Sovereignty under Attack: Foreign Investor-Host State Disputes and Host Country Policy Autonomy

Quan Li\textsuperscript{1} \quad Jennifer Tobin\textsuperscript{2}

\textsuperscript{1}Texas A&M University
\textsuperscript{2}Georgetown University

November 15, 2017
Rise of International Investment Disputes

782 Disputes: 1987–2016, 114 Host and 74 Home States

Year of initiation vs. Count of Disputes

Source: UNCTAD
BITs + Investment Disputes: Legal standing for private investors to sue host country governments (Simmons 2014).

Argument: This transformative change in the relationship between foreign investors and host countries brings about significant constraints on the autonomy of the host state.

- Scope of disputes
- Branches of host government
- Levels of host government

Our goal is to document these important developments and their consequences. We demonstrate how national sovereignty appears under attack in both a positive and a negative sense.
Types of Claimed Breaches in 782 Disputes: 1987-2016

- Direct Expropriation & Others: 36
- Direct Expropriation Only: 26
- Missing: 300
- Others: 420
Expanded Scope of Disputes
Expanded Scope of Disputes: Illustrative Cases

- Expropriation
  - Burmilla Trust and others v. Lesotho

- Beyond Expropriation:
  - Portigon v. Spain
  - Biram and others v. Spain
  - Eiser and Ergia Solar v. Spain
  - Isolux v. Spain
  - ...
  - Olin v. Libya
  - Tekfen and TML v. Libya
  - Strabag v. Libya
  - ...
  - TransCanada v. USA
  - Cargill v. Mexico
  - Novera v. Bulgaria
Multiple Branches of Government Involved

- de Sutter and others v. Madagascar (Judicial—positive?)
- Muszynianka v. Slovakia (Constitutional—negative?)
Multiple Levels of Government Involved

Illustrative case: Metalclad

- Not just an issue at the national level
- Not just the executive branch
- Constraining, but can be positive or negative


- Expansion of disputes beyond traditional types of direct expropriation and nationalization
- Expansion of disputes beyond traditional sectors of extractive and manufacturing
- Firms on offensive, overcoming liability of foreignness and obsolescing bargaining
Implications and Contributions

- International Institutions and state behavior (Burley 1993; Chayes and Chayes 1995; Downs, Rocke and Barsoom 1996; Simmons 2000, 2014).
  - Do international institutions constrain state behavior or are states complying out of self-interest?
  - By giving private firms legal standing, BITs affect firm and government behavior

- Domestic sovereignty is under attack. This is both positive and negative