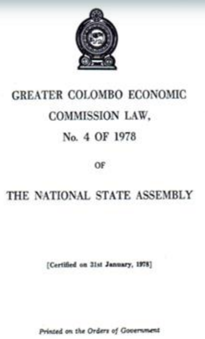
Why Do Governments Consent to ISDS in National Investment Laws? An Empirical Study

Taylor St John

Tarald Laudal Berge and Taylor St John. 2019. "Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws." http://ssrn.com/abstract=3447365


GREATER COLOMBO ECONOMIC COMMISSION LAW,
No. 4 OF 1978
OF
THE NATIONAL STATE ASSEMBLY

KUVENDI I KOSOVËS
СКУПШТИНА КОСОВА
ASSEMBLY OF KOSOVO

Law No. 02/L-33

ON FOREIGN INVESTMENT

The Assembly of Kosovo,

LAW ON FOREIGN INVESTMENT
CHAPTER 1
GENERAL PROVISIONS

1969

MONITEUR CONGOLAIS

PREMIERE PARTIE

Government Gazette

REPUBLIC OF SOUTH AFRICA

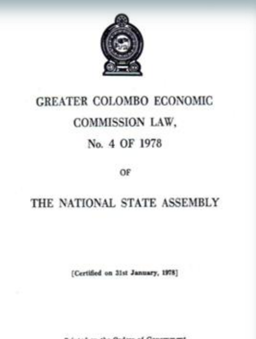
Vol. 606 Cape Town 15 December 2015 No. 39514

THE PRESIDENCY

No. 1236 15 December 2015

Act No. 22 of 2015: Protection of Investment Act, 2015

AIDS HELPLINE: 0800-123-22 Prevention is the cure


GREATER COLOMBO ECONOMIC COMMISSION LAW,
No. 4 OF 1978
OF
THE NATIONAL STATE ASSEMBLY

KUVENDI I KOSOVËS
СКУПШТИНА КОСОВА
ASSEMBLY OF KOSOVO

Law No. 02/L-33

ON FOREIGN INVESTMENT

LAW ON FOREIGN INVESTMENT
CHAPTER 1
GENERAL PROVISIONS

1969

MONITEUR CONGOLAIS

PREMIERE PARTIE

Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 606 Cape Town 15 December 2015 No. 39514

THE PRESIDENCY

No. 1236 15 December 2015

Act No. 22 of 2015: Protection of Investment Act, 2015

AIDS HELPLINE: 0800-123-22 Prevention is the cure

OUTLINE

- Provisions Providing Consent in National Investment Laws
  - Arbitration mentioned in 74 laws around the world
  - Interpreting consent provisions: a subjective exercise?

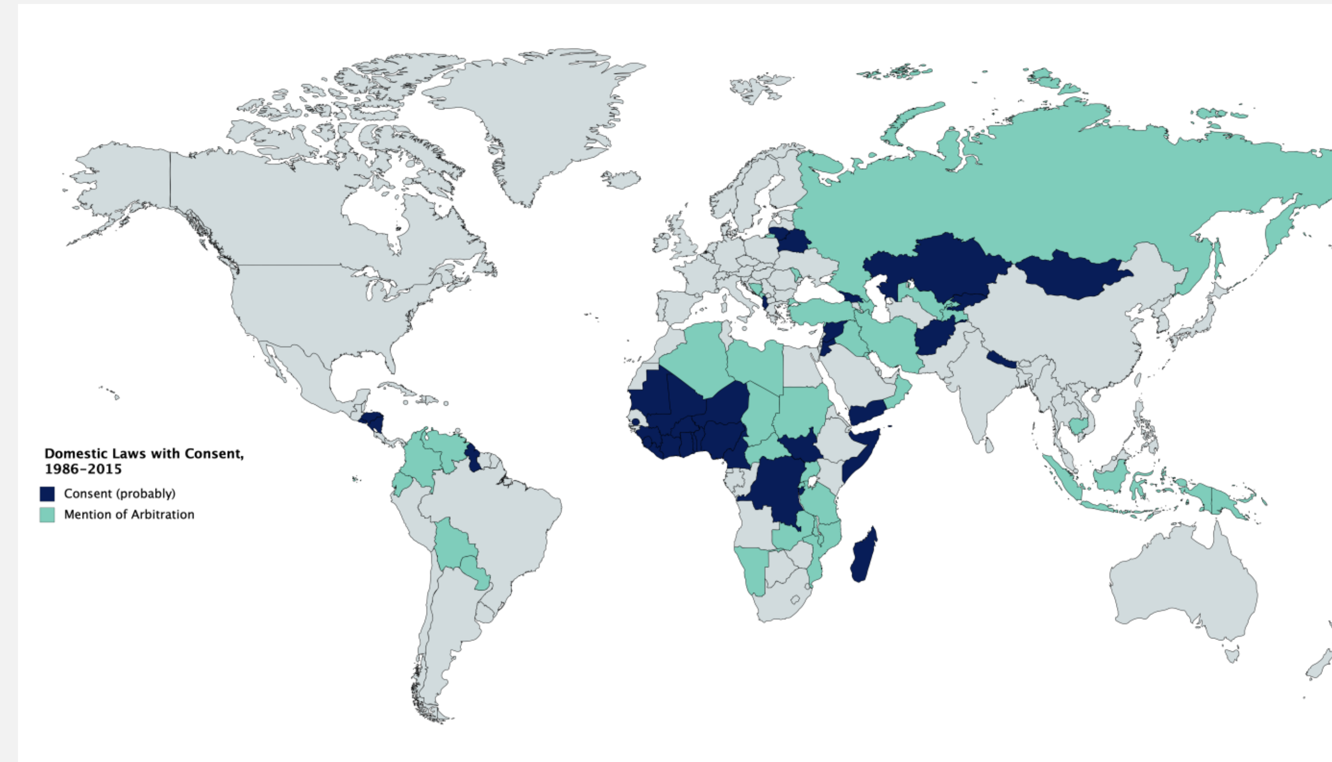
- Why? Our Focus: FIAS Legal Reform Work
  - Why consent to arbitration is a puzzle
  - World Bank advice on arbitration in domestic laws since 1965
  - FIAS best practice advice
  - Correlation between FIAS missions and arbitration in domestic laws

- Policy Conclusions
  - Should tribunals adopt a liberal interpretation?
  - Should FIAS and bilateral donors continue to recommend consent to arbitration?
  - Should governments rewrite their laws to remove consent?

CONSENT TO ARBITRATION IN DOMESTIC LAWS

- 61 known investor–state arbitration cases have relied on domestic laws for jurisdiction (Hepburn 2018, pg. 659)

- 125 domestic investment laws
- 74 laws mention investor–state arbitration
- 42 laws provide consent (probably, ultimately up to the tribunal)



National Investment Laws, 1986-2015

Dark blue: consent to arbitration (probably)
Green: mentions arbitration

IS THIS CONSENT?

Article 42 of Azerbaijan's 1992 Law: No Consent.
Disputes or disagreements arising between foreign investors and enterprises with foreign investments and state bodies of the Azerbaijan Republic, enterprises, public organizations and other legal entities of the Azerbaijan Republic, disputes and disagreements between participants of the enterprise with foreign investments and such enterprise itself are to be settled in Law Courts of the Azerbaijan Republic or, on agreement between the Parties, in the Court of Arbitration, including those abroad.

Article 13 of Belarus' 2013 Law: Ambiguous.
Disputes between an investor and the Republic of Belarus not regulated under a pre-trial procedure through negotiations within three months from the day of receipt of a written proposal about the regulation thereof are settled through court proceedings in accordance with the legislation of the Republic of Belarus.

If disputes not referred to the exclusive competence of courts of the Republic of Belarus, arisen between an investor and the Republic of Belarus are not regulated under a pre-trial procedure through negotiations within three months from the day of receipt of a written proposal about the regulation thereof under a pre-trial procedure, then such disputes may, at the option of the investor, be regulated also:

- in an arbitration court being established for settlement of each specific disputed according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), unless the parties agree otherwise;
- at the International Centre for Settlement of Investment Disputes (ICSID) in the case if this foreign investor is citizen or legal person of a member state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965.

Article 17 of Burundi's 2008 Investment Code: Consent.
Disputes resulting from the application of the present investment code between the Government and the investor, which are not settled amicably, shall be settled in accordance with the laws and regulations in force in Burundi. Disputes can be settled, according to the choice of the investor, by internal institutional arbitration or international arbitration. When the investor takes recourse to international arbitration, he will do so in accordance with arbitration rules of the International Centre for the Settlement of Investment Disputes as applicable at the time of execution of the investment which gave rise to the dispute.

ANNEX: PROVISIONS PROVIDING CONSENT

5) Laws that consent to international arbitration

Country	Law Name	Year (Law was Passed)	Source	Coding
Afghanistan	Law on Domestic and Foreign Private Investment	2005	UNCTAD	Consent

Note: UNCTAD and ICSID 2012-1 both have 2005 Afghanistan Private Investment Laws, but the two are different. Both are unofficial translations (although the ICSID version is a translation provided by the Embassy of Afghanistan in Washington DC.) The dispute resolution clauses are below – both provide consent.

UNCTAD version

Article 26 Disputes between foreign and domestic investors versus the Office of Investment and government officials may be directly resolved in an amicable manner by understanding and observing the rules of this legislation and documentation of the Enterprise, including whatever specialized contracts have been signed and agreed upon.

Should the disputes not be resolved in this manner, the parties shall settle their dispute according to the provisions of the Washington Arbitration Regulations of March 18, 1965 or in accordance with the United Nation's Judiciary Laws for International Commerce.

Article 27 The decision based on theses international agreements for dispute settlement and/or their rendered judgments shall be final and both parties are obliged to accept such a final decision.

ICSID 2012-1 Version

Article 30 (5) If a dispute arises pursuant to a contract or other agreement between a Foreign Investor or an Approved Enterprise with foreign ownership on one hand and an administration or organization of the State on the other hand with regard to a Foreign Investment (...) the parties shall endeavor to settle such dispute amicably by mutual discussions. Failing such amicable settlement, and unless the parties to such dispute otherwise agree, the parties shall submit such dispute to: The International Centre for Settlement of Investment Disputes (ICSID) for settlement, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965. 2. Arbitration in Accordance with UNCTIRAL Rules if ICSID rules preclude [the Foreign Investors from] arbitrating before ICSID. The Government, in such cases, consents to the submission of any such dispute to ICSID for settlement by arbitration in accordance with Article 25 (1) of the Convention.

El Salvador	Investment Law (Decree No. 732)	1999	Cases	Consent

Article 15 of El Salvador's investment law was the basis for jurisdiction in Pacific Rim v El Salvador. The tribunal in Inceysa v. El Salvador noted that the law provided consent: "The foregoing clearly indicates that the Salvadoran State, by Article 15 of the Investment Law, made to the foreign investors a unilateral offer of consent to submit, if the foreign investor so decides, to the jurisdiction of the Centre, to hear all ́disputes referring to investments ́ arising between El Salvador and the investor in question. However, in the case at hand, as indicated in the previous paragraphs, Inceysa cannot enjoy the rights granted by said Investment Law because its ́investment ́ does not meet the conditions of legality."

Pac Rim Cayman LLC v. The Republic of El Salvador, Memorial Objections on Jurisdiction (page 114).
Article 15:
Should disputes or differences arise among local or foreign investors and the State, regarding the investments made by them in El Salvador, the parties may resort to the competent courts of justice, in accordance with legal proceedings.
In case of disputes arising between foreign investors and the State, regarding their investments in El Salvador, the investors may refer the dispute to:
a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by means of conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) . . . .

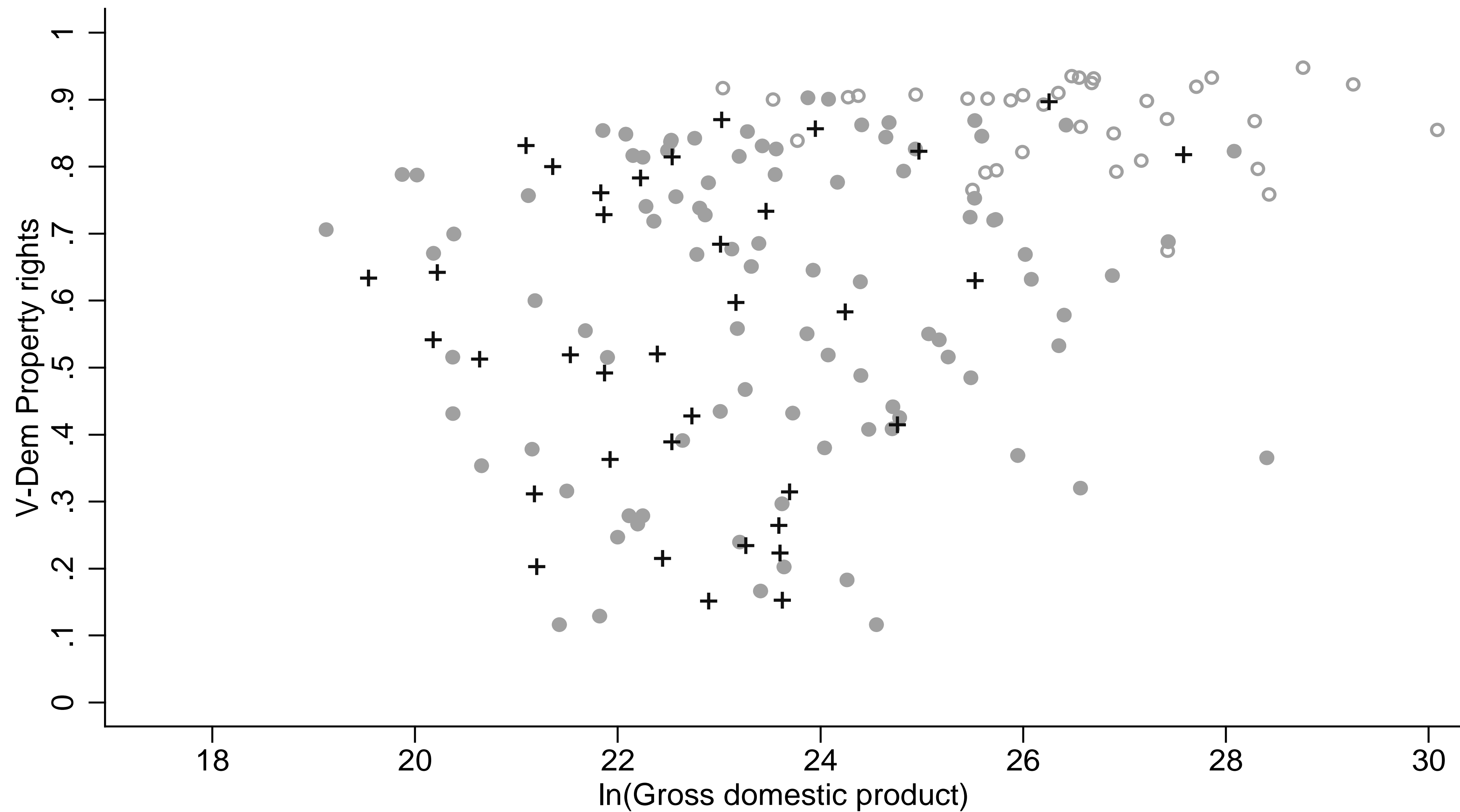
WHY CONSENT IN DOMESTIC LAW IS PUZZLING

- Costs: Arbitration clauses can be extremely costly.
  - The exposure or potential for claims may be greater than under a BIT, since all foreigners have access to arbitration, not just foreigners or firms with a particular nationality.

- Benefits: Uncertain.
  - No evidence that providing investors with access to arbitration leads to additional investment (Bonnitcha, Poulsen, and Waibel 2017: 158–166).

- Not emulating successful examples.
  - No developed or OECD state has ever consented to arbitration in their domestic law.

- There are no domestic constituencies likely to lobby for arbitration.
  - Especially since it gives foreigners a right that citizens do not have.
  - Unlike a bilateral treaty, there are no reciprocal benefits.


V-Dem Property rights
0
.1
.2
.3
.4
.5
.6
.7
.8
.9
1
18
20
22
24
26
28
30
ln(Gross domestic product)
No consent to arbitration (non-OECD member)
No consent to arbitration (OECD member)
Consents to arbitration in domestic investment law

WORLD BANK ADVICE: CONSENT TO ARBITRATION

- 1965: World Bank Executive Directors first suggest that governments provide access to ICSID in national law.
- 1960s-1970s: ICSID Secretariat catalogues national investment laws from all developing states, and stands ready to advise governments on drafting their national investment laws.
- 1980s: World Bank officials define best practices for national investment laws in a template, which becomes the "Guidelines on the Treatment of Foreign Direct Investment" (1992).
- 1984: FIAS is created to provide advice on host country policies that affect the flow of foreign investment.

FIAS BEST PRACTICE GUIDANCE

Current FIAS best practice guidance on arbitration:

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

(2010 *Investment Law Reform Handbook, pg. 53)*

FIAS BEST PRACTICE GUIDANCE (2)

Interviews with FIAS officials:

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

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

CORRELATION BETWEEN FIAS ASSISTANCE AND ARBITRATION MENTIONS/CONSENT IN NATIONAL LAWS

Country	FIAS advisory mission completed	Law mentioning arbitration	Law consenting to arbitration	Time from last FIAS mission to law
Afghanistan	2004	2005	2005	1 year
Albania		1993	1993	
Algeria		1993		
Armenia	1999; 2000; 2003			
Azerbaijan	2003; 2005	1992		
Kazakhstan	1998	1994	1994	
Kenya	2000; 2005			
Kuwait	1998; 2000	2013		13 years
Kyrgyzstan	1998; 1999; 2001	2003	2003	2 years
Liberia	2010	2010	2010	0 years
Libya		2010		
Lithuania	1999	1999	1999	0 years
Macedonia	2000			
Madagascar	2007; 2008	2008	2008	0 years
Malawi	1992	1992		
Maldives	2003			
Mali	2012	1991	1991	
Marshall Islands	1998			
Mauritania	1999; 2002	2002	2002	0 years
Micronesia	2000			
Moldova	2004	2004		0 years
Mongolia	1998; 2001; 2003	2013	2013	10 years
Montenegro		2011		

EXTERNAL INVOLVEMENT IN DOMESTIC LAW DRAFTING

- Donor funding and project design
  - Project is funded, local (private) lawyer and external consultant hired
  - Diagnostic and scoping exercises (in-country interviews, evaluating current laws)
  - Local lawyer writes first draft of the new law

- External review
  - Law sent to FIAS in Washington for review

- External participants in the Working Group
  - For example: USAID, US Chamber of Commerce, local Chamber of Commerce

CONCLUSION 1: SHOULD TRIBUNALS ADOPT A LIBERAL INTERPRETATION FOR AMBIGUOUS PROVISIONS?

- David Caron (2010: 673) observed that "arbitral practice, if anything, appears to incline toward a liberal interpretation of a foreign investment law that is unclear as to the scope of remedies provided."
- "The approach in ILC Guiding Principle 7 of a restrictive interpretation in case of doubt, however, is likely not necessary, or justified, in the circumstances of a reasoned, debated, public law. Legislatures intend to be bound by their laws and for their laws to be followed. Legislation is discussed at length and is frequently the result of compromise between various constituents. Legal counsel is involved and procedures are followed by which the problems and confusion are (hopefully) removed from the law" (Caron 2010: 674).
- → If domestic debate didn't match this standard, and especially if officials perceived providing arbitration access would get them material rewards from the World Bank, should this guidance stand?

CONCLUSION 2: SHOULD FIAS, BILATERAL DONORS, AND OTHER ADVISERS CONTINUE TO RECOMMEND ARBITRATION ACCESS?

- No empirical evidence of additional investment or other benefits from providing consent to arbitration. Costs: increases a government's vulnerability to costly arbitrations.

- Recommendations to provide consent may trigger internal and external contestation.
  - Example: Myanmar (Bonnitcha forthcoming)

- For FIAS or donors, recommending arbitration may be a reputational risk. It may delay or impede other tasks or reforms that FIAS or others value more highly.

CONCLUSION 3: SHOULD GOVERNMENTS REWRITE THEIR DOMESTIC LAWS TO REMOVE ARBITRATION ACCESS?

- Countries that have rewritten their laws to remove consent include:
  - Egypt
  - El Salvador
  - Guinea
  - Jordan
  - Kazakhstan
  - Tunisia
- Risks or obstacles to removing access?
  - Elevating the issue to the top of agendas may be tough. (Thus it's easier to remove access after facing a claim, since the claim generates awareness of the risk and assigns it priority.)
  - Ministries may be wary of taking actions that are perceived to create a more restrictive environment for foreign investors. (Note: consent to arbitration is not part of the World Bank Doing Business indicators or other indices.)