Introduction

On June 19 2008, Viorel and Ioan Micula, Romanian-born brothers with Swedish citizenship, attended a hearing at the World Bank's Paris office. Three years earlier, the Miculas had filed a claim requesting over 450 million euros in compensation from the Romanian government. The claim was being heard at the International Centre for Settlement of Investment Disputes (ICSID), a small arm of the World Bank that arranges arbitrations between foreign investors and states. The arbitration tribunal had three members: one appointed by the Miculas, one appointed by Romania, and the third by agreement of the parties. In that hearing room in Paris, there were thirty lawyers, but no one from the Romanian government, Swedish government, or the European Commission.[1]

The Miculas' counsel argued that when Romania partially withdrew investment incentives to disfavored regions, it violated the Fair and Equitable Treatment clause in the Sweden–Romania bilateral investment treaty (BIT).[2] Romania's counsel argued that these incentives had to be partially withdrawn as a condition of Romania acceding to the European Union (EU)—a position the European Commission confirmed in an amicus submission.[3]

The ICSID tribunal found that Romania had violated the Sweden–Romania BIT by prematurely repealing the economic incentives and by failing to inform the Miculas promptly about the repeal. The arbitrator appointed by Romania dissented here, noting that "situations of two parts of government speaking at cross-purposes, as well as hesitation or wavering, are usual occurrences, particularly in times of rapid (and rather disorderly) change. They can happen in the best of governments." The arbitrator also observed that the Romanian government had no intention to deceive; rather, this was merely "a case of

[1] *Micula v Romania* (Decision on Jurisdiction 2008): 8–15.
[2] *Micula v Romania* (Decision on Jurisdiction 2008): 8–15.
[3] *Micula v Romania* (Award 2013): 15, 93, 97. In 2016, the Commission filed an amicus with the US Court of Appeals for the Second Circuit (New York), where the Miculas sought to enforce the award against Romanian assets in the US. In 2015, the Commission concluded that payment of the award itself would violate EU rules on state aid, and ordered the Miculas to pay back all amounts already received (Commission Decision 2015/1470 of March 30 2015 on State Aid).

failure of communication and...coordination between different parts of government."[4]

The award sparked outrage in Romania: no property had been taken from the Miculas—they had lost only their expectation of not having to pay a particular tax for four more years. Their claim to Swedish citizenship was tenuous, their primary residence was Romania, the "disfavored region" was their hometown, and the Miculas were well-known as some of Romania's wealthiest men.[5] The award, to be paid by Romanian taxpayers, would cost more than 30 euros for every working person in Romania—about 10 percent of the average Romanian monthly salary.[6]

The Swedish government remained silent throughout the Micula case. If investment dispute resolution were a state–state system, like trade dispute resolution, would the Swedish government have taken up the case, brought a claim against Romania, and antagonized the European Commission?

That question could also be asked about another case involving a Swedish investor. The German government decided to phase out nuclear energy after the 2011 Fukushima disaster. Phasing out nuclear energy is a complex process, and the utility companies affected argued that the decision was taken hastily and saddled them with losses from earlier-than-planned shutdowns. The affected companies filed complaints with the German Constitutional Court. Most of the companies were German and their only legal recourse was to German courts. One of the companies, Vattenfall, was a Swedish state-owned firm. Swedish nationality gave Vattenfall the ability to bring two claims against the German government at ICSID, alleging violation of the Energy Charter Treaty. The Vattenfall cases surprised German officials and citizens—in the German press, there was a sense of incredulity that a foreign corporation could challenge German environmental regulations before an international tribunal, which might award billions of euros in compensation to the foreign firm.[7] Here again, would the Swedish government—aware of Sweden's own tumultuous political history with nuclear phase-out[8]—have taken up the case against the German government?

[4] Dissent of Georges Abi-Saab (2013): 5.

[5] The Miculas are frequently covered in the Romanian press, including articles on their extravagant lifestyles. For instance, Victor Micula's son is known for landing a helicopter at a Black Sea resort and for refusing to comply with police while driving his Ferrari (Bonchiş 2015).

[6] Romania was ordered to pay the award of RON 376,433,229 (84.5 million euros), plus interest, plus half the cost of the arbitration, plus their legal fees (11.5 million euros). The Miculas were ordered to pay their own legal fees, which totaled 18.4 million euros, and half the cost of the arbitration. *Micula v Romania* (Award 2013): 366–7. The average Romanian monthly salary in January 2013 was 1548 lei (351 euros). Institutul National de Statistica 2017.

[7] In a *Frankfurter Rundschau* article, for instance, Vattenfall's claim at ICSID is described with outrage while its parallel claim in German courts is not (Schlandt 2013).

[8] Phasing out nuclear power has long been a salient, even a defining issue in Swedish politics. Sweden held an advisory referendum on nuclear power in 1980 (after the Three Mile Island

It is difficult to imagine the Swedish government—or any other government—taking up these cases. So why did governments create a special system in which foreign investors are able to bring their cases directly against states? In other words, what explains the rise of investor–state arbitration? These questions motivate this book. The chapters that follow probe the intellectual, political, and economic forces behind the rise of investor–state arbitration.

The corporations and law firms that dominate investor–state arbitration today were not present at its creation. It did not emerge through corporate greed or investor lobbying. In fact, there was almost no demand from investors for this type of arbitration. Nor did powerful states have a strong preference for it, compared with other options available to them for investment protection. Nor was it created because there was evidence that it facilitated investment or improved the climate for investment—there was no such evidence. Most investors and officials believed investment insurance was far more effective at facilitating investment. So why, and how, did it emerge?

International officials with peacebuilding and development aims drove the rise of investor–state arbitration. They saw themselves forging a lowest common denominator solution for investment protection, something that most of their member states could ratify in the short run, which could also facilitate the growth of international law related to foreign investment in the long run. While these international officials were able to anticipate many developments—including an enormous caseload from investment treaties—they certainly did not set out to create a system so loathed that the European Trade Commissioner recently called ISDS, another abbreviation for this type of arbitration,[9] "the most toxic acronym in Europe."[10] They did not intend to create a system that embodies the worst fears of those concerned about runaway globalization. If they had been alive to read it, they would have been horrified by how *The Economist* introduced ISDS in 2014:

> If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government

accident), which led to a nuclear phase-out policy. This policy was then reversed in 2009, but Sweden now has a tax on nuclear power, and decisions to close older reactors are pending (World Nuclear Association 2017).

[9] Investor–state dispute settlement (ISDS) and investor–state arbitration are interchangeable in contemporary parlance, and I follow that usage. Where possible, I prefer investor–state arbitration, because it is a more precise term. Technically, it is a subset of ISDS, which includes mediation, conciliation, and other forms of dispute resolution.

[10] Commissioner Cecilia Malmström said this in Washington DC (Palmer 2015) and at the European Parliament (Ardhe 2015).

> passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe.[11]

Foreign firms would not have that special right without the actions of those officials in the 1960s. This book uses thousands of archival documents to elaborate and illustrate this argument, tracing investor–state arbitration from their initial ideas to contemporary realities. This book provides a new explanation for the rise of investor–state arbitration, split into two phases. In the first phase, several institutional options for investment protection were discussed, and I argue that the intensity of involvement from international officials determined which institutional framework emerged. The creation of this institutional framework, ICSID, kicked off the second phase, which is a process of gradual institutional development that led to contemporary investor–state arbitration. It was ICSID Secretariat officials who encouraged states to provide access to investor–state arbitration in their investment treaties. Only after treaties with investor–state arbitration existed did a constituency of law firms and investors begin developing a preference for it, based on the revenue and prestige they received from it. While this constituency was developing, the institution of investor–state arbitration was being put to new purposes. Institutions do not determine the purposes to which they may be put. Analyzing gradual institutional change helps to explain how unintended consequences emerge and why institutions persist even when they generate unintended consequences.

The international officials who developed investor–state arbitration had all fled the Second World War and were drawn to the idea of ISDS because they believed in the power of law to resolve disputes peacefully and believed that rich societies had an imperative to use law to facilitate development in poorer societies.[12] Yet it is their actions, stabilized through decades of path-dependent institutional development, that created today's investor–state arbitration system—a system which many observers, like *The Economist*, perceive as working against ordinary people and against development.

[11] *The Economist* 2014.

[12] For instance, in a speech to the International Law Association in 1973, ICSID Secretary General Aron Broches ([1973] 1995: 514) chastised the international legal community for not doing enough to improve the quality of life in poor states: "We failed to meet adequately the moral obligations accepted in all civilized societies since the beginning of time, the obligations of the strong to help the weak. These moral obligations toward which international law is moving, however slowly and painfully, to recognize as legal obligations, exist not only between rich and poor societies, but also between any given society and its poor members." Later in the same speech, Broches ([1973] 1995: 516) challenged his audience, "to help create the conditions for economic and social progress, with dignity and in freedom, remembering that the ultimate object of law is the welfare of mankind."

THE PUZZLE: WHAT EXPLAINS THE RISE OF INVESTOR–STATE ARBITRATION?

Providing individual investors with standing against states is a fundamental revision in the nature of sovereignty. Governments moved from a state-based international investment order to one in which individuals were accorded equal standing. Why? This is the central puzzle. This development is related to momentous transformations in human rights that occurred after the Second World War—specifically, individuals being endowed with rights under international law—and some of the same legal minds were involved, but in investment, the dynamics were different.[13] In investment, a muffled plea of "never again" came from German bankers who found the uncompensated expropriation of their assets (largely by the American and Soviet governments) during and after the Second World War unconscionable.

This transformation of sovereignty took decades. Rather than one moment of institutional design, the institution of investor–state arbitration developed incrementally—a transformative political change that occurred in small steps. Since the end of the Second World War, ISDS has been transformed from a vague idea into an expansive, decentralized legal architecture in which bilateral treaties, contracts, and domestic law all provide access to arbitration that is backed up by robust enforcement. I argue that the crucial period to explain the rise of investor–state arbitration is roughly 1954 to 1994, long before it attracted much public or scholarly attention. Actions taken during these years of neglect and near-invisibility laid the foundations for the subsequent explosion in investment arbitration.

The explosion in the investor–state caseload occurred largely after 2000. During its first twenty-five years, between 1966 and 1991, ICSID (the only investor–state arbitration organization that releases its caseload) registered one case per year, on average.[14] In 2015 alone, ICSID registered fifty-two cases.[15] Individual cases are an engine of legal reasoning that push forward the development of investor–state arbitration. As a growing proportion of the caseload becomes publicly available, it has become possible to write a history of ICSID by "presenting the landmark cases that have been decided under its auspices."[16] Analyzing cases is the domain of the lawyer, and a profusion of

[13] Elihu Lauterpacht is perhaps the best known of the legal thinkers involved with individual standing in both investment and human rights (see Chernykh forthcoming).

[14] During this period, there were twenty-six cases registered (ICSID 2016).

[15] ICSID 2016.

[16] Kinnear et al. 2015. As more decisions become public, it also becomes possible for tribunals to rely heavily on past decisions, despite the absence of formal precedent in ISDS. Commission (2007: 151) finds that tribunals now routinely discuss the role played by "ICSID's case law." Fauchald (2008) finds tribunals increasingly cite other instruments of international law. The average jumped to between eleven and thirteen previous awards per decision during 2004–6.

legal scholarship analyzes the interpretive innovations that drive this field of practice. The focus of this book is different. It seeks to explain the earlier, political decisions that made this caseload possible.

This book splits these early decisions into two phases: creating the ICSID Convention, and eliciting state consent for ISDS. I argue that without the actions taken during these two phases, it is unlikely that contemporary investor–state arbitration would exist. Each of these phases can also be considered a manifestation of an institutional design puzzle familiar to international relations scholars: the creation of a new international organization on the basis of a multilateral treaty and the delegation of dispute resolution.

First Phase: Creating the ICSID Convention

The ICSID Convention is a multilateral treaty that sets out procedural rules and enforcement provisions for the resolution of disputes between foreign investors and states through arbitration or conciliation. It is the closest thing to a founding treaty for investor–state arbitration. Ratifying the Convention formally recognizes that individuals—natural or otherwise—have the legal standing to bring a claim directly against a state under international law. When the Convention came into force in 1966, and for decades afterwards, it was synonymous with the idea of investor–state arbitration. Although there are historical antecedents, for many governments around the world, the idea of equal standing between individual investors and states was radical.

Technically, it was possible for individual investors to face a state in arbitration prior to the ICSID Convention. By 1966, the International Chamber of Commerce (ICC) in Paris had decades of experience as the global headquarters of commercial arbitration, and it was possible, and perhaps common, to include recourse to ICC arbitration in contracts between foreign investors and states.[17] The Permanent Court of Arbitration (PCA) in The Hague, established in 1899, was able to administer disputes between investors and states—a fact the PCA Secretariat advertised in the late 1950s and that the British government raised during the creation of ICSID.[18]

Guillaume (2011: 7), a former president of the International Court of Justice (ICJ), argues that of all types of arbitration, ICSID decisions refer to precedent the most. In his words, "they do this . . . with rather excessive zeal."

[17] Records of ICC arbitrations between investors and states are not public so there is no authoritative count, but government officials discussed them in the 1960s as though they were common. For instance, British officials noted: "When contracts are being negotiated between Western industrialised countries, there is normally no difficulty about arbitration since the accepted thing is to provide for ICC arbitration." Letter from Hester Boothroyd to Mr. Mitchell entitled "IBRD and Arbitration," February 6 1962. UK T 312/251.

[18] Letter from Hester Boothroyd to Peter Reilly, October 4 1961. UK T 312/251.

If investor–state arbitration was already possible, why did states go to the trouble of drafting a new treaty? The ICSID Convention is distinct because it emerged at the World Bank, and, unlike any previous treaty, is an intergovernmental convention dedicated to investor–state arbitration. The involvement of the World Bank changed investor–state arbitration in several ways. First, the idea of investor–state arbitration was reframed to fit within the Bank's mission of facilitating investment and improving investment climates. Second, the World Bank's involvement meant that appealing to capital-importing countries became a central concern. Arbitration could not disrupt the World Bank's main business—lending to capital-importing states, many of them newly independent—and the World Bank's special relationship with its borrowers underlay the entire drafting and ratification process.[19] The initiative would have been fundamentally different, and likely a failure, without the World Bank's backing.

The ICSID Convention included many legal and technical innovations, but the reason it matters in this account is because it rebranded arbitration, put the World Bank's reputation behind it, and introduced it to new audiences. It created an intergovernmental framework and set in motion dynamics that would eventually lead to contemporary ISDS. The ICSID Convention also created a new international organization, known as the ICSID Secretariat, which, as an arm of the World Bank, has direct, privileged lines of communication to governments.

The patterns of state ratification for the ICSID Convention reflect the Bank's focus on newly independent countries, and suggest a relationship between investor–state arbitration and foreign investment policymaking generally. Fifteen of the first twenty ratifications were from sub-Saharan African states. During the first six years that the Convention was open for ratification, only forty-seven states ratified out of the 102 eligible to do so. During the 1970s and 1980s, few additional states ratified. Then in the early 1990s, the number of ratifications rose sharply, in line with changing ideas toward foreign investment, especially in former Soviet and Latin American states. Today there are 153 member states, out of 189 World Bank member states. While other arms of the World Bank have near-universal membership, many large countries remain outside ICSID today, including Brazil, Ethiopia, India, Mexico, Poland, Russia, South Africa, and Thailand.[20]

[19] Gwynn (2016) conceptualizes the World Bank's position and advocacy for investment arbitration and treaties using Susan Strange's concept of structural power. Although I recognize that the special relationship between the World Bank and its borrowers was vital for ICSID's emergence, I do not use the term structural power because it obfuscates underlying dynamics, and these underlying dynamics are important for the rise of ISDS. Without structural power, I can better interrogate the arguments and relationships cultivated by individual officials, and gain more analytical insight into the relations between different arms of the World Bank.

[20] The comparable arms of the World Bank Group are the International Finance Corporation (IFC) (184 member states) and the Multilateral Investment Guarantee Agency (181 member states).

When a state ratifies the ICSID Convention, that ratification does not enable investors to bring cases against them. Ratification is an official, public recognition of the principle that investors *could* have the legal standing to bring cases against them. The ICSID Convention's unique double-consent formulation requires that a state provide its consent in two places before an investor can bring a claim.[21] In order for ICSID to have any cases, states must provide their consent in a second instrument.

Second Phase: Eliciting State Consent to ISDS

The actual delegation of dispute resolution authority occurs with the second consent, when states write access to arbitration into their treaties, contracts, or domestic laws. State officials specify the substantive law to be applied: in a treaty arbitration, it is the text of the treaty; in a contract arbitration, it is the text of the contract; and when domestic law provides the basis for jurisdiction, specified host country laws are the relevant substantive law.[22] In theory, this gives state officials discretion to tailor the substantive legal standards or exempt sensitive sectors. It also means that states could, in theory, remain members of ICSID but revoke their delegation to ICSID arbitration by exiting or rewriting their treaties, contracts, and domestic laws to remove access to arbitration.

Despite receiving the majority of the scholarly attention, especially in the field of political science, BITs have provided the basis for only 60 percent of ICSID's caseload to date. Investment contracts have provided the basis of consent for nearly 17 percent of cases, regional or sectoral agreements for 13 percent, and domestic laws for nearly 10 percent.[23] Table 1.1 details how different instruments delegate dispute resolution to ICSID, including multilateral agreements, several of which have been negotiated, although none have come into force.

This table makes clear that investor–state arbitration and BITs are analytically distinct phenomena. None of the first BITs provided access, and not all of the BITs in force today provide access.[24] All instruments of consent—contracts, domestic laws, and every type of treaty—are important, historically and possibly in the future. It is the decentralization of consent that makes ISDS

[21] Report of the Executive Directors 1965; Schreuer et al. 2009. The jurisdiction of ICSID is a topic of extensive legal scholarship, in part because of its unique double-consent requirement. Schreuer's commentary on the ICSID Convention devotes 340 pages to ICSID's jurisdiction.

[22] These are simplifications; in any particular arbitration, there may be other sources of applicable law and Most Favoured Nation clauses that can make other instruments relevant.

[23] ICSID 2016: 10.

[24] UNCTAD (2016) finds 1683 out of 1959 mapped treaties include provisions that mention ICSID.

Table 1.1. How Consent Operates in Different Types of Investment Agreements

Type of investment agreement	How consent to ICSID operates	Examples
Individual investment contracts	Consent to ICSID is written into individual contracts between investors and host states	Contracts are private, but discussed in contract-based cases, like *Société Générale de Surveillance (SGS) v Pakistan*
Domestic law	Consent to ICSID is written into domestic legal frameworks on foreign investment	Albania's Foreign Investment Law of 1993
BITs	Consent to ICSID is written into a bilateral treaty between two states	Thousands in force; for example, Argentina–France BIT
Bilateral free trade agreements, with investment chapters	Consent to ICSID is written into the investment chapter of a trade treaty	US–Chile Free Trade Agreement
Regional investment (or trade) agreements	Consent to ICSID is written into treaties negotiated at a regional level or for a specific issue area	North American Free Trade Agreement, Energy Charter Treaty
Multilateral investment agreements	Consent to ICSID is written into multilateral treaties with global aims or scope	Multilateral agreement on investment (not in force; negotiations discontinued in 1998)

resilient.[25] Even if, for instance, investor–state arbitration were removed from all European investment treaties, the its survival would not be in doubt. Thousands of contracts, dozens of domestic laws, and hundreds of treaties would still be in force that provide investors with standing. In other words, ISDS is bigger than BITs.

An explanation of why states provided consent to ISDS must include why, for instance, nearly forty governments have inserted clauses into their *domestic law*, enabling foreign investors to bypass their national courts and instead take them, the government, directly to international arbitration. This is a unilateral concession of sovereignty, inherently more puzzling than taking the same action in a bilateral negotiation. Who elicited this consent from governments, and why did governments agree to provide it? This is what the puzzle looks like in the second phase, eliciting consent for ISDS.

This book is structured to examine the two phases sequentially. Chapters two to five focus on the creation of the ICSID Convention. Chapters six to eight evaluate how consent was elicited from states in domestic laws, contracts, and all varieties of treaty.

[25] Pauwelyn (2014) frames contemporary ISDS as the result of thousands of different decisions made by many actors, making it stable and dynamic. Puig (2013) observes that ISDS, and ICSID in particular, is more resilient than typically assumed.

CONVENTIONAL ACCOUNTS: LOBBYING AND INTERGOVERNMENTAL BARGAINING

Beth Simmons observes that "the private right to sue a government for damages and to choose the forum in which to do so constitutes the most revolutionary aspect of the international law relating to foreign investment in the past half-century."[26] Remarkably, despite a substantial political science research program on investment treaties, the rise of ISDS—the most revolutionary aspect of these treaties—has not been the subject of political science scholarship.

Decades of conventional wisdom assume that investors drove the creation of investor–state arbitration, and dominant scholarly explanations rely on this assumption. It is investors that gain from having the standing to bring claims directly and it is therefore reasonable to expect that investors sought this standing.[27] Firms may request ICSID access from two governments. First, they can ask host governments directly, for instance in contract negotiations.[28] Second, and more importantly, they can ask their home governments. Domestic lobbying channels are well-developed pathways and there is every reason to expect that firms lobbied for their preferred ISDS policy and that their governments translated this lobbying into a state preference for access to arbitration.[29] Capital-exporting states, therefore, are assumed to have an *ex ante* preference for investor–state arbitration.[30] This is classic liberal intergovernmental preference formation, familiar across many issue areas.

In conventional accounts, when capital-exporting states negotiated treaties that provide their investors with standing, they were acting on their investors' preferences. Capital-exporting states largely determine the content of BIT dispute resolution clauses in these accounts. As their relative bargaining power increases, so does the likelihood of their investors having direct access

[26] Simmons 2014: 17.

[27] This standing strengthens the bargaining position of an investor, even before they file a case; negotiation that occurs in the shadow of arbitration is likely to reach a different conclusion than similar negotiation without the shadow of arbitration.

[28] Wells and Ahmed (2007: 72, 134–5, 259) provide examples of ICSID in contract discussions.

[29] In line with scholarship on firm lobbying in other areas, such as trade. See Milner 1997, chapter 2; Mansfield and Milner 2012, chapters 2 and 3.

[30] For instance, Allee and Peinhardt (2014: 62–3) observe: "In terms of preferences, all else equal, home-state governments will prefer BITs to include multiple, strong options for enforcing the treaties . . . The best way to do this is to include in the treaty elements such as preconsent clauses, multiple options for enforcement, and the ability to utilize institutionalized arbitration venues." They find real-world evidence of these preferences in the model BITs of OECD countries, which "reveal their preferences and serve as a template for treaty bargaining. These model treaties typically include advanced consent to arbitration and provide for arbitration through permanent arbitration institutions" (Allee and Peinhardt 2014: 63).

to arbitration.[31] Given their wish to attract foreign investment, host countries "are 'price-takers' with respect to the terms of these treaties."[32] The dispute resolution clause is particularly important for attracting investment: influential scholars argue that capital-importing states accept arbitration clauses because it makes their commitments more credible, and that additional credibility is expected to attract additional investment.[33] A series of large-N studies connect "strong" dispute resolution clauses to additional investment.[34]

Existing accounts provide an intuitive explanation for the two phases examined in this book. With regard to the first phase, creating the ICSID Convention, conventional explanations generate clear expectations. First, firms develop a strong preference for investor–state arbitration machinery. Then, governments of capital-exporting states (likely led by the US government, as the largest exporter and largest shareholder of the World Bank) draft and push a new proposal for an investor–state arbitration convention. Conventional accounts also expect firms and home governments to lead in eliciting state consent, the second phase.

These accounts assume that firms articulate a clear preference for ISDS to be included in the investment treaties signed by their home governments. The more active domestic industry groups are, the likelier it is that a government will insert ISDS into its treaties. Firms also articulate a clear preference for ISDS in contracts and domestic laws, and demand ISDS from their host states. The governments of capital-importing states are presented with contracts and treaties that include investor–state arbitration by foreign firms and capital-exporting states, and they make the decision to provide access to arbitration as part of a trade-off for more

[31] Allee and Peinhardt 2014: 72–3. Coding the dispute resolution provisions of BITs is a detailed, legal exercise, and the measure used by Allee and Peinhardt raises serious doubts about validity. What matters for the enforceability of an award is whether the relevant treaty includes enforcement through the New York Convention or the ICSID Convention. Their indicator does not measure this. Instead, Allee and Peinhardt (2014: 54) create a composite indicator called "treaty enforceability" from three underlying indicators: (i) preconsent to international arbitration; (ii) how many venues for arbitration are provided in the treaty; and (iii) the degree to which the available arbitration venues are institutionalized.

[32] Elkins, Guzman, and Simmons 2006: 822.

[33] Guzman (1998) first put forward this logic in an influential article, later expanded and tested by Elkins, Simmons, and Guzman 2006; Büthe and Milner 2008, 2014; Allee and Peinhardt 2010, 2014; Simmons 2014.

[34] Büthe and Milner (2014), for instance, analyze investment flows into 125 developing countries from 1971 to 2007, and show that more investment is induced by trade agreements that include stronger mechanisms for credible commitment. Allee and Peinhardt (2011) find that investment treaties with stronger dispute resolution provisions attract more investment. Many studies have examined the impact of BITs (or BITs with ISDS access) on investment flows, yet problems like missing and poor quality data (Kerner 2014), endogeneity (Aisbett 2009), and the need to distinguish between sectors (Colen, Persyn, and Guariso 2016) suggest caution in drawing strong conclusions from these results. In addition, studies come to contradictory results; some (Hallward-Driemeier 2003; Rose-Ackerman and Tobin 2005; Yackee 2007) find that BITs have no effect on investment flows, while others (Neumayer and Spess 2005; Salacuse and Sullivan 2005; Büthe and Milner 2008, 2014) find an effect.

Table 1.2. Empirical Expectations from Existing Explanations

Expectations about preferences
1. Firms articulate a coherent preference for new investor–state arbitration machinery. 2. Governments of capital-exporting states respond to the lobbying from firms by developing a preference for, and advancing proposals for, investor–state arbitration.
Expectations about the drafting of the ICSID Convention
1. Governments of capital-exporting states (likely led by the US) draft and push a new proposal for an investor–state arbitration convention.
Expectations about ISDS clauses appearing in investment treaties
1. Firms articulate a coherent preference for the insertion of access to investor–state arbitration in investment treaties. 2. The governments of capital-exporting states respond to the lobbying from firms by inserting investor–state arbitration into investment treaties. The more active domestic industry groups are and the more concerned they are with investment treaties, the more likely we are to see demands for arbitration. 3. The governments of capital-importing states are presented with contracts and treaties with investor–state arbitration by investors and capital-exporting states. This is their first exposure to arbitration. 4. By implication, international officials do not influence the content of bilateral treaties, contracts, or domestic laws.
Expectations about gradual institutional change
1. Investor and state preferences are stable, but to the extent there is change in investor preferences, it is driven by exogenous factors. 2. If ISDS no longer aligns with state preferences, governments use control or corrective mechanisms to realign the institution with their new preferences.

foreign investment. Finally, if ISDS no longer aligns with state preferences, governments use control or corrective mechanisms to realign the institution of ISDS with their new preferences. These expectations are summarized in Table 1.2.

These conventional explanations leave important questions unanswered. For instance, why did investors and governments select this particular form of dispute resolution? Was ad hoc arbitration truly what they considered optimal? What explains the timing? If investors lobbied for arbitration, why did it take them so long to bring cases?

THE ARGUMENT: INTERNATIONAL OFFICIALS AND INCREMENTAL CHANGE

This book puts forward a new explanation for the rise of ISDS, applying the tools of historical institutionalism. In short, my explanation is that international officials backed one institutional framework, and the creation of this institutional framework kicked off a process of gradual institutional development that led to contemporary investor–state arbitration and established a pro-ISDS constituency along the way.

This explanation starts by presenting the mid-1950s to the late 1960s as a critical juncture, a period in which actors faced "a broader than normal range of feasible options."[35] These years were relatively open to new multilateral cooperation on investment dispute settlement for several reasons. First, the post-war years were conducive to multilateral institution building generally.[36] Second, the end of colonial rule opened up new conversations about how investment disputes should be resolved, with both colonizers and former colonies turning to multilateral cooperation for a better way forward. In the early 1960s, government officials saw three viable paths for multilateral cooperation: intergovernmental discussions were held about a proposal for a substantive convention, a proposal for investment insurance, and an arbitration convention.

I argue that the intensity of involvement of international officials—which varied between the three paths—is the primary reason why only one of these possible institutions emerged, and why the arbitration convention (ICSID) was what emerged. Investor demand or investor preferences were, if anything, likely to be much stronger for the other two proposals—but that is an empirical question. My explanation starts with no assumptions about investor or state preferences for investor–state arbitration. Imputing preferences backward from who benefits today obscures the process through which preferences for ISDS actually emerged. The reasons behind an institution's creation cannot be inferred from its effects; they are "a wide-open terrain for systematic research."[37]

While not assuming preferences, this explanation does expect antecedent conditions—that is, actors' experiences before the critical juncture—to matter for outcomes. Antecedent conditions can vary in importance.[38] Given the charged nature of expropriation, I expect previous experiences to be influential, even capable of overpowering considerations of optimal design at times. Lingering disagreements and distrust between governments can compromise their ability to cooperate and find technical solutions. Officials active in the 1960s had lived through the Second World War, with its many expropriations (by the American, British, German, and Soviet governments, among others), as well as the expropriations associated with decolonization. These experiences are likely to have influenced officials' views and potentially inhibited cooperation between governments.

[35] Capoccia 2016: 92.
[36] Hale, Held, and Young 2013: 4–9.
[37] Pierson 2004: 130.
[38] Slater and Simmons 2010.

Intergovernmental disagreements create openings for international officials to enter the institutional design process.[39] In the early 1960s, a small group of expert international officials—with their own personal and institutional experiences of expropriation—had strong motivation, sufficient resources, and enough autonomy from states to influence investment protection. These officials had two motivations: advancing policy goals and ensuring organizational survival.[40] They worked within the Legal Department of the World Bank, and therefore had considerable resources in terms of funding and time, but even more importantly, they had unparalleled resources in the form of specialized expertise, access to privileged information, and a formidable reputation.[41]

I argue that this group of international officials used agenda-setting and brokering to facilitate the creation of the ICSID Convention. "Agenda-setting" is defined here as inventing institutional options or policy proposals—which they must match to problems perceived by government officials.[42] To foreshadow the findings of Chapter four, these officials set the agenda by drafting the proposal for ICSID: the Convention emerged nearly fully formed out of the World Bank's Legal Department. Brokering is the ability to construct coalitions and work around disagreements skillfully. To foreshadow Chapter five, these officials brokered the ICSID Convention into existence by introducing their proposal to governments slowly, quietly, and refining the proposal as needed to secure the widest possible support.

Once the Convention came into force, these officials had a strategic interest in making ICSID a success. One of the first tasks they faced after the Convention came into force (and they had become ICSID Secretariat officials) was to elicit consent from states. ICSID needed cases to survive, and it needed consent from states in order to have cases. Therefore, I argue these officials used agenda-setting and brokering to elicit consent from states. As Chapter six demonstrates, ICSID officials did set the agenda, by drafting model clauses that show government officials how to provide advance consent to investor–state arbitration. Then, ICSID officials brokered these clauses into existence by disseminating them widely and meeting government officials to discuss how these model clauses could be adapted into domestic law, contracts, and treaties. I argue that investor–state clauses were layered into treaties: they were added with little fanfare, alongside state–state clauses, but over time supplanted the state–state system entirely. The centralized starting point for investor–state clauses in treaties was the ICSID Secretariat: without the Secretariat's actions, it is doubtful that governments would have added clauses giving individuals standing in their treaties.

39 Johnson 2014.

40 While these motivations have roots in competing approaches (the first ideational [Barnett and Coleman 2005] and second material [Vaubel 2006]), they may be intertwined in reality.

41 Beach (2004) and Tallberg (2010) elaborate resources available to international officials to influence outcomes.

42 Pollack 2003: 50.

I theorize the subsequent trajectory as a process of gradual institutional development propelled by positive feedback, which slowly builds a constituency for investor–state arbitration, while other forms of gradual institutional change keep operating in the background. Positive feedback encourages actors (in this instance, governments, law firms, and other actors) to make commitments that stabilize investor–state arbitration and make a reversal of course more difficult.[43] As law firms and investors receive positive feedback in the form of prestige and revenue, they adapt their practices, take actions that stabilize the institution, and develop a preference for investor–state arbitration. As positive feedback accumulates, constituencies and preferences develop. In other words, preferences—including investor preferences—are endogenous.[44] This means that I argue investors to develop a preference for investor–state arbitration slowly, and only *after* large awards and expansive interpretations became public, which occurred in the 1990s.

At the same time that positive feedback is building a constituency, the purposes that institutions are called to meet can change dramatically over time. Conversion is a form of gradual institutional change that calls attention to the process by which actors put an institution to a new purpose. I apply conversion to the actions of government officials when they negotiated investment treaties. Have the purposes of ISDS within investment treaties changed over time? I answer this question by examining a place where conversion is least likely to occur: the American investment treaty program, widely perceived as the most consistent (in terms of treaty text) and the most closely managed in the world. To foreshadow Chapter seven, the purposes of the American treaty program have changed over time, and the purpose of ISDS changed alongside this broader change: officials drafting the initial US model treaty saw it as a way to protect investment, but a decade later, investment treaties were reimagined as tools to lock in domestic liberalization reforms in former Soviet or Latin American states.

Once granted, a right is difficult to revoke. The "dead weight of previous institutional and policy decisions" limits the ability of governments and other actors to change course.[45] Governments seeking to change or exit investor–state arbitration today face thousands of treaties, contracts, and laws, and even more importantly, they face a constituency that has developed with an interest in the maintenance of ISDS. Even when an institution generates unintended consequences, governments face many obstacles to exit. Chapter eight explores these obstacles as well as the related question of who determines the uses to which an institution is put.

Empirical expectations generated by my explanation are summarized in Table 1.3 below.

[43] Pierson 1996: 146. [44] Fioretos 2011: 376.
[45] Pierson 1996: 146–7.

Table 1.3. Empirical Expectations from My Explanation

Expectations about preferences
1. No assumption about firm preferences regarding investor–state arbitration. 2. No assumption about government preferences, but previous expropriation experience may influence government officials.
Expectations about the drafting of the ICSID Convention
1. World Bank officials lead the creation of an investor–state arbitration convention, relying on agenda-setting and brokering.
Expectations about ISDS clauses appearing in investment treaties
1. Lobbying from firms about investor–state arbitration in investment treaties is weak or absent. 2. Governments of capital-exporting states (not being lobbied by investors) are ambivalent and/or have not considered the idea of adding investor–state arbitration to investment treaties, until information from international organizations reaches them. 3. Governments of capital-importing states are "educated" by international organization officials about investor–state arbitration. 4. International officials draft and disseminate model clauses for use in bilateral treaties and contracts. They do so to generate a caseload.
Expectations about gradual institutional change
1. Investors and capital-exporting states slowly and endogenously develop a preference for arbitration. 2. Governments find it costly and difficult to use control or corrective mechanisms, even when officials believe that ISDS does not align with their preferences.

THE RESEARCH APPROACH: SOURCES AND METHODS

Chapters two to eight adjudicate between the two explanations for the rise of investor–state arbitration. To do so, these chapters draw on over 30,000 pages of primary materials, almost none of which have been used in previous scholarship. Where copyright permits, every archival document cited in this book is available in the Qualitative Data Repository (https://qdr.syr.edu/). The repository also contains a document with all translated quotations in this book, first with the English translation used here and then with the text in its original language.

The most revealing materials were internal deliberations and confidential letters and memos sent within the ministries of capital-exporting states. Instead of assuming or speculating about what these officials were thinking as they inserted their first ISDS clause, it is possible to go back and look.[46] I looked at all declassified files related to ICSID in the national archives of Germany, New Zealand, Switzerland, the UK, and the US.[47] I also looked at all files related to multilateral investment conventions, investment insurance, and investment treaties during the relevant years.

Importantly, I drew upon files from multiple ministries or branches of government, which provide multiple perspectives and sharper insight into internal debates. For instance, in the UK, both the Treasury and the Foreign Office kept folders related to ICSID, and these parallel sets of records show that these ministries at times had different concerns. In the US, the State Department, the United States Trade Representative (USTR), and the Senate Committee on Foreign Relations records are kept not just in separate folders but in different cities, which made me especially aware of the differences in their views toward investor–state arbitration.

Primary sources from a forty-year period, 1954 to 1994, were accessed, and the changes over time vividly illustrate the reality that to understand a phenomenon like ISDS, one needs analysis that provides a "moving picture" instead of a "snapshot."[48] Government views change over time: the US moved from opposition to support of the OECD Draft Convention within a five-year period, while the Swiss government moved in the opposite direction during the same five years. Priorities and influence shift with changes in the party in power: for instance, German banker Hermann Abs had exceptional access to government while Konrad Adenauer was Chancellor, but that influence diminished after Adenauer left office, and diminished still further when the first Social Democratic Chancellor, Willy Brandt, took office. The records also show that historical memories and beliefs, correct or not, can endure for decades in a government: even in the late 1960s, German officials believed that the US government did not support the OECD Draft because they saw it as an attempt to receive compensation for German property seized in America during the Second World War.

The perspectives from national archives were compared with archived documents from international organizations. The ICSID Secretariat does not have public archives, but the World Bank Group archives contain personal papers from officials that worked for ICSID, including papers from Aron Broches, Georges Delaume, and Paul Szasz, as well as papers belonging to the World Bank Presidents but relating to ICSID. Many of these World Bank officials also recorded oral histories before they died; these are an invaluable source, brimming with personality, wit, and frank reflections. As with

[46] The admonition to "go back and look" comes from Pierson (2004: 47).
[47] Yannick Stiller provided superlative assistance with files written in French and German.
[48] Pierson 2004: 2.

governments, the World Bank changes over time in its ideological outlook and priorities, and these wider changes affect ISDS. For instance, after Robert McNamara became World Bank President in 1968, Aron Broches was left with the title of General Counsel but few of the responsibilities of the post, because McNamara preferred to rely upon an American lawyer, Lester Nurick—giving Broches time and other resources to devote to ICSID.

I also located publications from the ICSID Secretariat in university libraries and personal collections: *Annual Reports*, *News from ICSID*, *Foreign Investment Laws of the World*, and a few miscellaneous publications. Many of these publications, and the four-volume *History of the ICSID Convention*, which is the *travaux préparatoires* for the Convention, have recently become available online through the ICSID Secretariat website. During the years that I spent researching this book, it became substantially easier to access documents related to ICSID, thanks to the efforts of ICSID's current Secretary General, Meg Kinnear, to increase transparency and to the pioneering scholarship of former ICSID Deputy Secretary General Antonio Parra.

I also interviewed thirty-six current and former officials in governments and international organizations involved with ISDS. These interviews provided deep background and help me triangulate findings that emerged from archival documents. Many of the interviews were conducted off the record, so to ensure consistency and total confidentiality, none of the interviews are cited in this book. Archival documents were found that expressed all the interview assertions that appear in this book, except for two comments. One appears in a footnote in Chapter seven and the other in Chapter eight; ancillary evidence supports both assertions and the relevant archive files have not been declassified yet.

The method used in this book is based on counterfactual reasoning—analyzing what happened in the context of what could have happened.[49] Counterfactuals are central to King, Keohane, and Verba's definition of causality,[50] and they are fundamental to much political science research: as Tetlock and Belkin observe, "the alternative to an open counterfactual model is a concealed one."[51] This book heeds Fearon's prescription that researchers using counterfactual argument "should be methodologically aware of what they are doing and should make their counterfactual arguments as explicit and defensible as they can."[52] The chapters in this book are structured as a series of counterfactual arguments, and these counterfactual arguments are defended on the basis that they all follow the "minimal rewrite of history rule," which instructs scholars to avoid counterfactuals that require undoing events.[53]

[49] Capoccia and Kelemen (2007: 355) use this description, quoting Isaiah Berlin.
[50] King, Keohane, and Verba 1994: 77–9. [51] Tetlock and Belkin 1996: 4.
[52] Fearon 1991: 170. [53] Tetlock and Belkin 1996: 7.

This book's overarching counterfactual is based on three actual proposals discussed in intergovernmental negotiations.[54] This counterfactual does not require undoing any events: it merely brings back how officials viewed their options during these years.[55] In Chapters four and five, the counterfactual revolves around the presence or absence of a specific causal factor: in the absence of World Bank agenda-setting and brokering, would the ICSID Convention have emerged? Chapter six has a similar counterfactual: would investor–state arbitration clauses have been inserted into investment treaties in the absence of ICSID agenda-setting and brokering? These counterfactual framings enable a more rigorous isolation and examination of the World Bank's influence. Chapters seven and eight do not pose counterfactuals; rather, they illuminate how earlier events shaped the choices available in later periods.

This book presents its findings as a structured, theory-guided narrative. The main theoretical expectations are set out in the tables above. "The extent to which a historical narrative is transformed into a theoretical explanation can vary," George and Bennett observe, and note that an explanation "may be deliberately selective, focusing on what are thought to be particularly important parts of an adequate or parsimonious explanation."[56] In many places, my explanation deliberately focuses on the strategy of World Bank officials. One shortcoming of theory-guided narratives is that researchers focus on supporting the argument that interests them most, while giving little attention to evidence that supports alternative explanations.[57] Identifying specific empirical expectations for an explanation other than my own counteracts this tendency, as does the alternation of focus in the chapters. Chapters three, five, and seven focus on the actions of government officials, while Chapters four, six, and eight focus on the actions of international officials and other non-state actors. This chapter structure helps to guard against an explanation that assumes that if the Bank was the dominant actor in one stage, it was always dominant: indeed, later chapters find that the role of Bank officials and the importance of the Bank's involvement vary considerably over time and in different countries.

At its core, this book analyzes decision-making by officials under conditions of uncertainty and often incomplete information. It seeks to understand why, facing the world they faced, with the information they had, officials made the decisions that created the architecture for ISDS.[58] The methods adopted "should therefore reconstruct, in a systematic and rigorous fashion, each step of the decision-making process, identify which decisions were most

[54] As mentioned previously, three proposals for new multilateral organizations related to investment were discussed in the 1960s: a substantive convention, an investment insurance organization, and an arbitration convention.

[55] This counterfactual echoes Lebow's (2000: 551) observation that "counterfactual analysis is not always based solely on speculation."

[56] George and Bennett 2005: 211.

[57] George and Bennett 2005: 217.

[58] This approach echoes how Jupille, Mattli, and Snidal (2013) frame institutional choice.

influential and what options were available and viable to the actors who took them, and clarify both their impact and their connection to other important decisions."[59] Subsequent chapters follow this advice, by taking particular care to elaborate the institutional paths available but not taken and to reconstruct each step of the decision-making process.

The rise of investor–state arbitration is a complex, decentralized phenomenon that unfolded over several decades. This complex process does not lend itself to easy operationalization in a single dependent variable. There are many possible observable, discrete indicators along the way: ratification of the ICSID Convention, insertion of access to ISDS in domestic law, and insertion of access to ISDS in investment treaties, for instance. These indicators appear in subsequent chapters, with the knowledge that each of these indicators captures only a small piece of the broader phenomenon. They are all part of the larger rise of ISDS, which is analyzed here as a single process over time, split into two phases.

FINDINGS

There are four main findings of my analysis, which are previewed here and then developed further in subsequent chapters.

1. Investor preferences for access to ISDS developed slowly over time. There was little initial demand from investors.

Only 16 percent of foreign investment firms surveyed by the ICC in 1962 believed that access to arbitration "affected the investment climate" of a country.[60] This is striking: the overwhelming majority of firms responding to an ICC survey—the most likely group to care about arbitration—thought it did not affect the investment climate. In 1976, a survey of the top legal counsel within Fortune 1000 firms found that only 15 percent of respondents were "familiar with" ICSID.[61] Ten years after it was created, 85 percent of the top lawyers at the largest international firms had not even heard of ICSID. This is

[59] Capoccia and Kelemen 2007: 355.

[60] Figure cited by a German official in 1962 (noting that no German firms that responded thought the investment climate would be improved by the creation of an arbitration tribunal.) Internal Note from Dr. Berger, March 8, 1962, subject: "Vermittlungs- und Schiedsgerichtstätigkeit unter dem Schutze der Weltbank (Mediation and Arbitration Activities under the Protection of the World Bank)." DE B102/48464.

[61] Ryans and Baker (1976: 70) asked, "Are you familiar with the Convention on the Settlement of Investment Disputes?" Apart from the 15 percent of respondents that were familiar with it, 81 percent reported that they were not and the rest did not give an answer.

the picture that emerges from the archives, too: investors were largely uninformed and uninterested.[62]

The finding of lackluster investor demand matters because it shows that the core assumption of dominant accounts of ISDS is untenable. The inaccuracy of this core assumption hampers existing theories' ability to explain—an *ex ante* assumption of investor demand obfuscates many puzzles related to ISDS.

2. The ICSID Convention did not emerge as an optimal institutional solution.

Institutional design is the art of the possible, not the optimal. The ICSID Convention did not emerge because relevant government officials believed it to be the best way to protect investment: by and large, they did not believe it was. It did not emerge because relevant officials believed it to be the most effective way to facilitate additional investment: most officials did not believe it would do so. As a British official wrote, "we do not expect the existence of the Centre to give any major stimulus to new investment at a rate in the short term."[63] Nor did officials believe it was the most direct way to develop or improve international investment law: a substantive multilateral treaty would have done this more directly. The ICSID Convention emerged because it was a lowest common denominator solution, inoffensive and ineffective enough to be possible.

3. Historically, the ICSID Secretariat was a highly autonomous actor. ICSID officials influenced states' decisions to delegate in their investment treaties.

ICSID Secretariat officials wrote and disseminated the model clauses that showed states and investors how to provide advance consent in their treaties. ICSID officials understood the ramifications of this, too: in 1984, before the first investment treaty case was filed, an ICSID official remarked that consents in investment treaties created an "enormous potential clientele."[64] Early events in a path-dependent process often matter more than later events,[65] and the Secretariat's actions in the late 1960s created the practice of inserting ISDS access in treaties, which was then reproduced thousands of times throughout the 1980s, 1990s, and 2000s. Yet without a moving picture approach, the Secretariat's influence disappears. The influence of the ICSID Secretariat has been forgotten

[62] In corporatist states like Switzerland and Germany, where the government held top-down consultations with industry groups about investment protection initiatives, firms were better informed. Yet they were still not particularly interested in arbitration. Elaborated in Chapter three.

[63] Letter from W. S. Ryrie to J. M. Stevens, January 1967, "International Centre for Settlement of Investment Disputes." UK FCO 48/145.

[64] Aron Broches (the World Bank's General Counsel from 1959 to 1979 and Secretary General of ICSID from 1966 to 1979) acknowledged the enormous potential clientele in 1984, though the first investment treaty arbitration was not filed until 1987. Broches 1984 (May): 44–5. *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

[65] Fioretos, Falleti, and Sheingate 2016: 11.

because investment treaty negotiations have been studied by examining only the moment of interstate bargaining. At any one time, the diplomatic maneuvering among states looms large, but seen as a historical process, the influence of other actors and the cumulative constraints of previous decisions come through.

No previous study has conceptualized the ICSID Secretariat with autonomy or the ability to influence events. Even Schill's insightful study, which emphasizes that arbitration is vital for turning bilateral investment treaties into a multilateral regime, does not take account of the special role the ICSID Secretariat played in facilitating the growth of arbitration.[66] Neither does Parra's otherwise exhaustive *The History of ICSID*.[67] Yet without the Secretariat's dissemination of model clauses, it is unlikely that ISDS clauses would have been inserted into investment treaties when they were, and perhaps ever.

4. Exiting from ISDS is hard: it is costly and difficult to rescind a right given to individuals once it has been created.

Once states provide a new right, individuals make commitments given the existence of this right, which over time has made exiting or reforming ISDS more difficult. Over time, a constituency of law firms and investors developed with a vested interest in the maintenance of ISDS. This constituency developed as law firms and investors received positive feedback in the form of revenue and prestige; the positive feedback stabilized investor–state arbitration and led this constituency to develop a preference for it. The commitments that are most important for stabilizing ISDS may not be actual foreign investments—they likely take the form of law firms building large practices devoted to international arbitration or government ministries negotiating dozens of bilateral treaties with ISDS. The accumulation of commitments and development of a constituency make a reversal of course difficult for governments. Even though states remain masters of their treaties, the obstacles to governments exercising control grow over time. The hurdles to realignment vary by country: while the institution of ISDS is sticky but malleable for officials in powerful countries, the institution of ISDS is stuck and viewed as unchangeable by officials in smaller countries.

STRUCTURE OF THE BOOK

Chapter one elaborates the theoretical argument. Then Chapters two to eight proceed chronologically, with each chapter pulling the reader forward toward the present. Chapters two to five study the first phase, the creation of the ICSID Convention, and then the second half of the book turns to the second

[66] Schill 2009(a). [67] Parra 2012, 2017.

phase, the eliciting of consent from states. Chapter two is a short chapter, serving only to identify historical antecedents and permissive conditions that were brought together in the ICSID Convention. Chapter three analyzes intergovernmental bargaining on investment protection in the 1950s and early 1960s, and focuses on the two multilateral paths not taken: a substantive convention and an insurance agency. Chapter four focuses on the World Bank's agenda-setting and brokering regarding the ICSID Convention, and why the Bank became involved with investment protection. Chapter five evaluates how states responded to the Bank's proposal for the ICSID Convention.

Chapter six documents how arbitration clauses were integrated into investment treaties and the forgotten role of international officials in this process. ICSID did not have a single case for eight years, but many advance consents to investor–state arbitration were provided in those early years, creating a lasting institutional infrastructure. Chapter seven charts the evolution of US government thinking on arbitration from 1966 to 1993, as investment treaties became instruments of foreign policy as well as devices to reward and reinforce liberalization reforms. Access to arbitration was a key US demand in negotiations with Argentina, Poland, Russia, and Turkey, but strong opposition from these middle-income countries spurred US negotiators to redraft arbitration provisions, and make refinements in the US model that were key milestones on the road to NAFTA. Chapter eight is another short chapter, which briefly probes why exiting from ISDS is so difficult, even after governments express a desire to exit. The conclusion examines two visions for the future of investor–state arbitration (one fully private and one fully public), and discusses the political prerequisites for either of these visions to become realities.

Readers familiar with international investment law may wish to go straight to Chapter three, which, along with Chapters four and five, provides new insight into the drafting of the ICSID Convention. Readers interested in international relations theory and international political economy scholarship will want to begin with Chapter one, and look at Chapters six and seven, which refute existing scholarship on investment treaties most directly. Readers interested in contemporary challenges will find Chapter eight and the conclusion of interest.