strong claim about the value that firms place on IIA protection: specifically, the assumption is that the benefit of gaining access to ISDS offsets the costs of establishing and maintaining an indirect ownership structure. I argue that – while IIA protection may serve as a form of insurance against the unlikely event of host country mistreatment – the returns to IIA protection pale in comparison to the returns to tax avoidance, and thus the latter is more likely to drive firms’ initial decision to invest indirectly. Second, the IIA-shopping hypothesis cannot explain the fact that, in 37% of observed proxy arbitration cases, the parent firm

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<sup>7</sup>Interestingly, there is substantial variation in reinvestment behavior among the very firms that file arbitration (Wellhausen, 2019).

<sup>8</sup>However, see Johns, Thrall and Wellhausen (2020) and Strezhnev (2017) on the problems with making inferences from observed win-rates in ISDS cases.

already had access to ISDS against the host and did not need to use a conduit subsidiary to gain standing. It also cannot explain the fact that, in 14% of all cases, the ultimate investor invested indirectly through a conduit subsidiary but did not use the subsidiary to file the dispute.

In the following section, I introduce an explanation for the observed patterns of indirect investment and proxy arbitration in ISDS: corporate tax planning, or tax avoidance.

### **3 Theory: tax planning and proxy arbitration**

My basic argument is as follows: first, indirect investment – investing through a wholly-owned “conduit” subsidiary in a third state, the only purpose of which is to hold direct ownership of the host state assets – is costly for investors, and they will only pursue this strategy when the expected benefits outweigh the costs. Unlike the IIA shopping theory, I argue that IIA protection is an insufficient benefit to justify the costs of indirect investment; there is little evidence to suggest that IIA-protected firms receive better treatment from host governments, and there is no guarantee that firms will be able to recoup damages through the ISDS mechanism. Rather, I argue that investors will route their investments through third state subsidiaries when the tax benefits of doing so outweigh the costs. Since tax considerations influence the decision to invest indirectly, and indirect investment is a necessary prerequisite for proxy arbitration, then corporate tax planning will likewise explain trends in the occurrence of proxy arbitration. Subsidiaries created for tax purposes are *repurposed* as ISDS claimants in the event that a dispute arises.

#### **3.1 The cost of indirect investment**

Indirect investment carries several fixed costs for investors. Would-be indirect investors must pay fees to incorporate the intermediate subsidiary, they must pay for office space in the hosting state, and some states require that even holding companies maintain at least one



employee. Even in business-friendly jurisdictions such as the Netherlands, investors must pay some annual fees to maintain the subsidiary. Investing indirectly through a subsidiary also requires the assistance of legal and accounting firms, both of which carry costs. While no high-quality data exists on the costs of indirect investment, rough estimates of the cost of establishing an intermediate subsidiary range from USD \$15,000<sup>9</sup> - \$50,000<sup>10</sup> with subsequent costs of \$40,000 per year.<sup>11</sup> While these amounts may be relatively small for large firms, they are costly enough that indirect investment is not the default strategy for investors; [Weichenrieder and Mintz \(2008\)](#) use German FDI microdata to show that only 30% of German outward FDI is indirect.

In contrast to the IIA-shopping theory, I argue that gaining protection under a BIT/IIA is not a sufficient reward to justify the costs of indirect investment. Just as there is little evidence to suggest that BITs increase FDI flows to capital-importing states ([Brada, Drabek and Iwasaki, 2020](#)), there is no evidence to suggest that foreign investors who are protected under a BIT receive better treatment from host governments. It is true that BIT-protected investors have access to ISDS in the event that their assets are expropriated or otherwise mistreated. However, ISDS does not guarantee investors a payout: only 51% of arbitrations end in either an investor victory or a negotiated settlement.<sup>12</sup> Further, use of the ISDS mechanism is still relatively infrequent compared to the scale of modern foreign direct investment: according to the data maintained by the UN Conference on Trade and Development (UNCTAD), fewer than 1,000 investor-state disputes have been filed from the first modern case in 1987 through July 2019.

I argue that investors are unlikely to pay the fixed costs of indirect investment in order to receive BIT protection, as protection under a BIT/IIA offers investors relatively weak insurance against the low-probability event that they face mistreatment by the host government.

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<sup>9</sup><https://velocityglobal.com/blog/international-subsiary-company-benefits-and-risks>, first cited in [Betz, Pond and Yin \(2020\)](#).

<sup>10</sup><https://10leaves.ae/publications/difc/how-much-does-it-cost-to-set-up-a-holding-company-in-the-difc>

<sup>11</sup>See footnote 8.

<sup>12</sup>Source: author calculations using UNCTAD data.

In contrast, all foreign investors are subject to regular taxes on their profits and on the capital that they transfer across borders, and these taxes are highly costly. As will be discussed in the following section, investors can lower their tax burden with certainty by strategically locating their intermediate subsidiaries in order to take advantage of the tax treaty network and variation in national corporate tax rates. Indirect investment for tax purposes offers investors a guaranteed reprieve from a high-probability event (e.g., being taxed), while indirect investment in order to gain BIT protection offers investors a probabilistic reprieve from a low-probability event (dispute with host government). My conjecture is therefore that tax considerations, rather than investment treaty shopping, shape investors' decisions to invest indirectly as well as the manner in which they do so.

### **3.2 Tax planning: why and how?**

There are two categories of taxation that most directly impact multinational firms. The first is the corporate income tax, which is levied on corporate profits (defined as the firm's revenue after deducting expenses). The second is withholding taxes, which firms must pay to State A when transferring capital from State A to State B (for example, sending dividend payments to foreign shareholders or paying interest on an intra-firm loan). Both taxes are highly costly, with rates often in excess of 30%, and firms therefore have a strong incentive to find ways to avoid paying them. The measures that firms take to avoid taxation are referred to as tax planning, and importantly they usually involve indirect investment through strategically located subsidiaries.

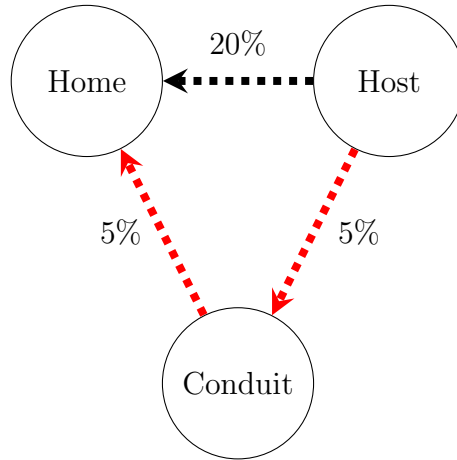
Indirect investment allows firms to benefit from cross-national heterogeneity in domestic corporate tax rates: the U.S. taxes corporate profits at 21%, while Bermuda does not tax corporate profits at all (Tørsløv, Wier and Zucman, 2019). Thus, firms who wish to reduce their tax burden may wish to “book” their profits in a low-tax jurisdiction in a process called “profit-shifting” (Hines Jr. and Rice, 1994). For a parent firm, this process involves establishing a subsidiary in a low-tax state whose only purpose is to hold ownership of one of

Table 1: **Definitions: two types of corporate taxation.**

Tax	Applied to:	Varies at the:	Set by:
Corporate income tax (CIT)	Firms' profits (operating revenue minus operating expenses).	National level	Domestic law
Withholding taxes (WHT)	Transfers of capital (dividends, interest payments, and royalties) between states. Discussed in context of intra-firm transfers between parent firms and their subsidiaries.	Directed-dyadic level	Tax treaties, Domestic law

the firm's foreign assets; this type of subsidiary is sometimes referred to as a "conduit entity" (Wamser, 2011). In this case, the conduit subsidiary would book the profits generated by the asset in its own low-tax jurisdiction, reducing the parent firm's tax liability.

Figure 1: **Indirect investment, tax treaties, and tax savings: a toy example.**



When firms transfer capital across borders, they must pay withholding taxes to the state that the capital is being transferred out of. Such cross-border transfers are common for multinational firms, who frequently want to distribute dividend payments to foreign shareholders, fund their subsidiaries using intra-firm loans, or simply repatriate profits earned by a foreign subsidiary to the home state. Unlike corporate income tax rates, withholding tax rates vary at the directed-dyadic level; the withholding rate on interest payments made from Ukraine to Canada may be different from the rate on interest payments made from Ukraine

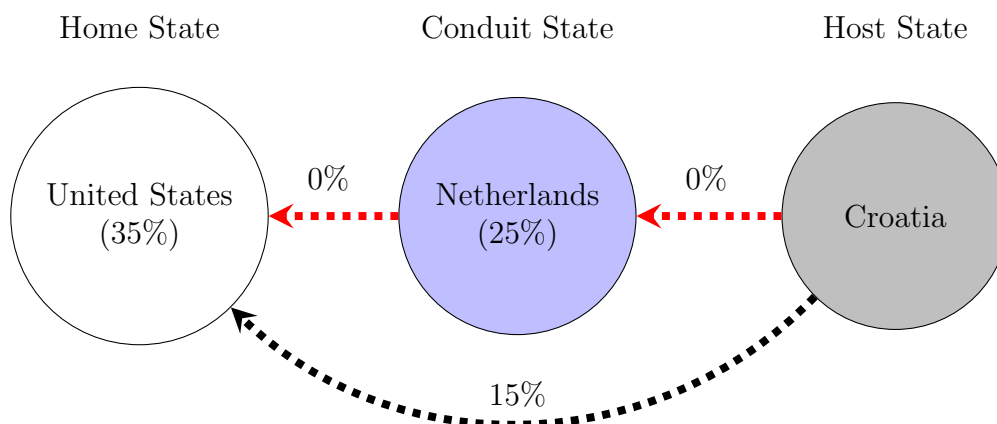
to France, which may in turn be different from the rate on interest payments made from France to Ukraine. This variation exists because, similar to the investment treaty regime, international cooperation on issues of corporate taxation mainly occurs at the bilateral level in the form of bilateral tax treaty negotiations (Rixen, 2011). States have signed thousands of BTTs, each one lowering the withholding tax rates charged on transfers between State A and State B. As a result, there is substantial variation in the cost to firms of transferring capital between pairs of states.

Indirect investment allows firms to take advantage of this heterogeneity. By establishing an intermediate subsidiary in a strategically selected third state, investing firms can gain access to lower-tax “paths” on which to send their capital. Figure 1 provides a (fictional) example of how this works: imagine that an investor wants to transfer capital from its host state subsidiary to its home state. The home and host states do not have a tax treaty together, so a direct transfer from host to home state would face a withholding tax of 20%. However, there may exist some third conduit state with which both home and host states have a tax treaty, and thus transfers from the host state to the conduit state and the conduit state to the home state are taxed at the reduced rate of 5%. The investor could thus reduce its effective withholding tax burden from 20% to  $1 - (1 - 0.05)(1 - 0.05) = 9.75\%$  by investing *indirectly* through a subsidiary created in the conduit state, taking advantage of the lower cost indirect path created by the bilateral tax treaty network.

### 3.3 Spillover effects: tax planning and proxy arbitration

In sum, firms can reliably lower both their income tax and withholding tax bills by investing indirectly through third-state subsidiaries. Forward-looking investors set up these conduit entities prior to investing abroad, resulting in FDI that is (ironically) indirect (Wamser, 2011; Weichenrieder and Mintz, 2008). The same subsidiaries that are created for tax planning purposes can be used to file ISDS in the event that a dispute arises, creating spillover effects between the international tax regime and the international investment protection

Figure 2: **From tax planning to proxy arbitration: the example of *B3 Croatian Courier v. Croatia*, ICSID 2015.**



Blue shading identifies the ISDS claimant, grey shading identifies the ISDS respondent. The black arrow represents the direct transfer from host state to home state, red arrows represent the indirect path of transfers. Percentages above arrows indicate the withholding tax rate levied on interest payments made from State A → State B. Percentages inside parentheses indicate corporate income tax rates.

regime.

Figure 2 provides an illustrative example drawn from an actual ISDS case, *B3 Croatian Courier v. Croatia*. In this case, the American parent firm (Bancroft Group) invested in Croatia indirectly through a conduit subsidiary (B3 Croatian Courier) incorporated in the Netherlands. The tax benefits of this arrangement are clear: first, the Netherlands' corporate income tax rate was substantially lower than that of the United States. Second, indirect investment also results in a lower effective withholding tax rate. As illustrated by the black dashed line, the withholding tax rate on direct interest payments from Croatia to the U.S. is 15%, and the U.S. and Croatia do not have a tax treaty together. However, the Netherlands has tax treaties with both Croatia and the U.S., creating a tax-free indirect path (Croatia→Netherlands→U.S.) for the parent investor.

When a dispute arose with the Croatian government, the American parent firm chose to file ISDS via its Dutch subsidiary using the Croatia-Netherlands BIT, making this a case of proxy arbitration. However, the firm could also file the case directly under the Croatia-United States BIT, which is comparable to the Croatia-Netherlands BIT on all

relevant dimensions. It is not clear why Bancroft chose to engage in proxy, instead of direct, arbitration. However, what is clear is that Bancroft invested indirectly through a Dutch subsidiary in order to minimize its tax burden, and that the subsidiary was then repurposed as an ISDS claimant when a dispute arose with the host state. Further, because the parent firm already had access to ISDS against Croatia through a BIT, this case cannot be explained by the IIA shopping theory.

Drawing on the applied example and the previous discussion of tax planning, it is possible to form some general predictions about how and when investors will invest indirectly and file proxy arbitration. From the tax planning perspective, the most desirable conduit states have low corporate income tax rates, low withholding tax rates, and have tax treaties with both the host state and the investor's home state. In contrast, the IIA shopping theory would predict that investors should choose conduit locations that expand their IIA portfolio, selecting conduit states that have IIA partners that the investor's home state does not have.

**Hypothesis 1:** Parent investors are more likely to incorporate conduit subsidiaries in states that have tax treaties with both home and host states, and use these subsidiaries to file ISDS.

**Hypothesis 2:** Parent investors are more likely to incorporate conduit subsidiaries in states that offer lower effective withholding tax rates (e.g., give investors access to cheaper “indirect paths”), and use these subsidiaries to file ISDS..

**Hypothesis 3:** Parent investors are more likely to incorporate conduit subsidiaries in states with low corporate income tax rates, and use these subsidiaries to file ISDS..

In order to evaluate the above hypotheses, I use novel data on the ownership structures of ISDS claimants. Before moving to the research design, the next section describes the data, the data collection process, and provides some descriptive trends.

## 4 Ownership structures of ISDS claimants, 1987-2015

In order to explain trends in indirect investment and proxy arbitration, it is necessary to first identify the ISDS cases that are associated with these strategies. Doing so requires collecting two critical pieces of information about each claimant in each case:

1. Is the claimant firm owned **or controlled**<sup>13</sup> by an investor (firm or individual) from a third-party state? If so, what is the nationality of the ultimate/beneficial owner?
2. Does the claimant firm hold ownership of the disputed host state assets indirectly through one or more conduit subsidiaries? If so, where are these subsidiaries incorporated?

I collected this information for over 1,000 claimants in 726 ISDS cases filed between 1987 (the first modern ISDS arbitration) and 2015.<sup>14</sup> I consulted a wide range of resources in order to verify firms' ownership structures. First, as the ownership of the investment is often a salient issue in ISDS cases, I began by checking case documents for information about claimant ownership structures.<sup>15</sup> Next, I searched business databases such as Orbis, Mergent Online, and Dun & Bradstreet; SEC filings and their non-US equivalents (such as SEDAR filings in Canada, or Companies House in the UK); firms' own websites and investor reports; leaked data from offshore service providers;<sup>16</sup> and secondary sources including local news, investigative reports, and specialized media outlets such as *IA Reporter*.

After collecting information on claimants' ownership structures, I classify each ISDS case according to the diagram presented in **Figure 2**. If the claimant firm is both the direct and

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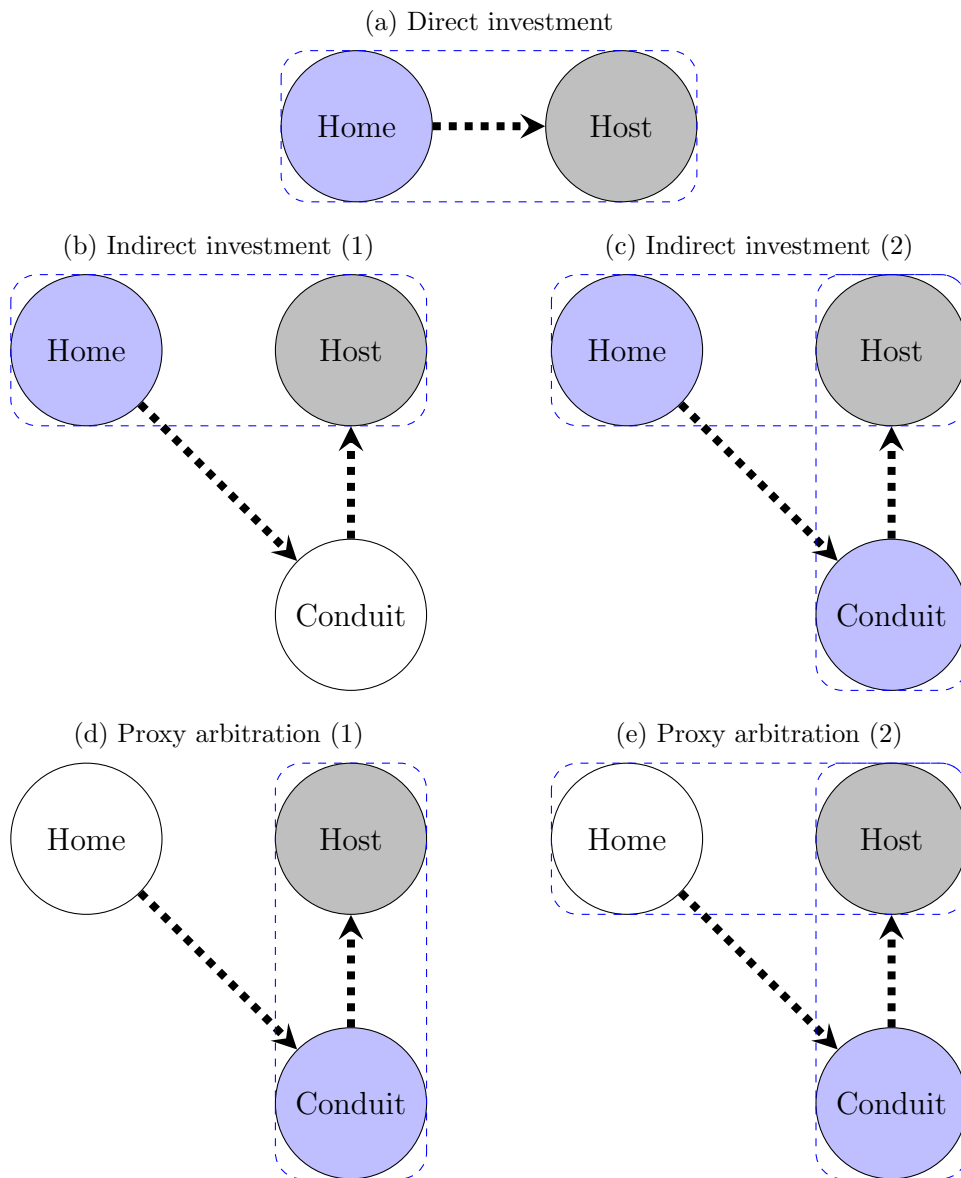
<sup>13</sup>This distinction is important because firms can pursue various strategies to obscure *de facto* control by manipulating *de jure* ownership. Examples include reverse mergers (see *LARAH v. Uruguay*, ICSID 2019), or transferring nominal (but not effective) ownership to a third-party (for a flagrant example, see *Gallo v. Canada*, PCA 2007).

<sup>14</sup>I chose to end my coding in 2015 for a practical reason: there is typically less information available about newer cases – no public case documents, few or no media reports, etc. The lack of information would likely make it relatively more difficult for me to identify indirect investment and proxy arbitration, resulting in lower quality data.

<sup>15</sup>Figure 6 provides an example of an ownership diagram (also called an “organigram”) that was included in a case document.

<sup>16</sup>Accessed at <https://offshoreleaks.icij.org/>.

Figure 3: Classification of ISDS cases according to claimant ownership structure and IIA coverage.

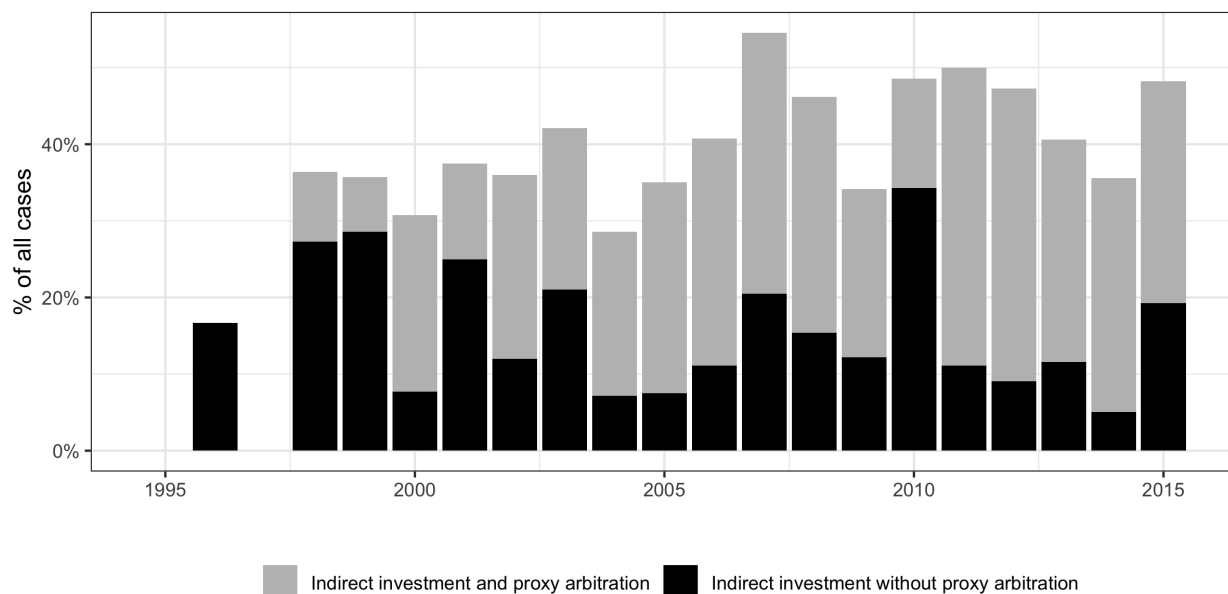


Grey nodes represent the host states where the disputed assets are located, and are the respondents in the ISDS case; blue nodes represent the firms that are claimants in the ISDS case; dashed arrows identify ownership relationships, pointing from owner to subsidiary; the blue dashed line surrounding two nodes indicates that an IIA exists between them, allowing for access to arbitration.

the ultimate owner of the host state assets, the case is one of direct investment. If the claimant firm is the ultimate owner but not the direct owner, the case is one of indirect investment but not proxy arbitration. As noted by Figure 2 (c), cases in which the ultimate



Figure 4: Indirect investment and proxy arbitration in ISDS, 1995-2015

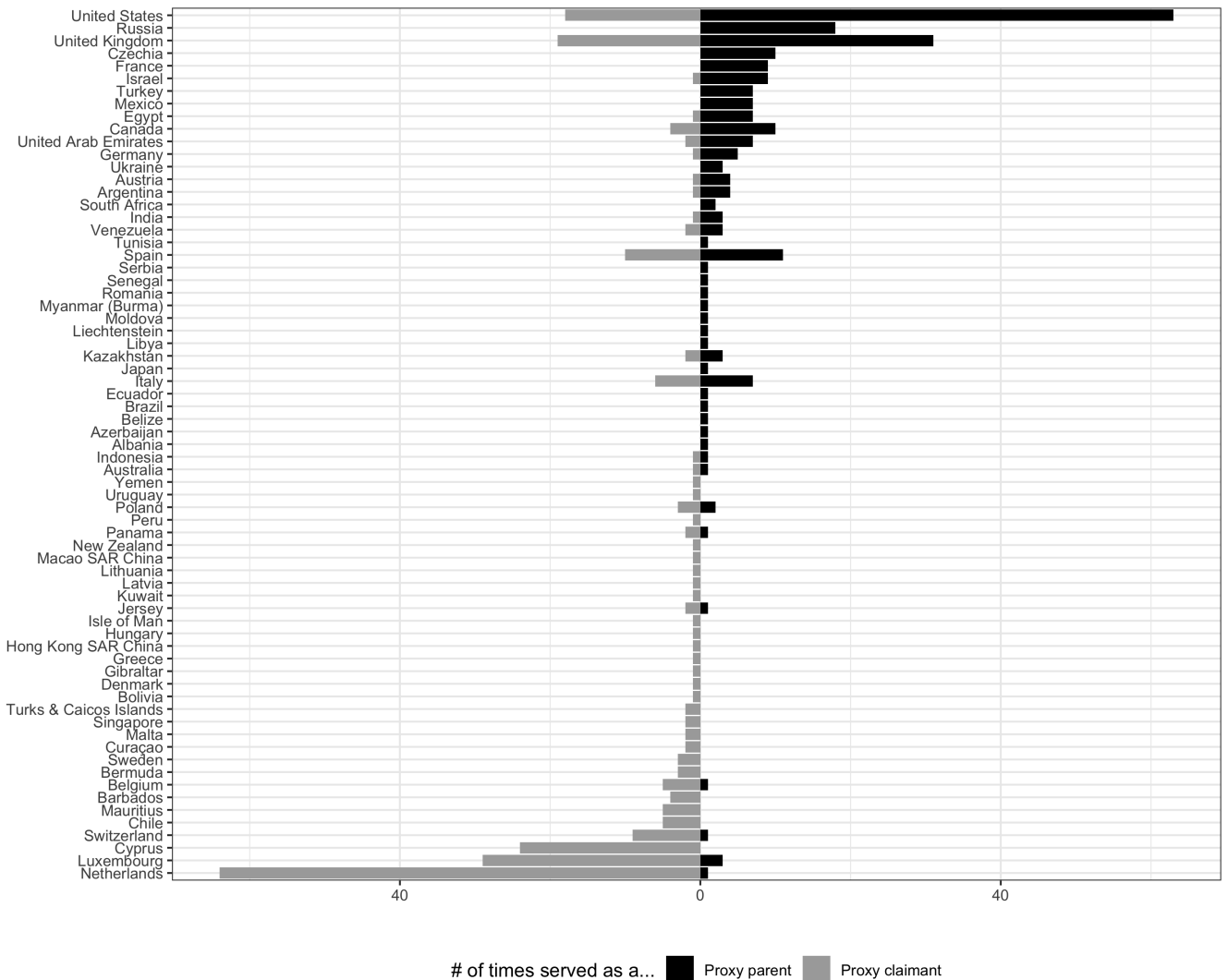


owner and the direct owner are both claimants are still indirect investment but not proxy arbitration. Finally, if the claimant is owned or controlled by a third-party entity who is *not* a claimant on the case, the ultimate owner has engaged in both indirect investment and proxy arbitration. As Figure 2 (e) shows, whether or not the ultimate owner had access to ISDS against the host is irrelevant: if the ultimate owner files ISDS using a conduit subsidiary without joining the case as a claimant, it is an incident of proxy arbitration.

How common are indirect investment and proxy arbitration in the international investment regime? Figure 3 graphs both the absolute number of cases filed annually and the percentage of cases filed annually that involve indirect investment and proxy arbitration.<sup>17</sup> First, note that while indirect investment and proxy arbitration are growing increasingly common, both strategies have long been present in investment arbitration. Second, note that while the trends in indirect investment and proxy arbitration tend to move in tandem, there remain a substantial number of non-proxy arbitration cases in which the claimant(s) nevertheless invested indirectly. Third, note that both phenomena are quite common: proxy

<sup>17</sup>I begin the time series in 1995 rather than 1987, as 1995 is the first year that a non-trivial number of cases were filed.

Figure 5: How does proxy arbitration affect the distribution of claimant nationalities in ISDS?



arbitrations consistently comprise between one-fourth to one-third of all ISDS cases filed in a given year,<sup>18</sup> and indirect investment (of which proxy arbitration is a subset) is consistently present in one-third to one-half of all cases. Investing indirectly through conduit subsidiaries, and filing ISDS through them, are mainstream rather than niche corporate strategies.

By cloaking the true nationality of the parent investor, proxy arbitration biases our understanding of which states' investors are the primary beneficiaries of ISDS. Figure 4 demonstrates this by plotting two quantities for each state: the number of times an investor

<sup>18</sup>This is largely consistent with [Betz, Pond and Yin \(2020\)](#)'s coding of all ICSID cases filed through 2016.

from that state has engaged in proxy arbitration as a parent firm (in black), and the number of times an investor filed ISDS indirectly using a conduit entity incorporated in that state (in grey). Official statistics thus *underestimate* the extent to which investors from states at the top of [Figure 4](#) use ISDS, and *overestimate* the extent to which investors from states at the bottom of [Figure 4](#) use ISDS.

Two points from [Figure 4](#) merit particular attention. First, note that almost all of the states at the bottom of the graph – the states who are net hosts of conduit subsidiaries – are well-known facilitators of tax avoidance. While the Netherlands is by far the largest host of conduit entities,<sup>19</sup> other major players include low-CIT jurisdictions (Cyprus, Mauritius, Barbados) and financial centers with large tax treaty portfolios (Switzerland, Luxembourg). Second, while the US and the UK are two of the largest home states for investors who engage in proxy arbitration, they also host substantial numbers of conduit entities. This is not surprising: both the US and the UK are key facilitators of global tax avoidance (through Delaware<sup>20</sup> and BVI/Jersey/Monaco/Isle of Man, respectively).

## 5 Research design

My goal is to show that, rather than arising as a direct result of BIT/IIA shopping, proxy arbitration occurs when investors who invested indirectly for tax purposes find that they are able to use their conduit subsidiaries as ISDS claimants. An empirical challenge is that I only have data on ISDS cases that actually occurred; I have no information about instances of indirect investment where neither investor nor conduit had access to ISDS against the host state, as such cases necessarily do not result in ISDS even when a dispute arises. This limits my ability to econometrically explain investors' initial decision to invest indirectly or file proxy arbitration, as I am beginning with a selected sample of investments in which

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<sup>19</sup>Thus validating prior qualitative work on the topic's focus on the Netherlands ([van Os and Knottnerus, 2012](#)).

<sup>20</sup>See e.g. Leslie Wayne, "How Delaware Thrives as a Corporate Tax Haven", *The New York Times*, 30 June 2012.

either the parent investor, the subsidiary, or had access to ISDS against the host state under a BIT/IIA.

Rather than predicting whether or not an investor will choose to invest indirectly or file proxy arbitration, I focus on the relationship between tax planning considerations and the structure of *observed* proxy arbitration cases. I take two empirical approaches: first, I conduct a series of simple difference in means tests to establish that the investors who invested indirectly (and filed proxy arbitration) had tax-based reasons to do so. Second, I use more rigorous regression models to predict conduit location choice: conditional on making the decision to invest through a conduit subsidiary, is an investor's choice of conduit location driven by the tax treaty network? As a tough test of the tax planning theory, I limit my attention to most-likely cases of IIA-shopping – proxy arbitrations in which the parent firm did not have standing to file ISDS directly – and test whether tax considerations are predictive of conduit location choice even in these cases. Finally, I conduct a series of empirical tests to examine the possibility that investors are not simply shopping for any BIT, but rather for a BIT that contains more favorable substantive protections.

## 5.1 Tax data sources

In addition to my original data on ISDS claimant ownership structures,<sup>21</sup> I use three other data sources to assemble my key independent variables. First, as previously mentioned I use panel data on national corporate income tax rates that was compiled by the Tax Foundation. To put together the panel (which spans the years 1980-2018), the Tax Foundation combined their own coding of government websites with yearly tax reports published by Big Four accounting firms and other academic tax databases.<sup>22</sup> I use this data to determine the CIT rate that would apply to each potential conduit entity.

Second, I require dyadic data on tax treaties as well as directed-dyadic data on with-

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<sup>21</sup>My data is built on the UNCTAD ISDS data.

<sup>22</sup>For more information, see: <https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/>.

holding tax rates. For the former I rely on [Barthel and Neumayer \(2012\)](#)'s replication data, which contains dyad-year tax treaty data for the period 1959-2007. For the latter, I draw on accounting/corporate services firm PricewaterhouseCoopers (PwC)'s publicly available territory tax reports.<sup>23</sup> For each territory,<sup>24</sup> PwC records the withholding rates for three types of transfers: interest payments, dividends, and royalties. For each type of transfer, territories maintain both a non-treaty rate (the withholding rate that is applied when a transfer is made to a non-treaty partner state) and a set of (typically lower) treaty-specific rates that vary based on the treaty partner to which the transfer is being sent. For example, New Zealand's non-treaty rates on interest/dividends/royalties are 15%/15%/15%, but its treaty-specific rates for transfers made to Belgium are 15%/10%/10%.

A limitation of the PwC data is that they are not longitudinal: they reflect only the tax treaties and withholding rates in force as of 2019. To address this issue, I take the following approach. First, I use [Barthel and Neumayer \(2012\)](#)'s tax treaty data to determine whether a given dyad had a tax treaty together in the relevant time period; if they did I use the 2019 treaty rates, and if they did not I use the 2019 non-treaty rates. The validity of this approach draws on the empirical observations that tax treaties are rarely amended (and thus the treaty rates rarely change) and states rarely change their non-treaty rates, so the primary issue with using the 2019 rates is simply that some treaties which were in force as of 2019 were not yet in force during the sample period.

While the CIT and withholding rates are two important considerations for tax-planning investors, I acknowledge that they are not the only considerations; financial secrecy, robust banking/financial service sector, and ease of establishing a business are just a few other variables that investors likely take into account when deciding whether (and where) to establish a conduit subsidiary. I thus use a less precise but more encompassing alternative measure in some of the conduit location models: a binary variable indicating whether or not a state

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<sup>23</sup>For an example, see: <https://taxsummaries.pwc.com/japan/corporate/withholding-taxes>.

<sup>24</sup>Note that, because there is subnational variation in withholding tax rates (for example, England's withholding rates are different from those of the British Virgin Islands), the territory – rather than the nation-state – is the appropriate level of measurement.

is considered to be a “tax haven” by the U.S. Department of Treasury.<sup>25</sup> The Treasury list is based heavily on the OECD’s classification, in which states are deemed to be tax havens if three of the following four conditions are met:<sup>26</sup>

1. Low or purely nominal domestic taxes on income.
2. Low or no transparency regarding financial and tax affairs.
3. Absence of tax information sharing with other governments.
4. No requirement that business activity be substantial (e.g., no measures taken against shell companies).

## 5.2 Variable construction and controls

### 5.2.1 Tax variables

Using the Tax Foundation CIT data, I create CONDUIT CIT which is equal to the CIT rate in each potential conduit state. I also create five and ten-year lags for this variable to take into account the fact that investment decisions are typically made some years before an ISDS case is filed. In line with Hypotheses 3, I expect the coefficient on CONDUIT CIT to be negative: investors should choose to incorporate conduit subsidiaries in states with low corporate income tax rates to facilitate profit-shifting.

For the conduit location models, I create several variables. First, I create variables to indicate whether there exists a tax treaty between the host state and the potential conduit (HOST-CONDUIT BTT) and whether there exists a tax treaty between the conduit and the home state (CONDUIT-HOME BTT). I include a measure of the number of states with which the potential conduit state has a BTT but the home state does not, also logged (CONDUIT-HOME BTT DISSIM). All of these variables make a given conduit location more favorable,

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<sup>25</sup>Downloaded via the World Economics and Politics Dataverse. See the list here: <https://fas.org/sgp/crs/misc/R40623.pdf>

<sup>26</sup>See <https://web.archive.org/web/20120512074208/http://www.oecd.org/document/63/...html>

and thus I expect each of them to be positively signed. Finally, I calculate the effective withholding rate levied on interest and dividend payments were they to be routed from host to conduit and then conduit to the parent’s home state (EFFECTIVE INTEREST WHT and EFFECTIVE DIVIDEND WHT, respectively). To do so, I follow [Arel-Bundock \(2017\)](#)’s method for both interest and dividend rates. For each home-host-conduit triplet  $ijk$ , the effective withholding rate on transfers made from  $i$  to  $j$  indirectly through  $k$  is equal to:

$$WHT_{ijk}^E = 1 - (1 - \tau_{jk})(1 - \tau_{ki}) \quad (1)$$

Where  $\tau_{jk}$  is the withholding rate on transfers from host to conduit, and  $\tau_{ki}$  is the rate on transfers from conduit to the parent’s home state. I expect a negative sign on the effective rate variables: higher effective withholding rates make a given indirect path less favorable for the parent investor.

### 5.2.2 Control variables

The most important control variable addresses the possibility of investment treaty shopping, a practice that scholars have identified as a driver of indirect investment and proxy arbitration ([Betz, Pond and Yin, 2020](#); [Gray, 2020](#); [van Os and Knottnerus, 2012](#)). If the tax variables that I investigate are correlated with IIA-shopping concerns – for example, if conduits with many tax treaties tend to have many BITs as well – then a failure to control for the latter would lead me to overestimate the effect of tax planning. To address this concern, I control specifically for the (logged) number of partner states with which the conduit state has a BIT but the parent state does not; this variable, used by [Betz, Pond and Yin \(2020\)](#), measures the number of new potential host states that the parent investor would be able to file ISDS against were they to invest indirectly through a given conduit. The IIA shopping theory would predict a positive sign on this variable, as the most desirable conduit locations should be those that expand the parent investor’s IIA “coverage.”

I also control for the per capita GDP of the potential conduit state, and I include an indicator variable equal to one when the potential conduit location is the Netherlands to ensure that its outlier status is not driving the results. I include year fixed effects to address unobserved temporal heterogeneity. Unfortunately, I lack financial information on the ISDS claimants and parent firms; however, I do include case fixed effects which allows me to account for (but not explicitly model) the influence of investor-level factors.

## 6 Results & Discussion

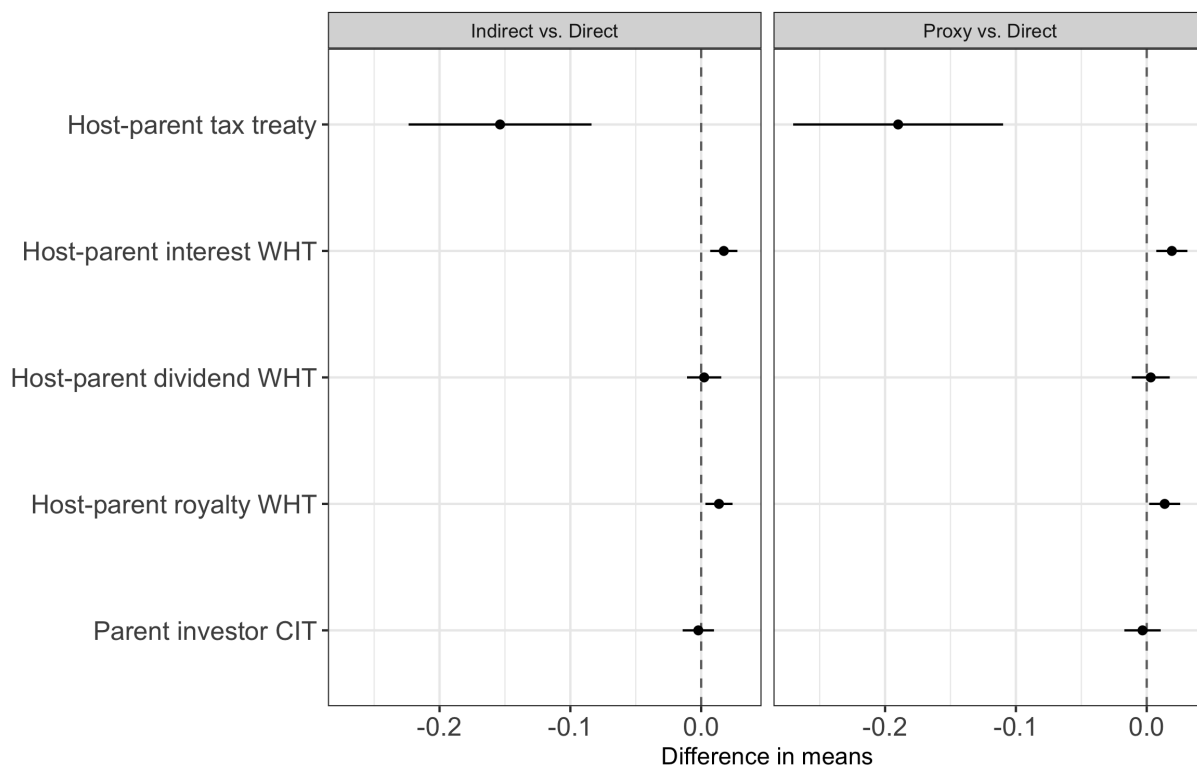
### 6.1 Difference in means tests

If I am correct that indirect investment is driven by tax planning, and that tax-based indirect investment determines the structure of proxy arbitration, then it follows that the firms who choose to invest indirectly should have some tax-based incentives to do so. Specifically, it follows that the investors who chose to invest indirectly did so because they would have faced a higher tax burden had they invested directly. As a basic test of this prediction, I compare two groups of indirect investors – all indirect investors, and indirect investors who filed proxy arbitration – to direct investors on a set of tax-related variables.

**Figure 6** displays the results of ten difference in means tests. The left panel compares all indirect investors to direct investors, and the right panel compares all investors who engaged in proxy arbitration to direct investors. First, I find that indirect and proxy investors are substantially (15-20 percentage points) less likely than direct investors to have a tax treaty between their (true) home state and the host state. I also find that indirect and proxy investors tend to face significantly higher withholding tax rates on direct transfers than those who invested directly. These results are consistent with the tax planning explanation: investors who chose to route their investment through conduit states would have been taxed more heavily had they chosen to invest directly. Likewise, indirect investment is less profitable for investors who already have access to a direct tax treaty and favorable withholding



Figure 6: **Do indirect and direct investors differ on tax variables?**



rates with the host state.

Finally, I compare the groups according to the corporate income tax rates in the investors' home states; the tax planning logic would suggest that investors from high-CIT states should be more likely to invest (and file ISDS) indirectly, as they stand more to gain from shifting their profits to a lower-tax jurisdiction. This is not borne out in the data, however, as there are no significant differences in home state CIT rates across groups. Still, taken together these results provide suggestive support for the tax planning theory. Investors choose to route their assets through conduit subsidiaries when the tax benefits to doing so outweigh the costs of indirect investment; investors who lack a direct tax treaty with the host state, or face high withholding tax rates on direct transfers, have a stronger incentive to invest indirectly in order to gain access to the tax treaty network and lower their tax burden.

## 6.2 Conduit location analysis: all indirect investors

Having provided some basic evidence that the investors who engage in proxy arbitration may have been motivated to invest indirectly for tax purposes, I now turn to an analysis of indirect investors’ conduit location choice: conditional on deciding to invest indirectly through a third state subsidiary, how do investors choose which state to select for the conduit? Studying investors’ choice of conduit location allows me to draw inferences about their motivations for investing indirectly. If the IIA shopping theory is correct, we should observe that investors choose conduit states that most expand their access to new BITs/IAs. If indirect investment is instead driven by tax planning, as I argue, we should observe that investors choose conduit locations that are tax-optimal: low corporate income tax rates, well connected in the tax treaty network, and with favorable withholding tax rates.

Table 2: **Data structure for conduit location analysis.**

Case ID	Home	Host	Conduit (observed)	Conduit (potential)	Chosen
1	USA	Venezuela	Netherlands	Algeria	0
1	USA	Venezuela	Netherlands	Angola	0
⋮	⋮	⋮	⋮	⋮	⋮
1	USA	Venezuela	Netherlands	Netherlands	1
2	UK	Ukraine	Cyprus	Algeria	0
⋮	⋮	⋮	⋮	⋮	⋮

To test these predictions, I begin by identifying 227 ISDS cases that involved indirect investment through a single conduit subsidiary.<sup>27</sup> For each case, I generate a set of potential conduit states; the dependent variable is a binary indicator of whether the potential conduit location was actually selected by the investor (see [Table 2](#)). The unit of analysis is thus the home state-potential conduit state-host state. As noted above in Section 5.2, explanatory variables are measured either at the conduit level (e.g., CONDUIT CIT), the bilateral host-conduit and conduit-home levels (e.g., BTT CONDUIT-HOME), or the triadic home-conduit-

<sup>27</sup>I focus only on cases with a single conduit subsidiary between parent and host, as attempting to incorporate all potential indirect paths of length two or more would quickly become computationally infeasible.

Table 3: **Conduit location models.**

<i>Lag</i>	DV: chosen as conduit location			
	<i>t</i>	<i>t</i> - 5	<i>t</i> - 10	<i>t</i>
Conduit CIT	-0.000 (0.000)	0.010 (0.008)	0.002 (0.007)	
Conduit-Parent BTT	0.002 (0.002)	0.000 (0.002)	0.002 (0.001)	
Host-Conduit BTT	0.006** (0.003)	0.010*** (0.002)	0.012*** (0.002)	
Effective Interest WHT	0.002 (0.010)	0.004 (0.008)	0.006 (0.007)	
Effective Dividend WHT	-0.009 (0.008)	-0.005 (0.006)	-0.009** (0.005)	
Conduit-Parent BTT Dissim	-0.000 (0.001)	-0.001 (0.001)	-0.002** (0.001)	
Tax Haven				0.018*** (0.002)
Conduit-Parent BIT Dissim	0.000 (0.001)	-0.001* (0.001)	-0.002** (0.001)	0.000 (0.001)
Conduit GDPPC (log)	0.002*** (0.001)	0.004*** (0.001)	0.004*** (0.000)	0.003*** (0.000)
Year FE	Y	Y	Y	Y
Case FE	Y	Y	Y	Y
Netherlands Dummy	Y	Y	Y	Y
N	7971	16711	22571	26260
R2	0.090	0.077	0.093	0.086

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

host level (e.g., EFFECTIVE INTEREST WHT).

Table 3 presents the results of four models estimated with OLS, with robust standard errors clustered on the ISDS case. The results do not provide support for Hypothesis 3, as the CONDUIT CIT variable is not significant in any specification. However, as predicted by Hypothesis 1, the coefficient on the HOST-CONDUIT BTT variable is positive and significant. It is also relatively large in magnitude: the presence of a tax treaty between the potential conduit state and the host state increases the probability that that state is selected as a conduit location by approximately 1 percentage point, which is substantial given that the

unconditional probability that any conduit location is selected is only 0.007. Further, in the 10-year lag model, the EFFECTIVE DIVIDEND WHT variable is negative and significant. Recall that this variable represents the total tax levied on capital transferred from host state to conduit state to home state; a negative coefficient suggests that investors are more likely to select conduit locations that offer lower indirect withholding tax rates, as predicted by Hypothesis 2.

The fourth model replaces all of the fine-grained tax variables with a dummy variable indicating whether or not the potential conduit location is considered to be a tax haven by the U.S. Treasury; as expected, the coefficient on the TAX HAVEN variable is positive and significant. Finally, all models include the CONDUIT-HOME BIT DISSIM variable, which measures the number of BIT partners that the conduit state has which the home state does *not* have. Conditional on the tax-related variables, the coefficient on the CONDUIT-HOME BIT DISSIM variable is insignificant or even negative and significant. Contra the predictions of IIA shopping theory, this result suggests that indirect investors do not select the conduit locations that maximize their access to new BITs.

### 6.3 Conduit location analysis: most-likely IIA shopping cases

The results presented in [Table 3](#) provide support for Hypotheses 1 and 2: among observed cases of indirect investment in ISDS, the location of the conduit subsidiary appears to be driven by the tax treaty network rather than the investment treaty network. However, this sample includes both indirect investors that engaged in proxy arbitration (filing ISDS through their conduit subsidiary) and those that did not. To provide an even tougher test for the tax planning theory, I repeat the above analysis on a sample of *most-likely* IIA shopping cases: instances of proxy arbitration in which only the conduit state, and not the investor's home state, had an active BIT/IIA with the host state (as illustrated in [Figure 3 \(d\)](#)). These are cases in which the investor would not have had access to ISDS against the host had they invested directly, and therefore this set of investors plausibly had the greatest incentive to

Table 4: **Conduit location models; most-likely IIA shopping cases.**

<i>Lag</i>	DV: chosen as conduit location			
	<i>t</i>	<i>t</i> - 5	<i>t</i> - 10	<i>t</i>
Conduit CIT	0.007 (0.053)	0.112*** (0.041)	0.041 (0.031)	
Conduit-Home BTT	-0.001 (0.018)	0.006 (0.013)	0.004 (0.009)	
Host-Conduit BTT	0.037** (0.015)	0.020 (0.013)	0.019** (0.009)	
Effective Interest WHT	0.060 (0.091)	0.072 (0.067)	0.059 (0.044)	
Effective Dividend WHT	-0.061 (0.055)	-0.114** (0.048)	-0.126*** (0.036)	
Conduit-Home BTT Dissim	-0.002 (0.005)	-0.001 (0.005)	-0.004 (0.004)	
Tax Haven				0.039*** (0.011)
Conduit-Home BIT Dissim	-0.003 (0.007)	-0.016** (0.008)	-0.012** (0.005)	-0.005* (0.003)
Conduit GDPPC (log)	0.010*** (0.003)	0.014*** (0.003)	0.012*** (0.002)	0.010*** (0.002)
Year FE	Y	Y	Y	Y
Case FE	Y	Y	Y	Y
Netherlands Dummy	Y	Y	Y	Y
Num.Obs.	1201	1953	3200	4376
R2	0.092	0.111	0.134	0.113

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

invest indirectly in order to gain access to investment treaty protection. If tax concerns are still more predictive of conduit location than the investment treaty network among this sample, it would constitute even more robust support for my theory.

I identify 99 proxy arbitration cases in which the parent investor lacked the ability to file ISDS against the host directly. As with the previous conduit location models, I generate a set of potential conduit locations for each case. However, identifying potential conduit locations is slightly trickier for these cases. All potential conduit states must have a BIT/IIA with the relevant host state, as if they did not it would mean that neither parent investor nor

subsidiary would have access to ISDS, and thus the case would not show up in the dataset. I therefore take the following approach: for each case, I identify potential conduit locations as all states that had an active BIT/IIA with the host state in the year that the case was filed.

Table 4 presents the results of four models, again estimated via OLS with robust standard errors clustered on the ISDS case. Each model contains the same covariates as the corresponding model in Table 3. In general, the results are highly similar to the models conducted using the full sample of indirect investments: investors choose to locate their conduit subsidiaries in states that have a tax treaty with the host state, and in states that offer access to favorable effective withholding tax rates. Again, low corporate income tax rates do not seem to be a driver of investors' conduit location decisions, and states identified as "tax havens" by the U.S. Treasury are substantially more likely to host conduit subsidiaries.

It is notable that, even among a sample of most-likely IIA shopping cases, the CONDUIT-HOME BIT DISSIM variable is not only negative but significant in three out of four models. If anything, investors are *less* likely to locate their conduit subsidiaries in the states that would most expand their access to new BITs. This finding does not completely rule out the possibility that the investors were nevertheless engaging in investment treaty shopping; after all, their choice of conduit location did give them access to arbitration against the host state even if it did not greatly expand their BIT portfolios. However, I argue that the results are more consistent with a different explanation: investors routed their investments through third state subsidiaries that would give them access to the tax treaty network, allowing them to reduce their overall tax burdens. When a dispute arises with the host state, investors may choose to file ISDS via their subsidiary if the subsidiary happens to have a BIT/IIA with the host state. This is often the case, as there is substantial overlap between the tax and investment treaty networks: as previously noted, 55% of all dyads that have a tax treaty together also have a BIT.

## 6.4 Heterogeneous BITs?

Thus far, I have treated BITs as a binary variable: two states either have a BIT together or they do not. However, while the vast majority of modern BITs provide investors access to ISDS, there are still significant substantive differences between them (Allee and Peinhardt, 2014; Berge, 2020). For example, there is variation across BITs in investors’ choice of arbitral forum (ICSID, UNCITRAL, or both) and in the presence of clauses that require firms to conduct “substantial business activity” in a state in order to gain BIT protection. Heterogeneity in substantive protections likely makes some BITs more appealing than others to investors (Betz, Pond and Yin, 2020), and raises the possibility of a different kind of BIT-shopping: rather than simply choosing a conduit location that has any BIT with the host state, indirect investors may prefer conduit locations that have a *favorable* BIT with the host state.

Following Betz, Pond and Yin (2020), I address this possibility using data on specific BIT provisions from the *IIA Mapping Project*, a collaborative effort between UNCTAD and legal scholars from various universities. This initiative has coded fine-grained information about the substantive protections present in many (though not all) of the world’s BITs. I draw on five specific provisions that past research has suggested may be important to investors:

1. The requirement that investors maintain “substantial business activity” in the conduit state in order to use the BIT. BITs with this provision are less favorable for indirect investors, as they typically establish shell companies – which by definition conduct *insubstantial* business activity – as their conduit subsidiaries (Betz, Pond and Yin, 2020).
2. The presence of a denial of benefits (DOB) clause. DOB clauses allow states to deny treaty “benefits” (e.g., access to ISDS) to investors who do not conduct substantial business activity in the conduit state. Indirect investors likely prefer BITs without DOB clauses, again due to their use of shell companies (Betz, Pond and Yin, 2020).

3. The presence of an unqualified (or “strong”) fair and equitable treatment (FET) protection. Over the past fifteen years, investors have increasingly cited violations of this vague treaty protection as their justification for filing ISDS cases against host states over a range of issues (Johns, Thrall and Wellhausen, 2020). Some BITs place limits on this protection while others do not; the latter are more favorable to investors, who can thus gain ISDS protection in response to a wider range of host state actions.
- 4/5. Whether or not the BIT allows investors access to file ISDS cases at ICSID, using UNCITRAL rules, or both. Without getting into the complexities of arbitral procedures, there is some sense that investors may prefer to file cases at ICSID due to the forum’s greater institutionalization and broader membership (Betz, Pond and Yin, 2020).
- A1. I also create a general “favorability index” for each BIT by adding a point for each investor-friendly provision.<sup>28</sup>

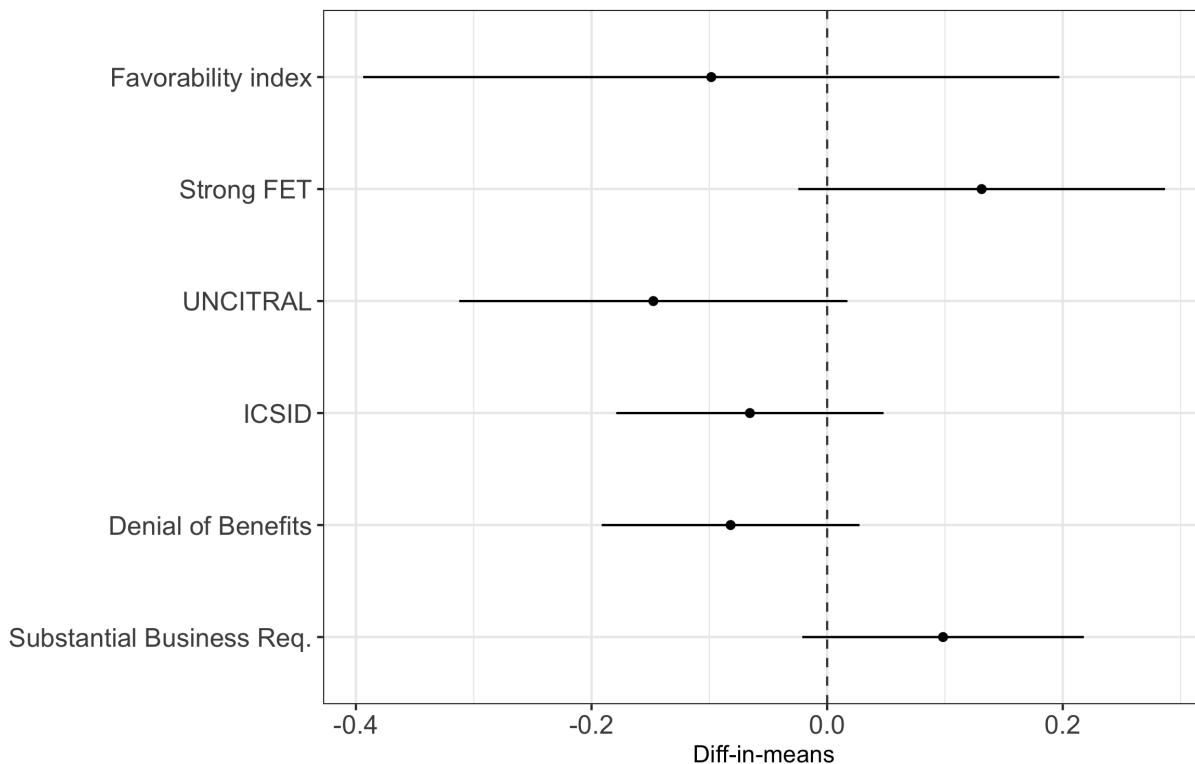
Using these data, I conduct three empirical tests to gauge the extent to which this investors may be investing indirectly in order to seek out BITs that offer stronger substantive protections. For the first two tests, I make use of a special subset of cases in which indirect investors had access to ISDS against the host state via both their home state’s BIT and their conduit state’s BIT. These are cases in which the investor invested indirectly despite already having direct BIT protection; I have argued that these cases cannot be explained by BIT-shopping, but it is possible that investors were simply shopping for more favorable treaties. As a first test of this possibility, I simply compare the home-host and conduit-host BITs according to the five provisions detailed above; if these investors pursued indirect investment strategies in order to access stronger BITs, we should expect the conduit-host BITs to be more investor-friendly than the home-host BITs.

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<sup>28</sup>More details on index construction are available in [Table A.1](#), and the index’s distribution can be found in [Figure A.2](#).



Figure 7: Comparing conduit-host BITs to parent-host BITs for indirect investors with access to both.



Coefficients represent the mean value of the variable among conduit-host BITs minus the mean value of the variable among parent-host BITs, and are presented with 95% confidence intervals.

Figure 7 presents the results of six difference-in-means tests comparing the provisions of the conduit-host BITs to those of the parent-host BITs among the subset of indirect investors that have access to both treaties. Most importantly, note that the two sets of treaties are not significantly different on any of the relevant provisions; it cannot be concluded that investors seek out conduit locations with BITs that are more favorable on average than their home state’s BITs. Additionally, while some coefficients are signed in the direction we would expect (FET, DOB), others are the opposite (ICSID, substantial business activity requirement).

For the second test, I make use of the fact that this subset of indirect investors had the opportunity to choose the treaty under which they would like to file the case. Even if these

Table 5: **Investors with access to multiple BITs do not choose to file disputes under the more favorable treaty.**

	DV: treaty chosen as legal basis for ISDS						
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Substantial Business Req	-0.144 (0.124)					-0.141 (0.123)	
DOB clause		-0.043 (0.176)				-0.107 (0.187)	
ICSID access			-0.161 (0.113)			-0.177 (0.119)	
UNCITRAL access				-0.094 (0.082)		-0.117 (0.087)	
Strong FET clause					-0.042 (0.109)	-0.122 (0.121)	
Favorability index							-0.036 (0.057)
Num.Obs.	122	122	122	122	122	122	122
R2	0.009	0.001	0.011	0.008	0.001	0.036	0.004

\*  $p < 0.1$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$ . Constant term estimated but not reported.

investors did not choose their conduit location with the express purpose of accessing a more favorable BIT, the IIA-shopping theory would expect that the investors should file the case under the more favorable treaty once a dispute arises. To test this proposition, I conduct a set of regressions. Taking the parent investor-BIT as the unit of analysis – resulting in two observations per parent investor, one for the parent-host BIT and one for the conduit-host BIT – I test whether investors are more likely to file disputes under treaties with certain provisions.

Table 5 displays the results of seven models, each estimated via OLS with robust standard errors clustered on the ISDS case: models 1-5 test each bilateral relationship, model 5 includes all five provisions, and model 6 substitutes all individual provisions with the favorability index. In no model is any BIT provision a significant predictor of the investor’s choice of legal instrument, and the provisions collectively explain very little of the variation in the dependent variable. These results do not support the assertion that investors with access to

multiple BITs will select the stronger treaty as the basis for their legal claims against the host government, casting further doubt on the possibility that investors invest indirectly in order to access more favorable BITs.

Finally, in order to determine whether BIT heterogeneity predicts conduit location choice for indirect investors whose home states do *not* already have a BIT with the host state, I reestimate the most-likely treaty shopping models from [Table 4](#) with the addition of the BIT-level covariates. Due to the fact that the *IIA Mapping Project* has not coded all of the BITs in my sample – including one-third of the BITs that were actually used in observed proxy arbitration cases – the level of missingness in this sample is high and nonrandom. The results should therefore be interpreted with substantial caution.

[Appendix Table 1](#) displays the results of seven models, again estimated with OLS and presented alongside robust standard errors clustered on the ISDS case. Among the BIT-level covariates, the only consistently significant predictor of conduit location is the presence of a denial of benefits clause; puzzlingly for the BIT-shopping theory, the coefficient is positively signed, implying that investors prefer BITs that *include* a DOB clause. While the tax variables are slightly less robust than in previous models (likely due to the smaller sample size and nonrandom missingness), each model contains at least one tax treaty-related variable that is statistically significant and correctly signed. Further, it is instructive to compare the models with and without BIT-level covariates within the same lag category. The addition of BIT-level covariates does not affect the sign or significance of any of the tax variables in any model.

## 7 Conclusion

Foreign investors are often able to use their overseas subsidiaries – typically “shell” companies with no substantial business activity of their own – to gain access to ISDS against their host state via other states’ investment treaties. This practice of arbitration by proxy

has fundamentally expanded the scope of the investment treaty regime: BITs may be bilateral in the sense that they are signed by two states, but they are global in the sense that they can be used by any investor that has structured their investment in the right way.

In this paper, I argue that proxy arbitration is not evidence of *ex ante* investment treaty shopping on the part of investors. Rather, it is a spillover effect that arises from the overlap between the international tax and investment regimes: firms and individuals make their foreign investments indirectly through third state conduit subsidiaries in order to take advantage of the bilateral tax treaty network (Arel-Bundock, 2017; Van 't Riet and Lejour, 2018; Weichenrieder and Mintz, 2008). If a dispute arises with the host state, investors can repurpose these subsidiaries as ISDS claimants. Using original data on ISDS claimants' ownership structures as well as detailed tax data from multiple sources, I show that the set of observed proxy arbitration cases are consistent with this explanation. Investors tend to locate their conduit subsidiaries in states that provide them access to tax treaties and low withholding tax rates, and these same subsidiaries become ISDS claimants when trouble strikes.

Modern multinational firms are affected by several bilateral and small multilateral treaty regimes: investment and taxation (as in the present study), labor (Peters, 2019), trade (Bacchini, 2019; Bütte and Milner, 2008), and environmental (Egger, Jeßberger and Larch, 2011; Mitchell et al., 2020), among others. These agreements are typically negotiated separately from one another, and each one seeks to incentivize or proscribe some set of firm behaviors. However, behaviors incentivized by one regime may have unintended downstream consequences for the functioning of other regimes. This is driven in part by the extent to which separate treaty networks overlap with one another: for example, 55% of all dyads with an active BTT have a BIT as well, 64% of the dyads with an active labor agreement are also bound together by a PTA, and 47% of the dyads with an active bilateral environmental agreement also have a BIT.<sup>29</sup> In this paper I identify one such spillover effect between the

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<sup>29</sup>Source: author's calculations based on treaty data from 2007.

tax and investment treaty networks, though many other similar examples likely exist. For scholars of IPE, paying greater attention to the potential for spillover effects across treaty regimes may shed some new light on old questions, such as the (non-)effect of BITs on FDI inflows to capital-importing states.

As a final thought, the results in this paper underscore the importance of developing a more robust theoretical framework for understanding the causes and consequences of regime complexity in the governance of global business. Large IPE literatures provide theoretical (Alter and Meunier, 2009; Gehring and Faude, 2014; Morse and Keohane, 2014) and empirical (Busch, 2007; Pratt, 2018; Raustiala and Victor, 2004) analyses of complex regimes, but the bulk of this work is state-centric: states are the ones navigating regime complexity, employing tactics such as forum shopping to take advantage of complexity, and so on. While many of the insights of the state-centric literature on regime complexity still apply when firms are the actor of interest, there are key differences. Most obviously, private actors are not sovereign; they are subject to the authority of the state(s) in which they operate, and thus they are doubly constrained by domestic and international law. However, private actors also have unique strategies for exploiting complex regimes. In particular, they can use their subsidiaries to gain access to new nationalities and to create indirect paths to access (or avoid) certain institutions: beyond the present paper, examples include indirect (or “entrepôt”) trade to avoid tariffs (Fisman, Moustakerski and Wei, 2008) and indirect investment to avoid being bound by the OECD Anti-Bribery Convention (Chapman et al., 2020). There is much to be gained by theorizing firms’ responses to international regime complexity, particularly as the field of international political economy continues to adopt firm-level research designs.

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# A Appendix

## A.1 Figures

Figure A.1: Organigram from *Aguas del Tunari v. Bolivia*

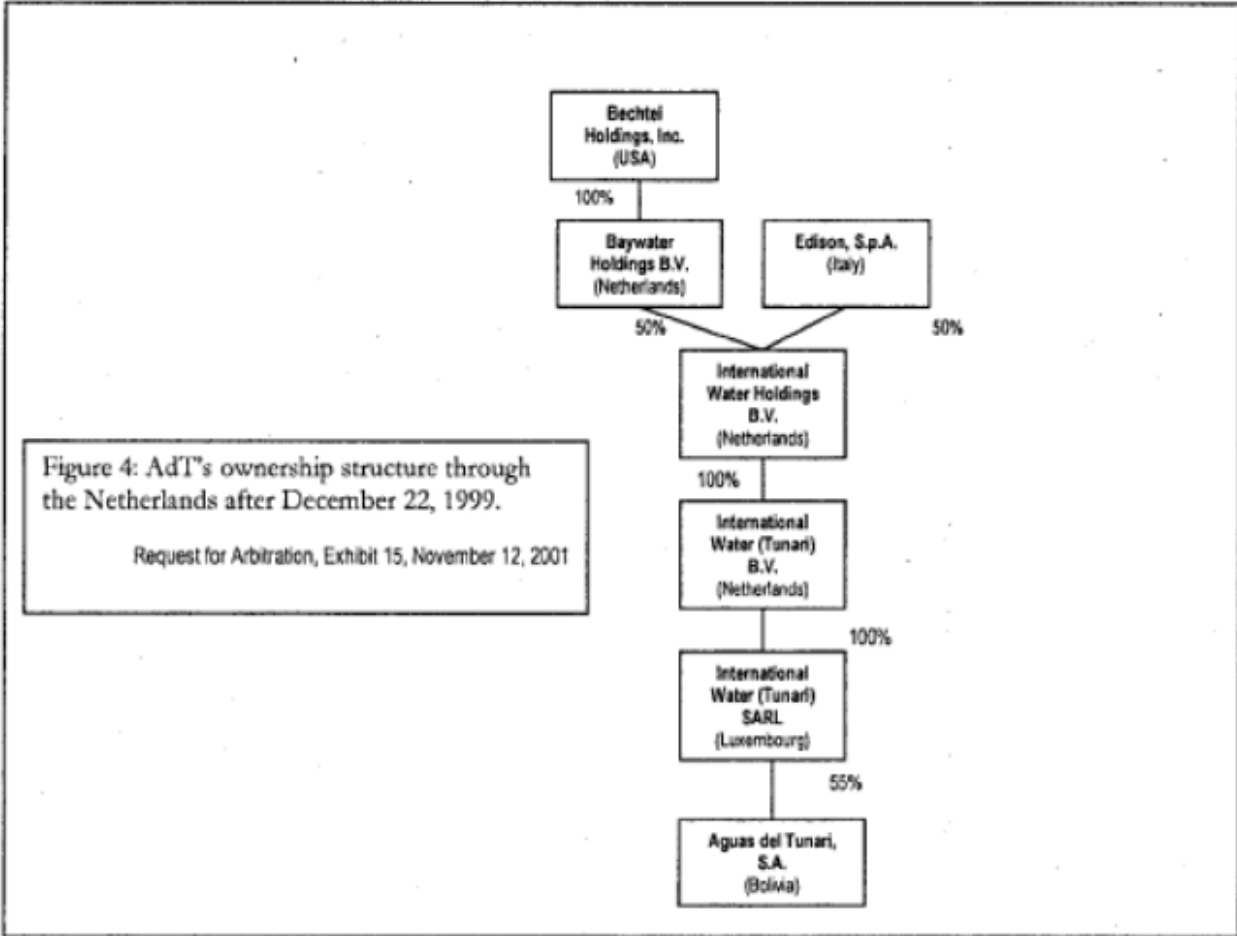
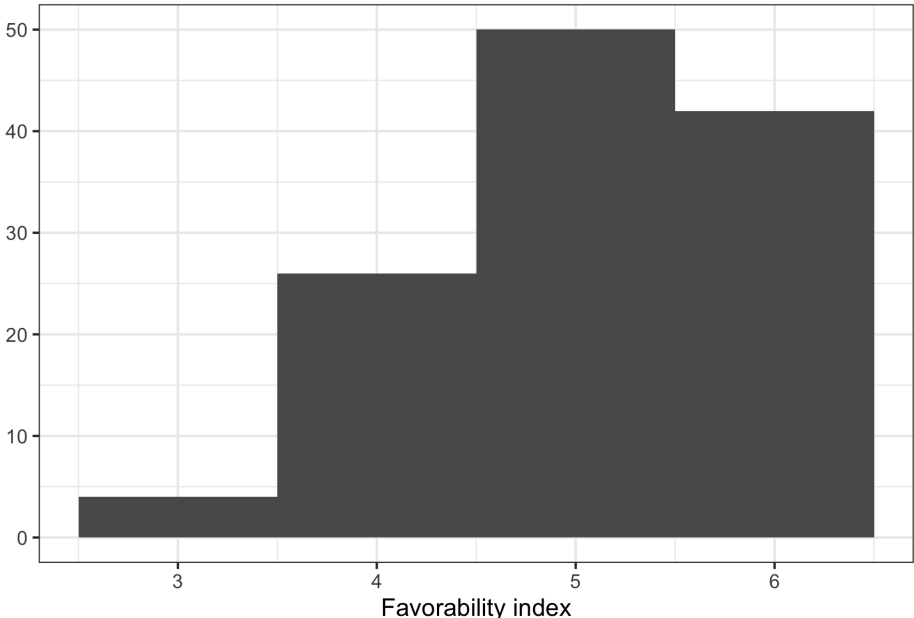
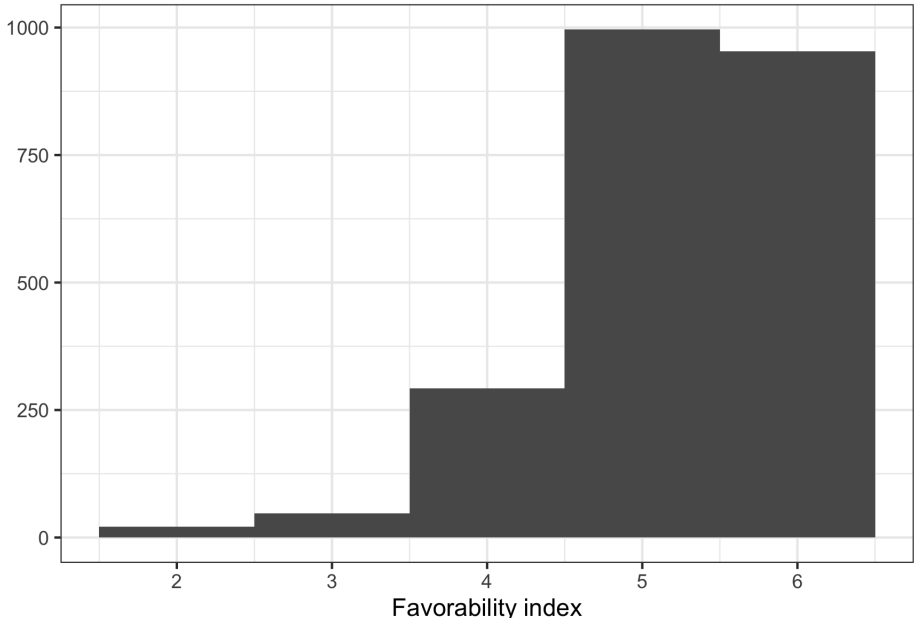


Figure A.2: **Distribution of favorability index variable within two samples.**

(a) Indirect investors with access to multiple BITs (Table 5)



(b) Potential conduit locations that have a BIT with the host state (Table A.2)



## A.2 Tables

Table A.1: **Favorability index construction.**

If...	Provision	Status	Points
	Substantial business activity	Absent	1
	Denial of benefits clause	Absent	1
	Strong FET clause	Present	1
	ISDS access	Present	1
	ICSID access	Present	1
	UNCITRAL access	Present	1
	<i>Total:</i>		/6

Table A.2: **Conduit location models; most-likely IIA shopping cases (with BIT-level covariates).**

DV: chosen as conduit location							
<i>Lag</i>	<i>t</i>	<i>t</i>	<i>t</i> - 5	<i>t</i> - 5	<i>t</i> - 10	<i>t</i> - 10	<i>t</i>
Conduit CIT	-0.021 (0.058)	-0.059 (0.059)	0.132** (0.061)	0.091 (0.058)	0.010 (0.060)	0.018 (0.065)	
Conduit-Parent BTT	-0.006 (0.024)	-0.006 (0.023)	0.013 (0.018)	0.009 (0.018)	0.024 (0.019)	0.019 (0.019)	
Host-Conduit BTT	0.051** (0.019)	0.051** (0.020)	0.019 (0.019)	0.014 (0.018)	-0.005 (0.022)	-0.005 (0.021)	
Effective Interest WHT	0.180 (0.109)	0.159 (0.107)	0.161 (0.100)	0.110 (0.101)	0.153* (0.079)	0.121 (0.075)	
Effective Dividend WHT	-0.069 (0.070)	-0.093 (0.065)	-0.159** (0.064)	-0.206*** (0.062)	-0.240*** (0.065)	-0.265*** (0.066)	
Cond-Par BTT Dissim	-0.003 (0.005)	0.000 (0.005)	-0.008 (0.007)	-0.005 (0.007)	-0.015 (0.010)	-0.015 (0.010)	
Tax Haven							0.044*** (0.016)
BIT: Substantial Biz		-0.008 (0.012)		0.006 (0.012)		-0.004 (0.011)	-0.020*** (0.007)
BIT: DOB clause		0.108 (0.064)		0.175*** (0.062)		0.157** (0.063)	0.081** (0.034)
BIT: ICSID access		0.020* (0.010)		0.009 (0.012)		-0.001 (0.018)	-0.000 (0.010)
BIT: UNCITRAL access		-0.018 (0.017)		-0.017 (0.012)		0.010 (0.013)	-0.008 (0.009)
BIT: Strong FET clause		0.004 (0.012)		0.003 (0.014)		0.017 (0.017)	-0.006 (0.007)
Cond-Par BIT Dissim	0.006 (0.007)	0.005 (0.007)	-0.005 (0.008)	-0.003 (0.008)	0.005 (0.007)	0.008 (0.008)	-0.000 (0.005)
Conduit GDPPC (log)	0.009** (0.003)	0.004 (0.003)	0.013*** (0.004)	0.005 (0.003)	0.012*** (0.004)	0.008* (0.004)	0.007*** (0.002)
Year FE	Y	Y	Y	Y	Y	Y	Y
Case FE	Y	Y	Y	Y	Y	Y	Y
Netherlands Dummy	Y	Y	Y	Y	Y	Y	Y
Num.Obs.	775	775	1217	1217	1288	1288	2306
R2	0.111	0.126	0.095	0.124	0.140	0.156	0.105

\* p < 0.1, \*\* p < 0.05, \*\*\* p < 0.01