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CONCEPTUAL DIFFICULTIES IN THE EMPIRICAL STUDY OF BILATERAL INVESTMENT TREATIES

*Jason Webb Yackee**

INTRODUCTION

Bilateral investment treaties, or BITs, have emerged as one of the most remarkable recent developments in international law. In BITs, two countries—often a developed country and a less-developed country—extend legally binding promises to treat each other’s foreign investors favorably. The first BIT, according to most observers, was signed in 1959, and since that time BITs have multiplied at an extraordinary pace.¹ The United Nations Conference on Trade and Development (“UNCTAD”) calculates that there were fewer than two hundred BITs in the 1980s; by 1998, there were at least 1700.² Many of these BITs contain dispute settlement provisions that allow investors to initiate binding international arbitration against the state hosting their investment. In BIT-based arbitrations, arbitrators are empowered to make authoritative statements on the content and application of important, contested, and politically sensitive international legal principles, such as the amount of

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1. I show below that, as a conceptual and factual matter, this claim regarding the “first” BIT is problematic. But it is sufficiently accurate to allow that year to serve as a very rough guide to the start of the BIT era. *See also infra* Figure 3, note 84, and accompanying text.

2. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS: AN OVERVIEW 22 fig.2, U.N. Doc. No. UNCTAD/ITE/IIT/13 (1999) [hereinafter UNCTAD TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS]; UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990s (1998) [hereinafter UNCTAD BITS IN THE MID-1990s] (“The total number of treaties signed by the end of 1980s jumped to 386 from a total of 167 at the end of the 1970s.”). In addition to these comprehensive reports, UNCTAD has published other important accounts of the growth of the BIT phenomenon. *See, e.g.*, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS [UNCTC], BILATERAL INVESTMENT TREATIES (1988) [hereinafter UNCTC BILATERAL INVESTMENT TREATIES]; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1959–1999, U.N. Doc. No. UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD BITS 1959–1999].

compensation due under international law for government actions that amount to an expropriation of the foreign investor's property.³

As a result of the proliferation of BITs, there has been a proliferation of international arbitration claims in which investors seek to recover money damages from the states hosting their investments for alleged violations of international law. For example, arbitral tribunals organized under the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"), the frequent forum of choice in BIT-based arbitration clauses, decided just twenty-six international investment disputes as of 1990; by 2007 ICSID tribunals had decided over 130 such cases, with over 120 additional cases still pending.⁴ Argentina alone faced international legal claims of approximately \$16 billion in 2004, roughly one percent of its gross domestic product ("GDP") at the time.⁵

These developments have led to critiques of the BIT system⁶ and increased interest from empirically minded social scientists who have studied the causes and effects of the treaties. For example, Elkins, Guzman, and Simmons have presented a sophisticated statistical model to support their argument that developing countries enter into BITs as part of a rational "competition for capital."⁷ Others have examined whether states

3. See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 55 (2003).

4. ICSID was established by multilateral treaty in the 1960s as a specialized forum to decide disputes between host states and investors. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. Information on the ICSID docket is available at <http://icsid.worldbank.org/ICSID/Index.jsp>.

5. Figures for legal claims pending against Argentina are those as of August 2004. R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims—First Lessons from Argentina*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES, AND CUSTOMARY INTERNATIONAL LAW 425, 425 (Todd Weiler ed., 2005). For data on gross domestic product, see United Nations Statistics Division, http://unstats.un.org/unsd/cdb/cdb_country_prof_select.asp (select country "Argentina" and profile "Economic growth, investment") (last visited Apr. 9, 2008).

6. For example, Van Harten argues that BITs set up a legal system that benefits business interests. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007). Sornarajah provides a brief overview of the most important critiques. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 259–268 (2d ed. 2004).

7. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006). See also Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 147 (2005) ("In some cases, if BIT signing is expected, it is likely that investors may invest in the host country before the BIT signing takes place, since the investors confidently anticipate that their [pre-BIT] investments will soon receive further protections when the signing occurs.").

that enter into BITs tend to attract greater amounts of foreign investment.⁸ For example, Neumayer and Spess have suggested that developing states benefit from massive increases in foreign direct investment (“FDI”) flows when they sign BITs with major capital-exporting states.⁹ Their findings are a powerful indication that international law matters to investors, who, if the statistics are to be believed, give the presence or absence of BITs great weight when making investment decisions.¹⁰

The purpose of this Article is to identify and draw attention to the conceptual difficulties implicit in empirical studies of BITs that have not yet been adequately addressed. The goal here is modest but important. Quasi-experimental statistical studies of investment treaties, such as the studies by Elkins, Guzman, and Simmons and Neumayer and Spess cited above, seek to confirm or disconfirm theoretical expectations through the identification of empirical correlations between key variables. As the old saw goes, correlation does not equal causation, and whether the former really does confirm the latter depends in part on the internal validity of the particular study and its measurements of the underlying theoretical concepts. A statistical study may be described as internally valid if the researcher has isolated the true cause of any observed correlation.¹¹ Put somewhat differently, internal validity requires that a study’s measurement techniques correctly identify the phenomena of theoretical interest and control for plausible alternative explanations.¹²

The central claim developed below is that empirical BIT analysts have so far done a relatively poor job of ensuring the internal validity of their studies—that is, whether the ways they measure the BIT phenomenon are sufficiently accurate and complete to capture the underlying theoretic-

8. See, e.g., Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567 (2005).

9. *Id.* at 1582.

10. See *id.* However, several other studies do not support Neumayer and Spess’s conclusion that there is strong positive link between BITs and foreign investment flows. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARVARD INT’L L.J.* 67 (2005); Marie Hallward-Driemer, *Do Bilateral Investment Treaties Affect FDI? Only a Bit . . . and They Could Bite* 1–2 (World Bank, Policy Research Working Paper Series No. 3121, 2003).

11. See EDWARD G. CARMINES & RICHARD A. ZELLER, *RELIABILITY AND VALIDITY ASSESSMENT* 12 (1979) (“In a very general sense, any measuring device is valid if it does what it is intended to do. An indicator of some abstract concept is valid to the extent that it measures what it purports to measure.”).

12. See generally CARMINES & ZELLER, *supra* note 11; WILLIAM M.K. TROCHIM, *RESEARCH METHODS KNOWLEDGE BASE* 171–190 (2d ed. 2001).

cal concept of interest. Analysts are not generally interested in the treaties simply as treaties, but as indicators of the degree to which states desiring foreign investment (“host states”) have used formal legal means—particularly international law and international legal institutions—to “credibly commit” to treat investors favorably.¹³ Postulating that BITs are credible commitment devices relies on the premise that the treaties are especially (and perhaps uniquely) effective at resolving what is said to be the central *problématique* of foreign investment: an investment, once made, cannot easily be undone, and the investor who relies on the host state’s initial promises of favorable treatment risks being rudely surprised when the host state later demands to renegotiate the terms of the original deal. This problem, sometimes described as one of “obsolescing bargain,”¹⁴ is not simply a problem for foreign investors; it is also a prob-

13. See generally Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998). Guzman’s view of BITs as a commitment device is reflected in most subsequent empirical studies of the treaties, including Neumayer & Spess, *supra* note 8, and Elkins et al., *supra* note 7. It is also reflected in doctrinal studies of the evolution of BITs. See, e.g., Thomas W. Wälde, *The “Umbrella” Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVEST. & TRADE 183, 185–86 (2005) (discussing BITs as part of a “culture of commitment”). Williamson’s influential work on transaction cost economics provides the obvious inspiration for credible commitment theories of BITs. See, e.g., OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 377 (1996). Williamson defines a “credible commitment” as:

... a contract in which a promisee is reliably compensated should the promisor prematurely terminate or otherwise alter the agreement. This should be contrasted with noncredible commitments, which are empty promises, and semi-credible commitments, in which there is a residual hazard. Credible commitments are pertinent to contracts in which one or both parties invest in specific assets.

Id. Williamson’s ideas also permeate the “political risk” literature and the much broader literature on the institutional origins of economic growth. See, e.g., WITOLD JERZY HENISZ, *POLITICS AND INTERNATIONAL INVESTMENT: MEASURING RISKS AND PROTECTING PROFITS* (2002); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 50 (James Alt & Douglass North eds., 1990).

14. See RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* 46–59 (1971); see also Jean Boddewyn, *Early U.S. Business-School Literature (1960–1975) on International Business-Government Relations: Its Twenty-First-Century Relevance*, in *INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY* 25, 36 (Robert Grosse ed., 2005). Obsolescing bargain theories of foreign investor-host state relations have been subject to some recent and important criticism. See *INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY* 315, pt. III (Robert Grosse ed., 2005). In my view, obsolescing bargain theory is most vulnerable to attack on the grounds that it exaggerates the extent to which long-term contractual stability is either desirable or achievable and ignores the powerful role that repu-

lem for host states that desire foreign investment. The host state that is unable to convince investors that it will not unduly interfere with the investment's profitability post-establishment will be denied investment or will have to pay a risk premium for it. BITs resolve problems of credible commitment by providing host states with a mechanism to make favorable substantive promises to investors (under the banner of international law) and by linking them to certain procedural guarantees—in particular, access to international arbitration—that allow the investor to enforce those promises. The prospect of litigation encourages host states to honor their promises to investors despite obsolescing bargain dynamics. Investors recognize that investments covered by BITs are relatively immune to such dynamics and will accordingly be more willing to invest.¹⁵

To test credible commitment theories of BITs, analysts generally attempt to quantify the extent to which host states have credibly committed to treat investors favorably with empirical data, such as the number of signed BITs and the amount of FDI. For example, Neumayer and Spess's study counts the number of BITs that each developing country has signed and looks for statistical correlations between the number of BITs and foreign investment flows.¹⁶ Elkins, Guzman, and Simmons's study likewise counts the number of BITs entered into by competitor countries and looks for correlations between the number of competitor BITs and the probability that a particular state will sign its own BIT.¹⁷

To construct their counts of BITs, these analysts rely largely, if not solely, on lists of treaties compiled by UNCTAD. UNCTAD has long researched and promoted BITs, and in various publications it has presented comprehensive chronological listings of BITs signed to date.¹⁸ UNCTAD's longstanding work documenting and analyzing the BIT phenomenon is significant, and its list of BITs may be adequate for certain research questions. But, as I explain in detail below, the list is problematic for the research questions posed by most empirical BIT analysts.

My basic argument is that the persuasiveness—or the internal validity—of empirical studies of the causes and effects of BITs necessarily depends on whether analysts have accurately and comprehensively iden-

tation plays in discouraging host states from treating foreign investors poorly. The latter problem stems in particular from the tendency to focus on the individual transaction or investment relationship, divorced from the larger context of the host country's ongoing and future relationships with other investors.

15. See VERNON, *supra* note 14, at 46–53; Elkins et al., *supra* note 7, at 812–14, 823–24; Neumayer & Spess, *supra* note 8, at 1570–71.

16. Neumayer & Spess, *supra* note 8, at 1573.

17. Elkins et al., *supra* note 7, at 827–28.

18. See *supra* note 2 and authorities cited therein.

tified the relevant instances of credible commitment. When analysts rely solely on UNCTAD's count of BITs, their studies fail to identify all sources of credible commitment that are theoretically likely to provide the host state with a competitive advantage attracting foreign capital. This is illustrated by two interrelated inquiries.

First, are the treaties that UNCTAD identifies sufficiently similar in their theoretical capacity to perform as credible commitment devices? Here, the inquiry is largely whether UNCTAD has gotten the treaty count correct and for a variety of reasons the answer is no.

Second, has UNCTAD identified all of the theoretically relevant legal devices by which states have sought to credibly commit to extend comparably favorable treatment to investors? My claim here is that analysts relying on UNCTAD's list of BITs have largely failed to recognize that BITs are not the only formal legal means by which host states might credibly commit to investor friendly policies. There are close equivalents to BITs—primarily municipal law and investment contracts—that have strong theoretical potential to act as reasonably comparable substitutes for investment treaties.

In short, UNCTAD's count of BITs provides a surprisingly misleading picture of the scope of the phenomenon of law-based credible commitment, both generally and as to particular states. This critique is not aimed at UNCTAD, however; it addresses scholarship that uses UNCTAD's treaty data uncritically by ignoring the treaties' content or other sources of credible commitment.

As I will demonstrate below, we should approach the statistical validity of existing empirical analyses of BITs with a substantial grain of salt, though this Article's main point is not really a statistical one. It makes no attempt to re-run existing statistical analyses, nor does it claim that key correlations would fall out of or into statistical significance if these analyses were re-run. The main point is more fundamental: BIT analysts need to convincingly link their abstract concepts to empirical indicators of those concepts.¹⁹ Until they do, credible commitment stories of the causes and consequences of BITs will remain far less persuasive than they might be otherwise.

Section I of this Article provides a brief historical overview of FDI and BITs in order to illustrate macro level trends over time. Section II places BITs firmly in the credible commitment framework, arguing that BITs that lack strong dispute settlement mechanisms have little theoretical potential to credibly commit developing countries to anything. Section III presents an empirical examination of the dispute settlement provisions of

19. See CARMINES & ZELLER, *supra* note 11, at 10.

nearly one thousand BITs. Section IV discusses the importance of alternative policy instruments that may serve as substitutes for BITs and argues that the use of such instruments must be considered when determining the extent to which a host state has legalized its relations with foreign investors. Section V concludes.

I. FOREIGN DIRECT INVESTMENT AND BITs: AN OVERVIEW

Developing countries have historically viewed foreign investment with deep ambivalence. As then U.S. Assistant Secretary of State William L. Thorp observed in 1948:

As engineers and technicians we are more than welcome; our skills are eagerly sought; but as businessmen, as entrepreneurs, we are often not so welcome. Sometimes we feel that at the same moment that our capital is sought, every obstacle is being put in the way of its use on a fair and equitable basis.²⁰

Mr. Thorp attributed this attitude to the perception of the foreign investor as an “exploiter and not a contributor”²¹—the foreign investor’s “interest is not in the local welfare, . . . his allegiance is to a distant stockholder, and . . . when he has won the highest return possible he and his enterprise will withdraw.”²² Developing countries’ policies toward foreign investors reflect this ambivalence. They seek to encourage the right kinds of foreign investment while also attempting to maintain the ability to control and subjugate that investment to national development or regulatory priorities.²³

The level of ambivalence ebbs and flows with time. In some eras, when ambivalence shades into hostility, developing countries may emphasize subjugation over encouragement. In other eras, when ambivalence shades into affection, systems of control may be dismantled in order to attract more investment through an improved investment climate. In this current era of seemingly relentless FDI promotion, FDI competition, and, perhaps not coincidentally, increasingly massive foreign capital flows, the idea of host state ambivalence toward foreign investment

20. L.H. Woolsey, *The Problem of Foreign Investment*, 42 AMER. J. INT’L L. 121, 121 (1948) (quoting Mr. Thorp’s commentary on foreign investment).

21. *Id.*

22. *Id.* (paraphrasing Mr. Thorp’s commentary on foreign investment).

23. This ambivalence is well illustrated in Moran’s influential study of the Chilean experience with foreign investors in the copper industry. See THEODORE MORAN, *MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE* 5–6 (1974).

must seem rather strange.²⁴ But not so long ago ambivalence, if not outright hostility, was the norm rather than the exception. After World War II, and especially by the 1960s and early 1970s, analysts and policymakers in the Third World and their sympathizers in the First pushed Argentine economist Raul Prebisch's ideas about the plight of the economic periphery into a reasonably coherent set of propositions about the dependency of the Third World on the First.²⁵ One of the chief villains in the *dependencia* theory was the multinational corporation, whose investments, if left unchecked, would perpetuate a world system in which the Third World would remain exploited and immiserated.²⁶ The overall mood was such that, by 1974, C. Fred Bergsten could plausibly claim:

Virtually every country in the world . . . is levying increasingly stringent requirements on foreign firms Few countries ask any longer the simplistic question: "Do we want foreign investment?" The issue is how to get foreign investment on the terms which are best for them, and indeed how to use the power of the firms to promote their own national goals.²⁷

Bergsten went on to warn that then current ideas about the proper role of foreign investors in national development strategies would lead to investment wars in which host states would increasingly regulate and limit the activities of multinational corporations.²⁸

Like most grandiose predictions, Bergsten's was quite wrong. What is so surprising is how quickly it was wrong. By the early 1980s, developing and developed countries alike were having serious second thoughts

24. On the growth of FDI promotional efforts by developing countries, see Jacques Morisset, *Does a Country Need a Promotion Agency to Attract Foreign Direct Investment? A Small Analytical Model Applied to 58 Countries* (World Bank, Policy Research Working Paper Series No. 3038, 2003); Louis T. Wells & Alvin G. Wint, Foreign. Inv. Adv. Serv., *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment* (Occasional Paper No. 20357) (2000). On the growth of FDI flows, see *infra* Figure 1.

25. See Jason Webb Yackee, *Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U.C. DAVIS J. INT'L L. & POL'Y 195, 203–06 (2005). Dependency theory was not so much a coherent theory as it was a collection of "more or less articulate notion[s]" centered around the belief that the international division of labor between the rich "core" countries and the poorer "periphery" was the primary reason for third-world underdevelopment. MAGNUS BLOSTRÖM & BJÖRNE HETTNE, *DEVELOPMENT THEORY IN TRANSITION: THE DEPENDENCY DEBATE AND BEYOND: THIRD WORLD RESPONSES 2* (1984). Dependency theorists argued that the "periphery" should pursue a development strategy based on economic self-reliance rather than on deep linkages with the "core." *Id.* at 76.

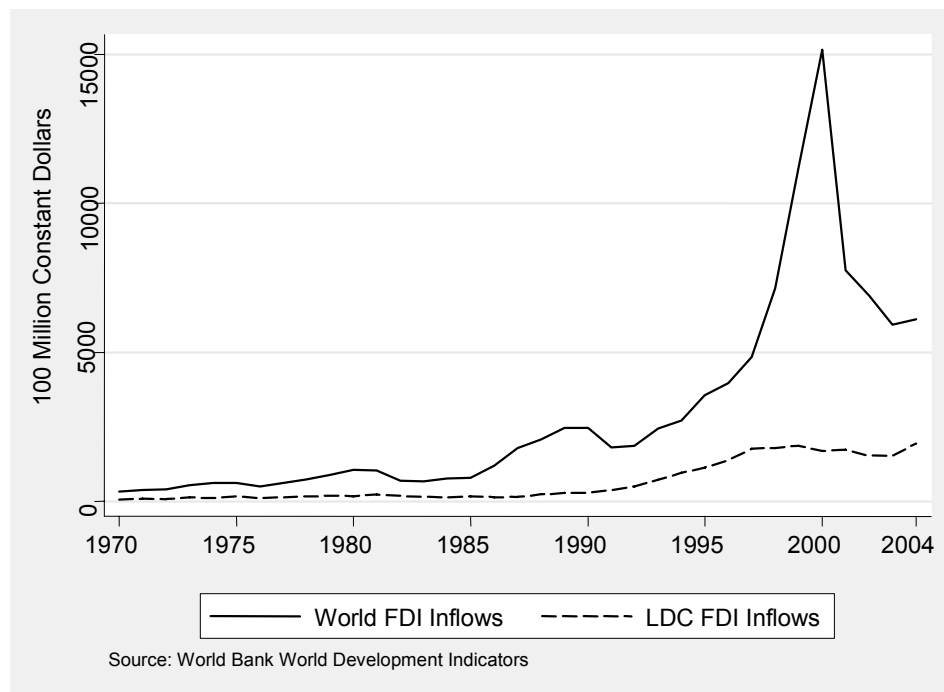
26. MORAN, *supra* note 23, at 3–15.

27. C. Fred Bergsten, *Coming Investment Wars?*, 53 FOREIGN AFF. 135, 136 (1974).

28. *Id.* at 151–52.

about the wisdom of restricting and controlling foreign investment. In a 1985 article, Encarnation and Wells documented the rise of competition for foreign investment among developing countries, in which there was a growing trend towards investment incentives and away from investment controls.²⁹ Indeed, over the following years many developing countries began dismantling the elaborate national controls of foreign investment that had been painstakingly erected just a few years before; either causally or coincidentally, the volume of worldwide FDI flows has increased by tremendous leaps and bounds.³⁰ Figure 1 illustrates the trend.³¹ In real terms as of the year 2000, the worldwide annual volume of FDI inflows increased from its 1970 level by a factor of nearly forty-eight. It is also striking that the bulk of the increased investment has gone to the most developed countries.

Figure 1. Annual FDI Inflows, World vs. Least Developed Countries



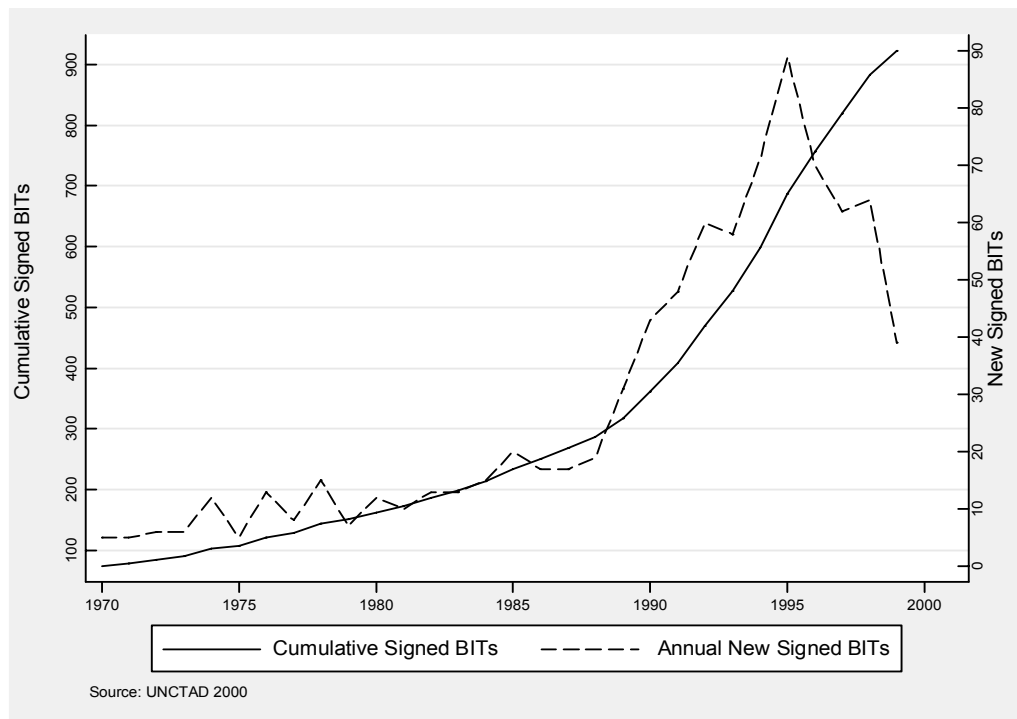
29. Dennis J. Encarnation & Louis T. Wells, Jr., *Sovereignty en Garde: Negotiating with Foreign Investors*, 39 INT'L ORG. 47 (1985).

30. See, e.g., Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 435-65 (1993) (documenting a loosening of the Andean Community's foreign investment regime).

31. Data for Figure 1 derives from the World Bank World Development Indicators, available at <http://www.worldbank.org/> (select "Index" and "Data and Statistics," then "Data" from the left-hand menu).

From a formal legal perspective, the most noticeable (and notable) aspect of the widespread change of heart regarding the value of FDI has been the diffusion of BITs as an important means of attracting foreign capital. Figure 2 below compares the cumulative number of BITs signed from 1970 to 2001 to the number of new BITs signed annually.³²

Figure 2. Cumulative and Annual Count of BITs Signed between Major Capital-Exporting and Capital-Importing Countries 1970–2001



32. Data for Figure 2 is compiled from UNCTC BILATERAL INVESTMENT TREATIES, *supra* note 2; UNCTAD BITS IN THE MID-1990S, *supra* note 2; and UNCTAD BITS 1959–1999, *supra* note 2. I discuss the mechanics of counting BITs in much more detail in the following Sections of this Article. Figure 2 includes BITs signed between the top eighteen capital-exporting states and the remaining capital-importing or less-developed countries (“LDCs”). The top eighteen capital-exporting states are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Singapore, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Historically these states have supplied between eighty-four and ninety-nine percent of annual world FDI flows over the past thirty-some years. The preceding figures were generated from FDI data compiled by UNCTAD’s Division on Investment, Technology, and Enterprise Development. See UNCTAD, Foreign Direct Investment Database, <http://www.unctad.org/Templates/Page.asp?intItemID=1923&lang=1> (last visited Mar. 11, 2008).

The coinciding trends illustrated in Figures 1 and 2 suggest that current interest in BITs is well justified. The rise to prominence of BITs demands explanation, as does the concurrent increase in FDI flows. Indeed, the casual empiricist could be forgiven for asserting (or assuming) a causal link between the two trends. While scientific query into questions of cause and effect, origins, and consequences should not be abandoned, it is nevertheless important to question how much we already know and suggest additional points and problems to consider as empirical research on BITs progresses. As I show in Sections II and III, future empirical research that accounts for important procedural differences in the BITs is a necessary first step in any empirical examination of them or their effects on investor behavior.

II. BITS, CREDIBLE COMMITMENT, AND THE IMPORTANCE OF PROCEDURE

BITs are best understood as dual-function devices. On the one hand, they provide states with a means of making what might be called “substantive” promises to treat investors well. On the other hand, they provide states with a means of making those substantive promises more credible. Consequently, a threshold conceptual question for any empirical BIT analyst should be whether the treaties identified by UNCTAD are sufficiently similar in terms of both the favorableness of the substantive promises extended to investors *and* the credibility of those promises. The potential value of a given treaty to an investor will naturally depend on the values given to these two logically separate parameters. A treaty that advances wholly credible but relatively stingy substantive promises is not necessarily more valuable to the investor than less credible promises of significantly more favorable treatment.

Analysts commonly assume that BITs’ substantive promises are indeed both equivalently favorable and identically credible. The first assumption is, with one major exception, not an entirely unreasonable one. The second assumption can be highly problematic.

Most BITs mimic, at least in broad strokes, the 1959 Draft International Convention on Investments Abroad (commonly known as the Abs-Shawcross Convention)³³ and the Organisation for Economic Cooperation and Development (“OECD”) 1967 Draft Convention on the Protec-

33. For the text of the Abs-Shawcross Convention, see *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 115, 116 (1960).

tion of Foreign Property.³⁴ Because of their common origins, the language used and the subjects covered in different BITs appear remarkably similar, both over time and across countries. For example, capital-exporting states have long been preoccupied with convincing host states to provide certain generally applicable standards of treatment for established investments.³⁵ BITs accordingly, and largely to a tee, promise that investors shall be treated in any number of imperfectly distinguishable ways. The most common examples include promises of “non-discriminatory” treatment, treatment that is not “unreasonable” or “arbitrary,” “fair and equitable” treatment, treatment including “full protection and security,” treatment as favorable as that provided to domestic investors (“national treatment”), and “most-favored-nation” (“MFN”) treatment.³⁶ Investors have also long been concerned with maintaining their ability to repatriate investment proceeds out of the host country and with receiving compensation in the event that their property is expropriated. Most BITs unsurprisingly contain somewhat more specific guarantees as to both subjects.³⁷

This set of promises forms what may be called the substantive core of modern BITs. Recognizing this substantive core makes it possible to analyze the treaties as a conceptually cohesive group. That task is further facilitated by the widespread promise of MFN treatment. A promise of MFN treatment means that when a host state offers more favorable substantive promises to investors in a later BIT, those more favorable promises will automatically apply to investors covered by the first, less favorable BIT.³⁸ The ubiquity of the MFN clause also makes it a largely useless and virtually impossible task for the analyst to construct any sort of index of the relative substantive favorableness of the various treaties, just as it makes it rather difficult for an investor to determine just what exactly has been promised.³⁹

34. Organisation for Economic Cooperation and Development [OECD], Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, O.E.C.D. No. 23081, *reprinted in* 7 I.L.M. 117 (1968) [hereinafter OECD Draft Convention].

35. See UNCTC BILATERAL INVESTMENT TREATIES, *supra* note 2, at 40.

36. These common BIT provisions are discussed in RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 49 (1995).

37. *Id.* at 97–118.

38. OECD Draft Convention, *supra* note 34, at 1.

39. The difficulty is compounded by the fact that “MFN clauses do not have a universal meaning. Indeed, the formulation and application of MFN clauses varies widely among investment treaties. . . . The proper application and interpretation of a particular MFN clause in a particular case requires careful examination of the text of that provision” OECD, *Most-Favoured-Nation Treatment in International Investment Law* 16 (OECD, Working Paper On International Investment No. 2004/2, 2004).

U.S. BITs provide the principal exception to the general rule of substantive sameness. The point is tangential to the larger argument, but it is worth emphasizing that U.S. BITs, unlike the BITs of other capital-exporting countries, consistently extend promises of favorable treatment to investors at the pre-establishment (i.e., pre-investment) stage of the investment process.⁴⁰ Generally, this means that host states entering into BITs with the United States promise to allow American investors to enter the country and make an investment under the same procedures and on the same terms as domestic investors or as the investors of other states—a significant relinquishment of a host state’s well-recognized (and for much of history, jealously guarded) sovereign right to exert largely absolute control over the entry of foreigners.⁴¹ And because promises of MFN treatment usually apply only to post-establishment phases of the investment process, this particularly liberal aspect of U.S. BITs is not incorporated by reference into the treaties of other capital-exporting countries. Analysts, especially those interested in the effects of BITs on FDI flows, should adjust the conceptual weight of the value of signing or ratifying a U.S. BIT as compared to signing or ratifying a BIT with another state. Signing a U.S. BIT represents a substantively different commitment than signing a BIT with other capital-exporting states.

The larger point, however, is that BIT promises, even if we assume them to be equally favorable, are *not* equally credible. To see why, note that if BITs have the capacity to function as credible commitment devices, it implies that something about the treaties makes them particularly unattractive—e.g., costly—for states to renege on favorable promises to investors. It has long been argued that in some instances treaty-based promises may be self-enforcing in the sense that a breach of the treaty will lead automatically, or nearly so, to the imposition of signifi-

40. For example, Article II(1) of the BIT between the United States and Uzbekistan establishes that “[w]ith respect to the establishment [or] acquisition . . . of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies [national treatment] or to investments . . . of a third country [most-favored nation treatment].” Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uzb., Dec. 16, 1994, S. TREATY DOC. NO. 104-25 (1996). But most non-U.S. BITs “guarantee no right of access for capital or persons to the host state, they leave the home state with unlimited discretion to prohibit or regulate outward investment flows, [and] the obligation of the host state not to discriminate applies only after investment is established.” Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT’L L. 621, 630 (1998).

41. SORNARAJAH, *supra* note 6, at 97 (“The right of a state to control the entry of foreign investment is unlimited, as it is a right that flows from sovereignty.”).

cant costs on the breaching state.⁴² In most cases those costs will be reputational—third parties will observe the breach and update their beliefs about the breaching state's willingness to honor its commitments.⁴³ In the case of foreign investment, the host state that breaches an investment treaty can expect perceptions of its investment climate to worsen, making it more difficult for the state to attract desired investment in the future. The prudent host state will thus weigh the short-term benefits of breaching the treaty (say, for example, the domestic political benefits of seizing a foreign-owned mining operation) against the long-term costs of forgone future foreign capital.

It is very difficult to argue, however, that the substantive promises contained in BITs are meaningfully self-enforcing. The difficulty arises from the fact that these core substantive promises are relatively vague standards. What the promises of favorable treatment actually mean or how they will apply in a given instance can be highly uncertain. This is particularly the case for the treaties' generally applicable standards of treatment, which have been described as "otiose,"⁴⁴ "vague and open to different interpretations,"⁴⁵ and "offer[ing only] a general point of departure in formulating an argument that the foreign investor has not been well treated."⁴⁶

Even where the promise is relatively specific so that in theory an observer might be able to tell with a reasonable degree of confidence and

42. See generally Beth V. Yarbrough & Robert M. Yarbrough, *Reciprocity, Bilateralism, and Economic 'Hostages': Self-Enforcing Agreements in International Trade*, 30 INT'L STUD. Q. 7 (1986).

43. That reputation might play a role in promoting host state compliance with international obligations (investment related or otherwise) is an old and rather obvious idea. See, e.g., Roy Preiswerk, *New Developments in Bilateral Investment Protection (With Special Reference to Belgian Practice)*, 3 REV. BELGE DR. INT'L 173, 195 (1967). Guzman provides a recent recycling of the idea. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1840–71 (2002). The real question is whether reputational concerns alone are sufficient to promote widespread compliance with BIT obligations. Preiswerk takes the position that they are; my own views, as developed below, are much more skeptical.

44. SORNARAJAH, *supra* note 6, at 235–36.

45. *Id.* at 236.

46. P.T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 625 (1995). Klebes, in a memorable turn of phrase, has suggested that the vagueness of BIT promises renders the treaties mere "traités d'atmosphère." Heinrich Klebes, *Encouragement et Protection des Investissements Privés Dans les Pays en Développement: Les Traités Bilatéraux de la République Fédérale D'Allemagne Dans Leur Contexte* [Encouragement and Protection of Private Investments in Developing Countries: The Bilateral Treaties of the Federal Republic of Germany in Context] 594 (1983) (unpublished doctoral dissertation, L'Université de Strasbourg) (on file with author).

without too much effort that if fact *X* has occurred then promise *Y* has been breached, whether fact *X* did indeed occur will often be highly contestable. For example, the common guarantee of “prompt, adequate, and effective” compensation in the event of expropriation can be surprisingly difficult to apply to particular facts.⁴⁷ Hiding behind even that modestly specific rule of law lurk immensely important legal questions, such as the proper application of expropriation law to government regulatory activity. That particular question has been left almost completely unaddressed in most treaties and remains far from settled theoretically or jurisprudentially, creating enormous legal uncertainty and fostering a growing political backlash against investment treaties.⁴⁸

This means that in most foreign investment disputes, save those arising from the most obvious and egregious conduct, it will be quite difficult for the parties or outside observers to determine whether or not a breach of a given promise has objectively occurred. It is even difficult for international arbitral tribunals to consistently construe and apply BIT promises.⁴⁹ And where a breach is not easily identified because of either legal or factual uncertainty, reputational concerns are unlikely to dissuade the host state from acting in ways that might objectively be considered contrary to its treaty or other international legal promises.⁵⁰ The investor, of course, is sure to claim the treaty has been violated, but the investor’s self-serving rhetoric, like the host state’s own, should not be counted on to reflect the true state of affairs, especially where it simply is not certain what a particular promise actually means.⁵¹

47. See Albrecht Stockmayer, *Bilateral Investment Promotion Protection and Treaties: A Model for Community Promotion of Mining Investment?*, 4 J. ENERGY & NAT. RESOURCES L. 247, 253–54, 256–57 (1985); Andreas F. Lowenfeld, *Introduction to EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY* 7 (Andreas F. Lowenfeld ed., 1971).

48. See Been & Beauvais, *supra* note 3, at 55.

49. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1545–82 (2005).

50. As Douglas North has emphasized more generally, “the costs of measurement and enforcement, discovering who is cheating whom, when free-riding will occur, and who should bear the cost of punishing defectors make self-enforcement ineffective in many situations.” NORTH, *supra* note 13, at 50. A major part of the difficulty arises from the high costs of “measuring the multiple margins that constitute contract performance.” *Id.* at 54.

51. I leave aside the possibility that what matters for reputational purposes is the mere fact that the host state and a particular investor are publicly feuding. In that case, the existence of the dispute might be taken as powerful *prima facie* evidence of a poor investment climate, regardless of the objective merits of any associated legal arguments or of the “true” factual state of affairs. The ultimate question is one of the informational value

In light of this discussion, it is worthwhile to briefly address Guzman's more general argument (one that he has applied specifically to international investment law) that treaties are "[t]he most formal and reliable international commitment" in large part because they "represent clear and well-defined obligations of states."⁵² This conclusion begs the question: treaties are the most formal and reliable international commitment in comparison to what? For Guzman, the comparison is, for the most part, between BITs and customary international law.⁵³ It would be misguided to argue that BITs offer no improvement over customary international law in terms of what might be called the international legal coverage of investment issues. BITs typically contain many promises that have never been incorporated into customary international law—promises to permit investors to transfer funds out of the host country, promises of MFN treatment, promises to recognize the subrogation rights of home states, promises to refrain from imposing performance requirements on investors, and so on.⁵⁴ In an absolute sense, and as I have already argued, these additional promises are typically framed in language that is far from clear and precise. In a relative sense, it is quite difficult to argue that customary law is *less* clear. Indeed, custom has nothing to say on these topics; whatever obligations might exist would necessarily derive from other sources, such as municipal law or investment contracts.

Even where BITs do treat topics traditionally covered by customary international law (such as expropriation), the treaties typically add little in the way of meaningful content, clarity, or precision. Indeed, the United States argues that the most important treaty promises, such as those requiring "prompt, adequate, and effective" compensation, "fair and equitable" treatment, or "full protection and security," merely incorporate by reference the same protections that were already available under custom.⁵⁵ The position is not unreasonable. UNCTAD agrees that "[m]ost

of an investor's (or its home state's) public claims of breach. Given inherent legal and factual uncertainties and strategic incentives to exaggerate and mislead, I assume that in many cases most third-party observers will attach little value to rhetorical claims of breach absent authoritative adjudication of the underlying claims.

52. Guzman, *supra* note 13, at 1873.

53. *Id.*

54. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 112–13 (2005) (discussing whether BITs represent *lex specialis* governing only the parties to the agreement or customary international law).

55. See Statement on NAFTA Article 1105 and the Availability of Arbitration Documents, NAFTA Commission (July 31, 2001), available at <http://www.naftaclaims.com/commission.htm>. At the instigation of the United States, NAFTA's Free Trade Commission issued a legally binding statement to "clarify" chapter 11's promises that "'fair and

[BITs] tend to restate traditional principles of customary international law with respect to the treatment of foreign property abroad.”⁵⁶

The fundamental issue, then, is one of distinguishing between the existence of an obligation and its clarity of meaning or application. BITs certainly commit host states to *something*. That something appears to be largely investor friendly, but what exactly the obligation will entail in particular cases can be quite obscure. For that reason, it is not theoretically plausible to treat investment treaties’ core substantive promises as meaningfully credible in and of themselves. Indeed, there is good reason to suspect that investment treaties, by making broad and vague promises to indiscriminate classes of investors, may make disputes even more likely.

What is theoretically necessary to render BIT promises credible is investor access to authoritative adjudication.⁵⁷ It is through adjudication that vague standards of treatment are given useful legal content⁵⁸ and inevitable factual disputes are resolved. International arbitration, as opposed to adjudication in municipal courts in the host state, is said to be essential because investors typically assume that municipal courts in developing countries lack the technical competence or neutrality to adequately and fairly resolve foreign investment disputes.⁵⁹ Wälde’s recent and quite forceful statement of the point is worth quoting at length:

It is the ability to access a tribunal outside the sway of the host State which is the principal advantage of a modern investment treaty. This advantage is much more significant than the applicability to the dispute

equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens,” and that the “minimum standard” of treatment imposed by NAFTA was no more than that same customary standard. *Id.* It has long been recognized that one of the primary aims of the U.S. BIT program has been to codify the United States’ understandings of customary international law, particularly in regard to compensation for expropriation. See Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 208 (1988).

56. UNCTC BILATERAL INVESTMENT TREATIES, *supra* note 2, at 9.

57. See Douglas C. North, *Institutions and Credible Commitment*, 149 J. INST’L & THEORETICAL ECON. 11, 21 (1993) (arguing that “creating the formal rules [and] creating and implementing a judicial system that will impartially enforce such rules” is necessary to solve credible commitment problems).

58. Indeed, some would say that *by definition* standards are given useful content after the fact through adjudication. See Louis Kaplow, *Rules Versus Standards*, 42 DUKE L.J. 557, 621 (1992).

59. See Robert B. Shanks, *Lessons in the Management of Political Risk: Infrastructure Projects (A Legal Perspective)*, in MANAGING INTERNATIONAL POLITICAL RISK 83, 93 (Theodore Moran ed., 1998).

of substantive international law rules. *The remedy trumps in terms of practical effectiveness the definition of the right.*

...

The effectiveness of substantive rights is everywhere—but nowhere more so than in investment disputes—linked to the availability of an effective (i.e., independent) enforcement procedure. This link is so close that the best way to emasculate an investor's right against a Host State is to sever the link between an international-law-based right and an international enforcement procedure and to compel the investor to seek justice before domestic courts. *Right and procedural remedy are, in practical and effective terms, one.*⁶⁰

Assuming Wälde's position is correct, the problem for BIT analysts is that not all BITs provide such access—neither comprehensively nor with absolute certainty. These extremely important differences in procedural (or perhaps more properly, remedial) content suggest that BITs as potential credible commitment devices are not created equal, and some treaties are likely to have far less value to investors than others.

Before presenting an empirical examination of differences in BIT dispute settlement procedures, let me add an important caveat. My basic argument thus far—that procedural differences in BITs matter conceptually—is premised on the assumption that an MFN clause in a BIT that does not contain an effective pre-consent to arbitration cannot be used to take advantage of a pre-consent provided in another treaty. This is admittedly a delicate question and one that is subject to substantial debate; nonetheless, an arbitral tribunal is unlikely to premise jurisdiction on an MFN clause where the treaty otherwise provides the investor with no right to unilaterally initiate arbitration as to the particular dispute at hand.⁶¹

60. Wälde, *supra* note 13, at 190, 194 (emphasis added). Wälde is not alone in viewing access to arbitration as the “greatest innovation” of BITs. One arbitral tribunal has observed:

The greatest innovation of ICSID and other systems directed at the protection of foreign investments is precisely that the rights of the investors are not any longer subject to the political and other considerations by their governments, as was the case under the old system of diplomatic protection, often resulting in an interference with those rights.

Enron Corp. & Ponderosa Assets L.P. v. Argentine Rep., Decision on Jurisdiction, ICSID (W. Bank) No. ARB/01/3 (Aug. 2, 2004), ¶ 37.

61. See Jürgen Kurtz, *The Delicate Extension of Most-Favored-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES, AND CUSTOMARY INTERNATIONAL LAW 523, 542–51 (Todd Weiler ed., 2005) (discussing a

III. BITS AND DISPUTE SETTLEMENT: AN EMPIRICAL EXAMINATION

Differences in the procedural content of BITS hold potentially important and largely unappreciated⁶² theoretical significance for our understanding of BITS as credible commitments to treat investors favorably. As demonstrated above, the treaties on UNCTAD's list vary substantially in terms of the procedural guarantees they offer investors.⁶³ This Section presents a systematic, empirical indication of the degree of variation using a four-fold classification scheme.⁶⁴ I first describe each of the four categories, then present Figures illustrating how the dispute settlement content of BITS has changed over time.

1. *Comprehensive, Effective Pre-Consents ("strong BITS")*. BITS with the greatest capacity to function as meaningful credible commitment devices are those that contain comprehensive, effective pre-consents to investor-initiated arbitration. In these truly modern treaties, each state agrees in advance of any particular dispute to allow future investors to

number of ICSID arbitral decisions in which a party to a dispute invoked the MFN clause in one treaty as the basis for a claim to expand the substantive protection of another treaty and the need to reintroduce formal limitations on the ostensibly broad language of the typical MFN clause); Luke Eric Peterson, *Majority Frowns on Using MFN Clause to Obtain Wider Arbitration Options*, INV. TREATY NEWS (Int'l Institute for Sustainable Development, Winnipeg), Jan. 11, 2008 (Can.), available at http://www.iisd.org/pdf/2008/itn_jan11_2008/pdf.

62. That is, unappreciated by observers other than lawyers practicing in the field of investment arbitration.

63. My results are compatible with those of Koremenos, though my methodology and focus are different. Koremenos presents results from a study of the dispute settlement provisions in a random sample of treaties of all types (i.e., not just investment treaties) published in the United Nations Treaty Series ("UNTS"). See generally Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUDIES 189 (2007). Koremenos finds that among treaties containing dispute resolution provisions, fifty percent include arbitration provisions. *Id.* at 190. But, it is important to note that her sample is drawn from UNTS treaties between states, so she refers only to provisions providing for *interstate* arbitration, not arbitration between states and private parties. Virtually all of the BITS in my dataset contain interstate arbitration provisions, though in practice they are very rarely used. The well-known *ELSI* case, based on the interstate arbitration provisions in the United States-Italy friendship, commerce and navigation ("FCN") treaty, provides the exception that proves the rule. Case Concerning Elettronica Sicula, S.P.A. (*ELSI*) (U.S. v. Italy), 1989 I.C.J. 15 (July, 20 1989). Very few developing countries reliably publish their BITS in the UNTS, making the UNTS a poor source of information about treaties involving such countries, which may impact the reliability of a BIT study. For a definition and detailed discussion of FCN treaties, see *infra* Section IV.B.

64. My classification scheme draws heavily on CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 191-224 (2001).

unilaterally initiate arbitration in the event of an investment dispute, broadly defined, before particular arbitral tribunals. These pre-consent clauses can be either explicit or implicit.⁶⁵ The ICSID is a frequent forum of choice for BIT pre-consents,⁶⁶ although pre-consents may also permit ad hoc arbitration (where the dispute is settled under custom-made rules), semi-ad-hoc arbitration (where the dispute is settled under model rules of international arbitration, such as those provided by the U.N. Commission on International Trade Law),⁶⁷ or privately organized institutional arbitration (such as through the International Chamber of Commerce).⁶⁸ In any of these cases, the host state will find it very difficult to convince an arbitral tribunal to decline to authoritatively decide an investment dispute once the investor has accepted the state's standing treaty-based offer to arbitrate.⁶⁹ Arbitral tribunals tend to generously interpret pre-consents to arbitrate,⁷⁰ and given the very real possibility of an adverse default award,⁷¹ states have an incentive to participate in proceedings. Just as importantly, investors benefiting from a favorable arbitral award can reliably collect upon it, even in the face of host state intransigence, by

65. For example, an explicit pre-consent might provide that "Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration." SCHREUER, *supra* note 64, at 214 (quoting Accord entre la Confederation suisse et la Republique du Ghana concernant la promotion reciproque des investissements, Switz.-Ghana, art. 12, June 15, 1999). Implicit pre-consents include those that contain "formulations to the effect that a dispute 'shall be submitted' to [arbitration] or that [the investor has] the right to initiate proceedings." *Id.* at 213. The German Model Agreement provides a typical example: "If the divergency cannot be settled within six months . . . it shall, at the request of the [investor], be submitted for arbitration. Unless the parties to the dispute agree otherwise, the divergency shall be submitted for arbitration [to ICSID]." *Id.* (citing German Model Agreement).

66. See MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 22 (1993). A state that has ratified the ICSID Convention agrees to abide by ICSID's rules and is eligible to use the ICSID system to resolve investment disputes. *Id.* at 31. However, investors may not initiate arbitration against the ratifying state by merely ratifying the ICSID Convention. *Id.* at 21. Some further expression of state consent to arbitrate is necessary, thus creating a need for consents in BITs, national law, or an investment contract. *Id.*

67. See generally ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1990).

68. International Chamber of Commerce [ICC], Welcome to ICC Dispute Resolution Services, <http://www.iccwbo.org/court/> (last visited Mar. 11, 2008).

69. See SCHREUER, *supra* note 64, at 219.

70. *Id.* at 212-13.

71. ICSID Convention, *supra* note 4, art. 45.

bringing an enforcement action in the courts of third states in which the host state might have assets.⁷²

2. *Limited, Effective Pre-Consents (“partial pre-consent BITs”)*. A certain number of BITs contain pre-consents of extremely limited scope. These treaties offer the state’s consent to arbitrate only certain kinds of disputes—typically disputes over the amount of compensation due in cases of expropriation and sometimes disputes over the freedom to transfer investments and proceeds out of the host state.⁷³ Completely excluded are disputes relating to the treaty’s other substantive promises. The lacuna is conceptually significant for at least two reasons. First, and most importantly, BITs derive much of their credible commitment power from giving investors the ability to threaten the host state with litigation over the meaning and applicability of vague substantive promises, like “fair and equitable treatment,” in order to persuade the host state to abandon or avoid a wide range of potential actions adverse to the investor’s interests.⁷⁴ Excluding the possibility of litigation over such matters removes the most important arrow from the investor’s quiver. Second, while protecting against the threat of uncompensated expropriation was the principal concern of investors of an earlier era,⁷⁵ today the risk of such expropriation, as it is traditionally understood, is objectively slight.⁷⁶ This sug-

72. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the ICSID Convention both provide investors with powerful enforcement tools. The New York Convention requires courts of contracting states to enforce international arbitral awards unless one of several strict conditions are met. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. III–V, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. The ICSID Convention requires the courts of contracting states to enforce ICSID awards as if they were final judgments by a domestic court (e.g., with no possibility of collateral attack). See ICSID Convention, *supra* note 4, art. 54. A recent example that illustrates how valuable these enforcement provisions can be involves a German investor who won an investment treaty award against the Russian government and was able to enforce the award by seizing “a \$40 million Russian-owned apartment complex in Cologne that once served as the local KGB outpost.” David Crawford, *Businessman vs. Kremlin: War of Attrition*, WALL ST. J., Mar. 6, 2006, at A6.

73. These treaties typically involved Communist states. Many remain in force in the post-Communist era, including BITs involving Russia and China. See Luke Eric Peterson, *Interpreting Narrowly-Worded Arbitration Clauses in Soviet-era and Chinese BITs*, INV. TREATY NEWS (Int’l Institute for Sustainable Development, Winnipeg), Jan. 17, 2008 (Can.).

74. See Preiswerk, *supra* note 43, at 195.

75. Wälde, *supra* note 13, at 201.

76. Michael Minor, *The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992*, 25 J. INT’L BUS. STUD. 177, 178 (1994) (discussing the decline in expropriations from the late 1970s through 1992). See also UNCTAD TRENDS IN INTERNATIONAL

gests that treaties that provide guaranteed access to arbitration only for expropriation disputes fail to cover the most common modern sources of investor-state tension. While it is difficult to say precisely how much less valuable these kinds of treaties are compared to those that offer investors comprehensive pre-consents, presumably they are significantly less valuable.

3. *Promissory Pre-Consents ("promissory BITs")*. Pre-consent to investor-initiated, enforceable arbitration for a wide range of investment disputes may seriously constrain a host state's policy autonomy. For that reason, a number of states have sought to limit their exposure to adverse awards and to preserve a greater degree of policy autonomy vis-à-vis foreign investors by offering carefully tailored promises to consent to arbitration rather than actual pre-consents.⁷⁷ As Schreuer suggests, the difference between a consent and a promise to consent is legally quite significant.⁷⁸ When a state has promised to consent to arbitration in a treaty, a refusal to actually consent when the investor so demands is indeed a breach of the treaty under international law. But in the face of such a refusal, no matter how illegal, an international arbitral tribunal will not exercise jurisdiction over the dispute because arbitral jurisdiction always and necessarily depends on the actual consent of the parties.⁷⁹ This much is quite clear. Less clear is whether the reputational costs of breaching a promise to arbitrate will typically be so great that a promise to consent is for all practical purposes of as much value to the investor as an actual pre-consent. BITs incorporating promissory pre-consents are arguably of significantly less credible commitment value to investors than are treaties containing true pre-consents precisely because the inves-

INVESTMENT AGREEMENTS, *supra* note 2, at 17 & 18 fig.1 (nationalization and expropriation peaked in the 1970s).

77. For an excellent example of a promissory pre-consent, see article 11 of the Agreement between Japan and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Protection of Investment, which provides "Each Contracting Party shall, at the request of the [investor], consent to submit any legal dispute . . . to conciliation or arbitration." Agreement between Japan and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Protection of Investment, art. 11, Aug. 7, 1982, 1358 U.N.T.S. 272.

78. SCHREUER, *supra* note 64, at 216.

79. But once consent has been given and accepted by the other party, it can be difficult or impossible for one party to withdraw its consent unilaterally. See ICSID Convention, *supra* note 4, art. 25(1) ("When the parties have given their consent, no party may withdraw its consent unilaterally."). This rule is what makes a BIT pre-consent effective—once offered by the host state and accepted by the investor, the host state cannot meaningfully avoid its obligation to arbitrate at the investor's choosing.

tor cannot reliably count on the host state's reputational concerns to ensure the investor's access to arbitration once a major investment dispute arises.

4. *No Pre-Consent ("weak BITs")*. Finally, many early BITs contain no investor-state dispute-settlement provisions whatsoever. A handful of these early treaties contain merely hortatory expressions of willingness to consider arbitration.⁸⁰ The lack of meaningful dispute settlement provisions means that these kinds of treaties have little, if any, theoretical potential to credibly commit host states to treat investors favorably, and they are easily considered the weakest of the four kinds of treaties from a credible commitment perspective.

Figure 3 illustrates the results of a comprehensive analysis of investor-state dispute settlement provisions in the BITs of the top eighteen most significant capital-exporting states by FDI volume⁸¹ based on full-text copies of the various treaties.⁸² Each BIT's dispute settlement provision is coded according to the four categories above.⁸³ Any categorization exercise inevitably raises a number of case-specific considerations of often quite subtle distinction, but because Figure 3 is intended largely for illustrative purposes of a general sort, a comprehensive discussion of those difficulties or of their resolution has been omitted.⁸⁴ In the vast majority of cases, treaty coding was straightforward.

80. For example, the Agreement on the Protection of Investments between the Kingdom of the Netherlands and the Socialist Federal Republic of Yugoslavia, signed on February 16, 1976, provides that the host state "shall give sympathetic consideration to any request" by the investor to arbitrate a dispute. SCHREUER, *supra* note 64, at 217.

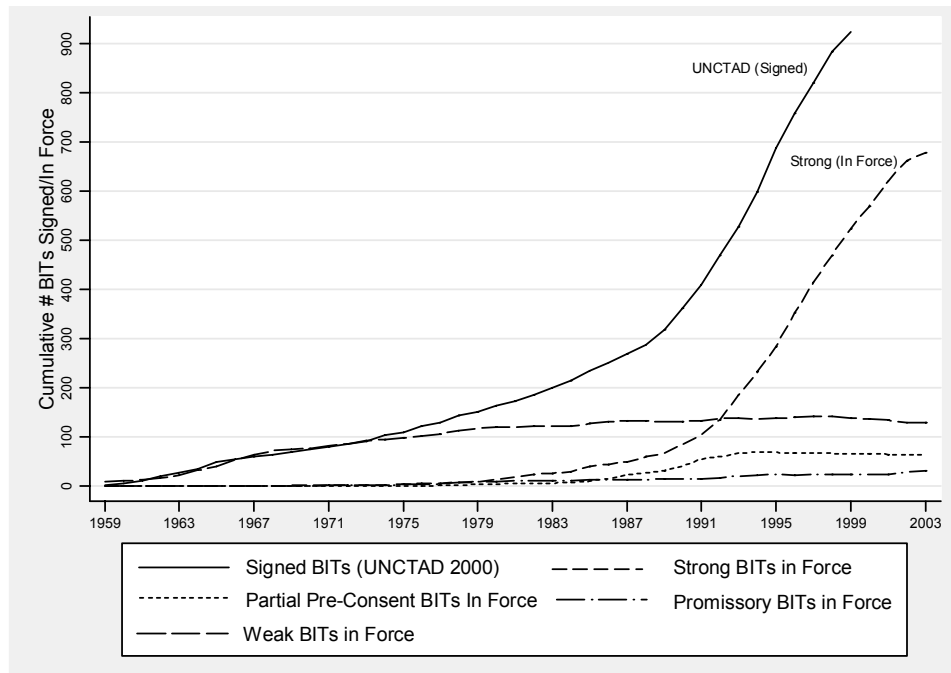
81. See *supra* note 32 for a list of the top eighteen capital exporting states.

82. In seven instances I was unable to obtain a full text of the relevant treaty. In each of these cases I evaluated the treaty as containing an effective and comprehensive pre-consent based on each treaty partner's contemporaneous BIT practice, though the evaluation is at best an educated guess.

83. Where possible I evaluated each treaty's content in its official language or as professionally translated by the United Nations. Where a treaty was available only in a language that I do not read (in nearly all cases Italian or German), a native speaker evaluated or translated the relevant passages.

84. For more details regarding the coding exercise, see Jason Webb Yackee, *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital* (2007) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with author).

Figure 3. Cumulative BITs in Force, Disaggregated by Dispute Settlement Provisions, 1959–2002 (18 Capital-Exporting Countries)



The solid line in Figure 3 shows the cumulative number of signed BITs through 1999 as listed on UNCTAD's year 2000 list.⁸⁵ By UNCTAD's count, there is a steady rise in the number of signed BITs beginning in 1959 (the year that Germany signed a BIT with Pakistan)⁸⁶ up until the

85. UNCTAD's list contains some obvious errors and omissions. Notably missing from the UNCTAD list, for example, are a relatively large number of Germany's early BITs, including those with Kenya, the Philippines, Ghana, Colombia, and Chile. This absence is puzzling because UNCTAD's list includes other German BITs that failed to enter into force, such as its 1964 BIT with Ethiopia. UNCTAD's list also leaves out a BIT-equivalent 1964 "exchange of letters" between Germany and India. For a comprehensive list and detailed discussion of these early German BITs, see generally Klebes, *supra* note 46. UNCTAD's list also curiously contains a number of French investment guarantee treaties ("IGTs") that provide rules relating exclusively to investments insured by the French government and that do not contain the core protections contained in most BITs. UNCTAD also includes a number of French "establishment" treaties with certain states in the Communauté française d'Afrique ("CFA"). These treaties are very different from the typical BIT.

86. The 1959 Germany-Pakistan BIT is the earliest BIT listed in UNCTAD's various lists of treaties. UNCTC BILATERAL INVESTMENT TREATIES, *supra* note 2, at 8. Empirical studies of BITs also tend to treat the Germany-Pakistan BIT as the first treaty of interest.

late 1980s and early 1990s, when a more dramatic increase is visible. A comparison of UNCTAD's aggregate count of signed BITs with a count of BITs differentiated by category on the basis of dispute settlement provisions, including free trade agreements and friendship, commerce, and navigation treaties ("FCN treaties") with BIT-equivalent investment provisions, as reflected in Figure 3 suggests a much more complex series of trends than the UNCTAD list alone.⁸⁷ The following analysis focuses on BITs that have entered into force, rather than on BITs that have merely been signed (empirical BIT analysts usually use UNCTAD's count of signed BITs to create their measures of BIT-based credible commitment), for a number of practical and theoretical reasons.

As a practical matter, it can be difficult both for the investor and the analyst to determine whether a signed treaty that has not entered into force actually exists, and if it exists, what it might contain. States supply copies of a signed treaty to the United Nations for publication in the United Nations Treaty Series rather haphazardly and only after entry into force (sometimes long after); they tend to publish the text of a treaty in their national legislative gazettes only after ratification. It is only very recently that capital-exporting states—and rarely developing countries—have begun to post reasonably up-to-date, comprehensive, and accessible lists of their BITs online. Even in these cases, links to the treaty text may not be provided, especially if the treaty is not yet ratified or in force.⁸⁸

See, e.g., Neumayer & Spess, *supra* note 8, at 1569. A number of commentators have repeated the assertion that the Germany-Pakistan treaty is the "first BIT" or the "first modern BIT." *See, e.g.,* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 657 (1990); Charles N. Brower & Jeremy K. Sharpe, *Notes and Comments: International Arbitration and the Islamic World: Third Phase*, 97 AM. J. INT'L L. 643, 647 n.30 (2003); SORNARAJAH, *supra* note 6, at 204 n.1.

87. For a definition and detailed discussion of FCN treaties, see *infra* Section IV.B. Most FCN treaties are essentially weak BITs because they contain no investor-state arbitration provisions. As discussed in the next Section, UNCTAD's list ignores these multilateral treaties. I have also corrected for the obvious mistakes discussed *supra* note 85.

88. ICSID has sponsored a loose-leaf collection of BITs that does an admirable job of obtaining and publishing the texts of the earlier treaties, but the collection's coverage of later treaties is quite spotty and incomplete. *See* INVESTMENT PROMOTION AND PROTECTION TREATIES, Binder Series I–VII (Int'l Center for Settlement of Inv. Disputes ed., Oceana Publications 2002). UNCTAD has recently developed an on-line repository of BIT texts, though important gaps in the collection remain, especially for treaties between developing countries, recently signed treaties, and treaties that are no longer in force. *See* UNCTAD, Investment Instruments On-line Database, <http://www.unctad.org/Templates/Page.asp?intItemID=3775&lang=1> (last visited Mar. 11, 2008).

More theoretically, treaties that have been signed but that have not entered into force have minimal credible commitment potential. My review of the texts of the various treaties suggests that almost all BITs provide that they shall not enter into force until some period of time after ratification by the parties to the treaty.⁸⁹ By itself, the act of signing a BIT neither creates an obligation to ratify the instrument nor establishes the signing parties' consent to be bound by the treaty.⁹⁰ Consequently, when a treaty has not entered into force, its substantive and procedural provisions are unlikely to have any legal force. Most critically for the foreign investor, arbitral tribunals are unlikely to accept jurisdiction on the basis of a treaty-based state pre-consent when the treaty has been signed but is not yet in force.⁹¹

What makes Figure 3 most interesting is its illustration that the BIT phenomenon—understood as one of credible commitment through the entry into force of “strong” BITs—began a decade later than is commonly recognized. The first BIT to enter into force that contained a full-fledged arbitral pre-consent was a 1969 treaty between Italy and Chad.⁹² Germany's 1959 treaty with Pakistan, which UNCTAD credits as the first BIT, contains no investor-state dispute settlement provisions of any

89. As a general matter, whether a treaty must be ratified before entering into force depends on whether the parties to the particular treaty intend it to be subject to domestic ratification procedures. Vienna Convention on the Law of Treaties art. 14, May 23, 1969, 1155 U.N.T.S. 331. My review of BIT texts, described in more detail below, suggests that the vast majority of the treaties explicitly state that they shall be subject to ratification prior to entry into force.

90. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 582–83 (6th ed. 2003).

91. UNCTAD, *Many BITs Have Yet to Enter into Force*, at 6, U.N. Doc. UNCTAD/WEB/ITE/IIA/2005/10 (Nov. 2, 2005). The study notes, for example, that none of Brazil's fourteen BITs, nor any of Colombia's four BITs, have entered into force. More generally, the study notes that as of 2004, of 2392 signed BITs, 674 had not entered into force; of those, more than 300 had been signed more than five years earlier suggesting that their prospects for eventual entry into force are slim. *Id.* at 1. Countries in some geographic regions were more unlikely to have ratified their signed BITs than those in other geographic regions. *Id.* at 4. For example, only forty-four percent of African BITs had entered into force, a percentage significantly lower than the equivalent figures for other regions. *Id.* at 4.

92. Accord entre le Gouvernement de la République Italienne et le Gouvernement de la République du Chad en Vue de Protéger et de Favoriser Les Investissements de Capitaux [Agreement between the Government of the Italian Republic and the Government of the Republic of Chad with the Aim of Protecting and Promoting Capital Investments] art. 7, June 11, 1969, *reprinted in* INVESTMENT LAWS OF THE WORLD, at Binder I (Int'l Center for Settlement of Inv. Disputes ed., Oceana Publications 2002).

kind.⁹³ Figure 3 also demonstrates that the BIT phenomenon—again, understood as the entry into force of strong BITs—was much more modest in scope in the 1970s and 1980s than is typically assumed. For example, the number of in-force strong BITs remained under one hundred until 1990, and throughout most of the 1980s the majority of BITs in force did not contain strong dispute settlement provisions.

Figure 3 also shows that a fair number of weak BITs remain in force. Truly weak BITs—those containing no effective investor-state dispute settlement provisions—are not atypical. Since the mid-1970s at least one hundred weak BITs entered into and remain in force. Also, a significant number of in-force BITs contain pre-consents of the markedly inferior “expropriation only” type (sixty-six to be exact). Finally, BITs with promissory pre-consents are relatively rare. In 2002, only twenty-eight of these kinds of treaties were in force, and capital-exporting states were especially prone to use them. For example, six of Japan’s nine BITs contain promissory pre-consents, as do ten of Australia’s eighteen BITs.⁹⁴

Figure 4 considers in more detail the BIT programs of France and Germany.⁹⁵ Historically, both states have been very important sources of investment capital.⁹⁶ Moreover, France and Germany were at the forefront of the BIT phenomenon as UNCTAD identifies it, signing large numbers of treaties in the 1960s and 1970s. But, few, if any, of these states’ early treaties contain comprehensive, effective pre-consents to arbitration. It is particularly striking to note that German investors did not enjoy the protections of a modern BIT until 1988 when Germany’s treaty with Nepal entered into force.⁹⁷ This is striking precisely because it is so often claimed that Germany initiated the BIT phenomenon, and

93. See Treaty for the Protection of Investment, W. Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23. Regarding UNCTAD’s credit to this treaty as the first BIT, see also *supra* note 86 and authorities cited therein.

94. Australia’s eighteen BITs are listed in Yackee, *supra* note 84, at 241. Australia’s BITs generally contain a comprehensive, effective pre-consent to ad hoc arbitration, but only if Australia and its treaty partner have not joined the ICSID Convention. See, e.g., Agreement between the Government of Australia and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investments art. XI(3), July 29, 1993, 1770 U.N.T.S. 302. Where they both have done so, the ad hoc option disappears, and the investor’s sole option is to seek ICSID arbitration. *Id.* at art. XI(4)(a). With respect to ICSID arbitration, each state party to the treaty promises only that it “shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor.” *Id.*

95. For clarity of presentation, Figure 2 does not include French and German BITs that contain promissory or partial pre-consents. Doing so adds only six BITs to each state’s count.

96. Elkins et al., *supra* note 7, at 818.

97. UNCTAD BITs 1959–1999, *supra* note 2, at 58.

the success of its early BIT program was regarded with something approaching jealousy.⁹⁸ In fact, however, measured by the presence of comprehensive, effective pre-consents, Germany's BIT program appears to be neither first nor substantively very important. Indeed, over the entire period of study, France had more strong BITs in force than Germany.

Figure 4. Cumulative Number of Signed BITs versus Strong BITs in Force, Germany and France 1959–2002

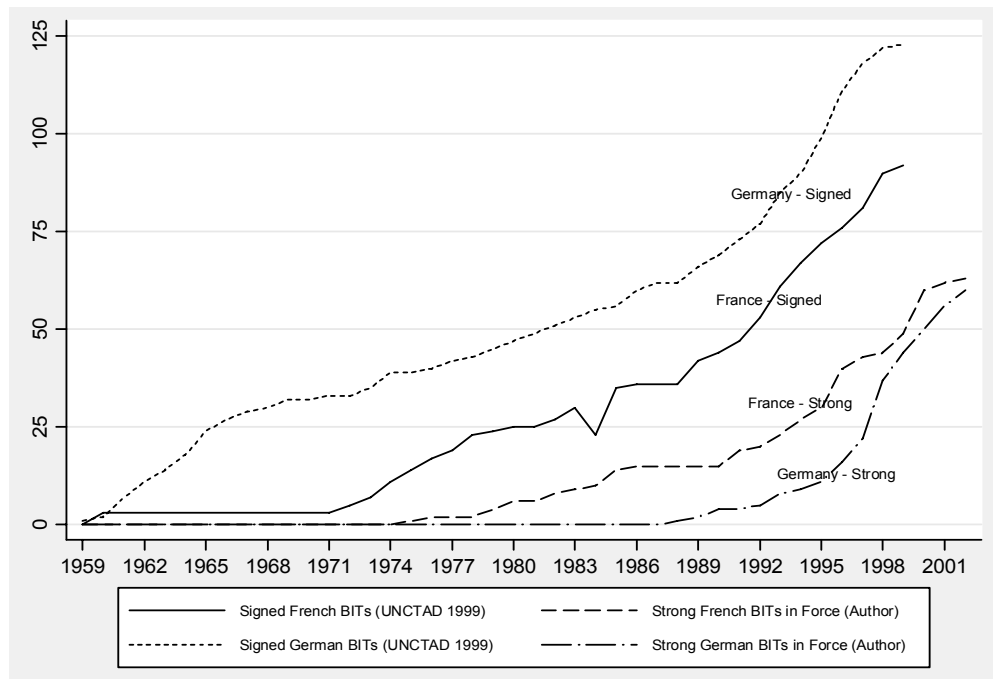


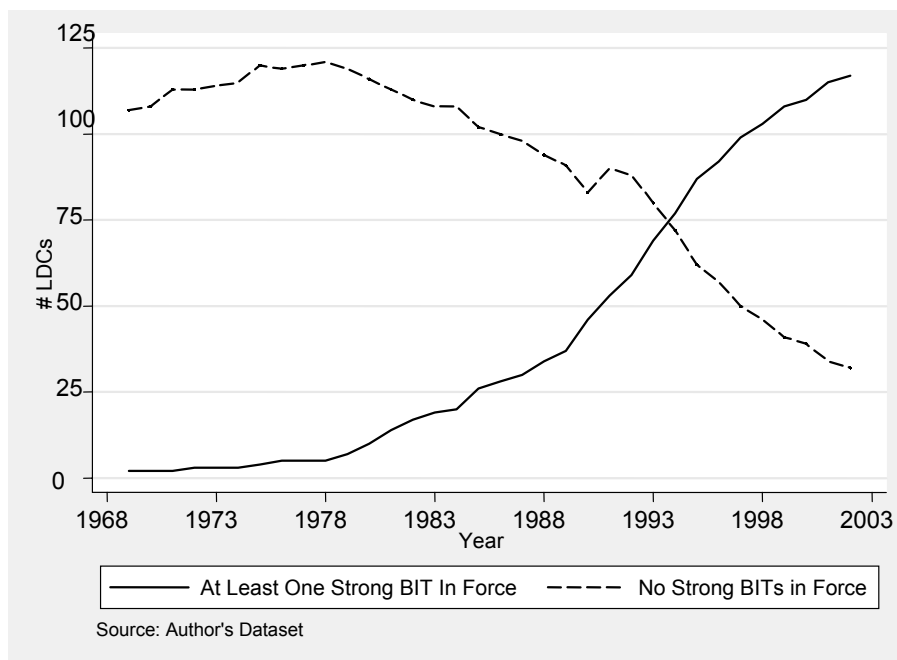
Figure 5, below, presents the data from a somewhat different angle. It compares the annual number of LDCs with at least one strong BIT in force against the annual number of LDCs with no strong BITs in force, beginning with Chad's 1969 treaty with Italy.⁹⁹ Figure 5 provides further

98. See *supra* note 86 and authorities cited therein (regarding the Germany-Pakistan BIT as the first BIT). Germany's early success in convincing developing countries to enter into BITs has been cited as an important impetus for the United States government's decision to revamp its own BIT program in the late 1970s. See, e.g., Vandeveld, *supra* note 55, at 208. The basic U.S. concern seems to have been that Germany's treaties gave German investors a competitive advantage over their U.S. counterparts. See *id.*

99. Accord entre le Gouvernement de la République Italienne et le Gouvernement de la République du Chad en Vue de Protéger et de Favoriser Les Investissements de Capitaux, *supra* note 92.

evidence that strong BITs did not become a numerically significant phenomenon until the late 1980s and early 1990s. Until 1993, a majority of capital-importing states had not entered into a strong BIT with a major capital-exporting country. But by the end of the sample (2002), 117 out of 149 developing countries—seventy-nine percent—had at least one strong BIT in force.

Figure 5. LDCs with One Strong BIT in Force vs. No Strong BITs in Force



IV. THE NEED TO CONSIDER BIT-EQUIVALENT MEANS OF CREDIBLE COMMITMENT

The previous Section demonstrates that how analysts count BITs has important consequences for understanding both the timing and scope of the BIT phenomenon, understood as one of treaty-based credible commitment. There are a number of additional reasons to be wary of exclusive reliance on UNCTAD's list of BITs for theoretically driven empirical inquiry. These additional problems stem from UNCTAD's focus on treaties that are bilateral and that deal exclusively with investment. UNCTAD's limited focus is theoretically problematic because it fails to

reflect the extent to which alternative policy instruments can act as reasonably effective substitutes for BITs.¹⁰⁰

A. The Irrelevancy of Bilateralism

That an investment treaty is bilateral rather than multilateral is not relevant to the treaty's potential value as a credible commitment device. While it is true that the most ambitious attempts to create investment treaties of worldwide scope have failed,¹⁰¹ there are important multilateral success stories. Chapter 11 of the North American Free Trade Agreement ("NAFTA") is the most well known example.¹⁰² Other noteworthy examples include the Association of Southeast Asian Nations' ("ASEAN") Agreement for the Promotion and Protection of Investments,¹⁰³ the Colonia Protocol for the Reciprocal Promotion and Protection of Investments in MERCOSUR,¹⁰⁴ and chapter 17 of the 1994 free trade agreement between Colombia, Venezuela, and Mexico.¹⁰⁵ The mul-

100. In fairness to UNCTAD, the organization certainly recognizes that BITs are not the only international agreements of potential relevance to investors, and many of its publications conjointly discuss and analyze BITs along with a broader class of international investment agreements.

101. See, e.g., OECD, *Multilateral Agreement on Investment Draft Consolidated Text*, Apr. 22, 1998, available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>. Multilateral Agreement on Investment negotiations began in 1995 and were discontinued in April 1998. The draft consolidates the text of the agreement considered in the course of the negotiations. See OECD Multilateral Agreement on Investment, http://www.oecd.org/document/22/0,2340,en_2649_201185_1894819_1_1_1_1,00.html.

102. North American Free Trade Agreement ch. 11, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

103. The original parties to the 1987 ASEAN agreement were Brunei Darussalam, Indonesia, the Philippines, Singapore, and Thailand. See Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987, 27 I.L.M. 612. Laos, Myanmar, and Vietnam later joined as well. See Framework Agreement on ASEAN Investment Area, Oct. 7, 1998, available at <http://www.aseansec.org/12815.htm>.

104. Protocolo de Colonia para la Promoción Recíproca de Inversiones en el MERCOSUR [Colonia Protocol for the Promotion and Reciprocal Protections of Investments in MERCOSUR], Mar. 26, 1991, available at http://www.sice.oas.org/Trade/MRCSR/colonia/pcolonia_s.asp. MERCOSUR, Mercado Común del Sur or the Southern Common Market, is comprised of Argentina, Brazil, Paraguay, and Uruguay. See www.sice.oas.org.

105. Tratado e Libre Comercio entre los Estados Unidos Mexicanos, la República de Colombia y la República de Venezuela [Free Trade Treaty between the Mexican United States, the Republic of Colombia and the Republic of Venezuela] (ACE No. 33), Ch. XVII, June 13, 1994, available at <http://www.sice.oas.org/Trade/go3/G3INDICE.ASP>. Venezuela denounced the treaty in 2006. Comunicado de Prensa, Go-

tilateral 1994 Energy Charter Treaty (“ECT”) is also significant because it regulates energy-sector investments (broadly defined) among over fifty states.¹⁰⁶ Analysts are hard pressed to justify the exclusion of these multi-lateral treaties from their samples since it is beyond cavil that these treaties offer investors substantive and procedural promises that are formally and functionally equivalent to those provided in modern BITs.

There are more difficult cases. Take, for example, the 1982 League of Arab States’ Treaty for the Investment of Arab Capital in Arab States, which has been signed by twenty-two states and ratified by twenty.¹⁰⁷ While the tone and content of this particular agreement are undeniably less investor friendly than modern BITs, the treaty does offer investors (sometimes carefully hedged) promises of MFN and national treatment, freedom to transfer investment proceeds, the right to “fair” compensation in the event of non-discriminatory expropriation, and the right to “compensation . . . equivalent to damages” in the event the host state breaches the treaty.¹⁰⁸ The treaty also offers investors the option to bring suit against a breaching host state before the Arab Investment Court, a specialized dispute settlement body that came into being in 1988.¹⁰⁹ Whether this multi-lateral agreement should or should not be considered a BIT equivalent need not be answered definitively here; the larger point is that the careful analyst will need to carefully consider whether it should be counted as one for the particular analysis at hand.

bierno Bolivariano de Venezuela Ministerio de Relaciones Exteriores, Venezuela Formalizo Denuncia del G-3 [Press Release, Bolivarian Government of Venezuela Ministry of Foreign Relations, Venezuela Formally Denounces G-3] (May 31, 2006), *available at* <http://www.mre.gov.ve/Noticias/A2006/comunic-142.htm>.

106. Final Act of the European Energy Charter Conference, Dec. 12, 1994, 34 I.L.M. 373. For more information about the ECT, see www.encharter.org/index.jsp.

107. For a copy of the Arab League treaty, see 2 UNCTAD’s INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 211 (1996). The treaty has been signed by Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Syria, Somalia, Sudan, Tunisia, the United Arab Emirates, and Yemen, and has been ratified by all of these states except Algeria and Comoros. *Id.*

108. League of Arab States’ Treaty for the Investment of Arab Capital in Arab States in 2 UNCTAD’s INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 211, *supra* note 107, art. 6(2) (affording MFN treatment on the basis of terms afforded non-Arab investors in similar field); arts. 6(1), 8(1), 15 (affording foreign investors treatment similar to Arab investors); arts. 2, 7 (establishing free transfers of capital and investment revenues); art. 9(2)(a) (establishing fair compensation for expropriation); art. 10 (describing compensation for damages).

109. See generally Walid Ben Hamida, *The First Arab Investment Court Decision*, 7 J. WORLD INV. & TRADE 699 (2006).

Incorporating multilateral investment agreements into existing analyses of BITs can also raise potentially difficult problems of weighting and double-counting. For example, several ASEAN members have signed BITs between themselves, both prior to and after signing the ASEAN agreement's BIT-like investment provisions. To cite just two cases, Vietnam joined ASEAN in 1995, but had already signed BITs with Indonesia, Thailand, Malaysia, and the Philippines as of 1992.¹¹⁰ Thailand, an original member of ASEAN, signed the 1987 ASEAN investment agreement, yet subsequently signed BITs with the Philippines and Indonesia in 1995 and 1998 respectively.¹¹¹ This practice raises a potential problem of double-counting that should be taken into account before blindly adding an additional seven BITs to each ASEAN member country's total.

Incorporating the ECT into existing analyses poses a particularly significant challenge because unlike most BITs the ECT is a sector-specific agreement. For example, the obligations undertaken by two countries to each other under the ECT are not of the same import as those undertaken in a BIT of general application between the same two states, and the presence or absence of a sector-specific agreement like the ECT necessarily needs to be appropriately weighted. The most obvious scheme would consider the relative importance of the energy sector to the member states' total potential supply of FDI. But whatever scheme is ultimately adopted, it is clear that weight of some sort should usually be given. Because of the sheer number of countries that have bound themselves to it,¹¹² analysts should not ignore the ECT's existence.

B. The Irrelevance of Exclusivity

As noted above, UNCTAD identifies the 1959 Germany-Pakistan treaty as the first BIT.¹¹³ This claim is accurate in the sense that this particular treaty is, apparently, the first to deal exclusively with investment-related issues independently of other commercial issues. The conceptual

110. UNCTAD BITs 1959–1999, *supra* note 2, at 120.

111. *Id.* at 109.

112. Fifty-one states have currently signed the ECT. Using the standard mathematical formula for calculating combinations of pairs,

$$N! / ((N - 2)! \times 2)$$

the ECT may be viewed as representing the rough equivalent of 1275 BITs. Of course, that number ignores the ECT's limited sectoral coverage. In addition, because many ECT states have also already signed comprehensive BITs with other ECT states, there is an issue of double-counting.

113. *See supra* note 86 and authorities cited therein.

problem is that exclusivity of subject matter is hardly sufficient to distinguish the Germany-Pakistan treaty from a host of other previous and contemporaneous commercial treaties as credible commitment devices. For example, FCN treaties provided (and sometimes still provide) investors with important investment-related guarantees while also addressing issues related to trade in goods, freedom of navigation, and the like.¹¹⁴

To appreciate the potential scope of the issue, note that the United States has negotiated FCN-type treaties since the early days of the Republic.¹¹⁵ France,¹¹⁶ Germany,¹¹⁷ Japan,¹¹⁸ and the United Kingdom¹¹⁹ have pursued roughly similar commercial treaty programs. The primary focus of the earliest commercial treaties was the regulation of trade and merchant relations; issues primarily of interest to investors were covered only accidentally or incidentally.¹²⁰ Over time the treaties became more concerned with investment-specific needs, and after World War II the United States concluded a series of twenty-one FCNs with a wide variety of developed and developing countries.¹²¹ A “major purpose” of the post-war FCNs was to “to protect . . . investment abroad.”¹²² Many FCN-type treaties are still in force and they are occasionally invoked by or on behalf of investors before municipal and international tribunals.¹²³ Most

114. UNCTC BILATERAL INVESTMENT TREATIES, *supra* note 2, at 3–4 (noting the “very broad scope” of such treaties, listing the wide variety of protections they provide, and that these treaties are no longer being negotiated but many remain in effect).

115. The “first treaty of this type signed by the United States was the Treaty of Amity and Commerce with France (1778).” ROBERT RENBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 2 (1960).

116. For a discussion of early French FCN-type “establishment” treaties, see generally ROY PREISWERK, LA PROTECTION DES INVESTISSEMENTS PRIVÉS DANS LES TRAITÉS BILATÉRAUX (1963).

117. *Id.*

118. See Yoshiro Matsui, *Japan’s International Legal Policy for the Protection of Foreign Investment*, 32 JAPANESE ANN. INT’L LAW 1, 3 (1989).

119. See Robin Burnett, *Negotiation of International Agreements in the Field of Commerce and Investment—Problems of Relevance to Newly-Independent States*, 9 J. WORLD TRADE L. 231, 235 (1975).

120. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1958).

121. See Vandeveld, *supra* note 55, at 207 nn.53 & 60.

122. Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373, 382–83 (1998). For citations to the major historical academic studies of the U.S. FCN program, see *id.* at 383 n.72.

123. See, e.g., Case Concerning Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July, 20 1989) (invoking the U.S.-Italy FCN on behalf of a U.S. investor whose Italian plant had been requisitioned by the Mayor of Palermo and occupied by protesting Italian workers); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) (invoking

importantly, the guarantees provided to investors in the FCNs are in many cases identical in form and substance to investment-only treaties.¹²⁴ It is particularly instructive to compare the main investor-related provisions of the 1959 United States-Pakistan FCN with the Germany-Pakistan BIT from the same year, as Table 1 does.¹²⁵

Table 1. FCNs vs. BITs

<i>Subject</i>	<i>1959 U.S.-Pakistan FCN</i>	<i>1959 Germany-Pakistan BIT</i>
<i>Preamble/Object & Purpose</i>	“[E]ncouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges”	“Desiring to intensify economic cooperation . . . , Intending to create favorable conditions for investments . . . promot[ing] investment, encourage[ing] private industrial and financial enterprise”
<i>General Standard of Treatment</i>	Treatment “no less favorable than other enterprises of whatever nationality engaged in similar activities” (Art. VII); freedom from “unreasonable or discriminatory measures” (Art. VI(3)); “the most constant protection and security” (Art. VI(1))	“[N]on-discrimination” (Arts. 1(2) & 2); “protection and security” (Art. 3(1))
<i>Expropriation</i>	Allowed only for “public purpose” and against “prompt payment of just compensation” that is “effectively realizable” (Art. VI(4))	Allowed only for “public benefit” and against “compensation” that is “actually realizable” and “equivalent of [sic] the investment affected” (Art. 3(2))

the U.S.-Japan FCN to challenge the applicability of American anti-discrimination laws to Japanese investors).

124. See Wayne Sachs, *The “New” U.S. Bilateral Investment Treaties*, 2 INT’L TAX & BUS. LAW. 192 (1984). The article’s title indicates Sachs’ deep skepticism about the novelty of the U.S. effort, which, as Sachs demonstrates convincingly, draws much more deeply on the U.S. FCN treaties than most observers acknowledge. *Id.*

125. Treaty for the Protection of Investment, W. Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23; Treaty of Friendship and Commerce, U.S.-Pak., Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4683.

<i>Transfers</i>	Freedom to transfer “funds” on national treatment or most favored nation basis (Art. XII(1))	Freedom to transfer “invested capital, of the returns,” “without undue delay” and at “just and reasonable” rate of exchange (Arts. 4 & 6)
<i>Dispute Settlement (State-State Only)</i>	Disputes between states “as to interpretation or application” subject to compulsory arbitration before the International Court of Justice (ICJ) (Art. XXIII(2))	Disputes between states as to “interpretation or application” subject to compulsory ad hoc international arbitration (Art. 11)

The similarities are striking and the conclusion is unavoidable—if the Germany-Pakistan treaty is a conceptually relevant BIT, then the U.S. FCNs must be relevant as well.

The practical importance of this point will vary according to the particular analysis. Many post-war FCNs were concluded with what today are considered to be well developed countries—Belgium, Denmark, Germany, Greece, France, Japan, Italy, Ireland, Luxembourg, and the Netherlands¹²⁶—and are irrelevant if the study at issue is concerned only with the causes and consequences of treaties involving developing countries. The United States and several other capital-exporting states have signed BIT-like FCNs with a number of developing countries. Thus, the failure of empirical BIT analysts to consider these FCNs as BIT-equivalent treaties is unjustifiable as long as the Germany-Pakistan BIT and others like it are also included in the analysis. Indeed, that UNCTAD’s exclusion of the United States-Pakistan FCN (and other equivalent post-war FCNs) is entirely arbitrary is best illustrated by the fact that UNCTAD’s list of BITs inexplicably includes a number of FCN-type commercial treaties concluded by Switzerland and Sweden in the years immediately following 1959.¹²⁷ Why these treaties should be included on UNCTAD’s list, but not the United States-Pakistan FCN or others like it is difficult to fathom.

126. See Won-Mog Choi, *The Present and Future of the Investor-State Dispute*, 10 J. INT’L ECON. L. 725, 731 (2007) (“Many of the FCNs, like the FCCRs and earlier commercial agreements, were concluded with developed countries, including Belgium, Denmark, Germany, Italy, France, the Netherlands, and Japan.”).

127. The Swiss and Swedish FCN-type treaties are listed in the appendix to Yackee, *supra* note 84.

How many BIT-like FCNs are at issue here? Not a great number, but not an insignificant number either. Table 2 lists the principal candidates for four of the most important capital-exporting countries. All of the FCN treaties listed below contain something arguably approximating the “substantive core” of modern BITs and involve developing countries (or countries that might fairly have suffered the name until quite recently).

Table 2. BIT-Like FCNs between Major Capital-Exporting Countries and Developing Countries

<i>United States</i>	<i>Japan</i>	<i>Germany</i>	<i>UK</i>
Ethiopia	Argentina	Dominican Rep.*	Cameroon*
Haiti*	Cuba		Iran
Israel	El Salvador		
Iran	India		
Nicaragua*	Indonesia		
Oman	Malaysia		
South Korea	Pakistan		
Taiwan	Peru		
Thailand	Philippines		
Togo	Singapore		
Vietnam			
Uruguay*			
Colombia*			

*Never entered into force or no longer appears to be in force
Source: Jason Webb Yackee, *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital* (2007) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill).

Other commercial treaties are worthy of consideration as well. They are not included in Table 2 because they emphasize investment-related issues to a lesser degree than other FCN treaties. This does not mean, however, that they are analytically irrelevant. In particular, Japan entered into at least eight commercial treaties with Communist states; the treaties ignore investment per se but nonetheless promise MFN treatment with respect to the “protection of property and security of business activities.”¹²⁸ It is very likely that these MFN provisions operated (and, to the extent these treaties remain in force, continue to operate) to fully extend many substantive BIT promises to Japanese investors operating in those (ex-) Communist states.

What significance do these largely BIT-equivalent FCNs and similar commercial treaties have for empirical studies of the BIT phenomenon? Arguably, to the extent that the FCNs fail to provide investors with guaranteed access to international arbitration (and all of them do), they should not be included in the analysis because they are not properly considered credible commitment devices of any significant potential. If that is indeed a supportable position, then many other early investment-only treaties, like the 1959 Germany-Pakistan BIT, should be dropped from the analysis as well.

It should also be emphasized that an analytical focus on investment-only treaties ignores the modern trend toward embedding significant investment provisions, including guaranteed investor access to international arbitration, within free trade agreements (“FTAs”). NAFTA’s Chapter 11 is the most well-known example,¹²⁹ but a host of other multilateral and bilateral free trade agreements contain similar investment chapters. The ASEAN Agreement for the Promotion and Protection of Investments¹³⁰ and the MERCOSUR Colonia Protocol for the Reciprocal Promotion and Protection of Investments¹³¹ have already been mentioned, but there are numerous other examples. Mexico, for instance, has signed FTAs containing BIT-equivalent investment chapters with Vene-

128. Matsui, *supra* note 118, at 3–4.

129. NAFTA, *supra* note 102, ch. 11; William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT’L L. 1, 3 (2006).

130. Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, *supra* note 103, art. X.

131. Colonia Protocol for the Promotion and Reciprocal Protections of Investments in MERCOSUR, *supra* note 104, art. 9.

zuela, Colombia, Chile, Nicaragua, Costa Rica, Bolivia, Honduras, El Salvador, and Guatemala,¹³² none of which are found on UNCTAD's list.

Finally, commercial treaties, whether of the FCN or FTA type, are not the only multi-subject treaty-based source of BIT-like guarantees to investors. The best example is Protocol One of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which provides foreign investors with an explicit guarantee that they shall not suffer expropriation in violation of the "general principles of international law" and legally binds most of Western and Eastern Europe, as well as Russia and Turkey.¹³³ Other provisions of the ECHR and its associated protocols give covered "natural and legal persons" the right to bring enforcement actions against expropriating states before the European Court of Human Rights; the European Court of Justice can also decide investor-state property rights claims arising under Protocol One.¹³⁴ That empirically minded BIT analysts have largely, if not wholly, failed to consider the ECHR as a credible commitment device that affect analysis of the BIT phenomenon is troublesome. One of the central achievements of BITs is often said to be the reinforcement of customary international law principles of just compensation for expropriation.¹³⁵ The ECHR does just that on a remarkable scale.

Many other international treaties, and even some non-binding international agreements, contain provisions of potential relevance to foreign investors. Among these, the WTO's General Agreement on Trade in Services ("GATS"),¹³⁶ the WTO's Trade-Related Investment Measures

132. The Organization of American States ("OAS") provides a comprehensive list and links to the full texts of these and other inter-American trade and investment agreements at http://www.sice.oas.org/agreements_e.asp (last visited Apr. 9, 2008).

133. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art.1, Mar. 20, 1952, 213 U.N.T.S. 262 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."). For a discussion of international cases brought under this provision, see Jon A. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY INT'L L. REV. 349, 382-85 (2001).

134. See Been & Beauvais, *supra* note 3, at 56.

135. This seems to be Guzman's view, for instance. See generally Guzman, *supra* note 13.

136. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments, *reprinted in* THE LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999). The GATS "covers FDI in services by defining trade in services as encompassing the supply of a service through the establishment of a 'commercial presence' in the territory of another GATS signatory" and imposes requirements of na-

(“TRIMS”) agreement,¹³⁷ the Treaty Establishing the European Community,¹³⁸ and the OECD’s various declarations and codes on foreign investment¹³⁹ stand out, but there are many others of greater or lesser conceptual relevance, and of greater or lesser facial resemblance to the typical BIT. Of significant potential importance are the various partnership and cooperation agreements (“PCAs”) that states wishing to accede to the European Union are required to sign and that typically contain provisions promising foreign investors certain rights of establishment, non-discriminatory treatment, and freedom to transfer capital, as well as hortatory calls to promote FDI and to improve the investment climate, and so on—all very BIT-like promises.¹⁴⁰

Whether all or any of these various non-BIT instruments should necessarily be included as BIT equivalents in all studies is an open question. Nonetheless, analysts should consider in a much more careful and theo-

tional and MFN treatment. Eric M. Burt, Note and Comment, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT’L L. & POL’Y 1015, 1030–32 (1997) (citations omitted).

137. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments, reprinted in THE LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 143 (1999). TRIMS ban “any host country investment restriction that directly affects trade flows.” Burt, *supra* note 136, at 1034.

138. Consolidated Version of the Treaty Establishing the European Community arts. 48–73, Dec. 24, 2002, 2002 O.J. (C 325/1) (establishing the free movement of people, services, and capital between European Union member states).

139. The OECD Declaration and Decisions on International Investment and Multinational Enterprises commits adhering states to providing national treatment to each other’s foreign investors. See OECD Declaration and Decisions on International Investment and Multinational Enterprises (2000), [http://www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/\\$FILE/00085743.PDF](http://www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/$FILE/00085743.PDF). Mexico, Korea, the Czech and Slovak Republics, Poland, Hungary, and Turkey, all members of the OECD, have signed on, as have a number of non-OECD developing countries, including Argentina, Brazil, and Chile. *Id.* OECD members have also adhered to codes of Liberalisation of Capital Movements and Liberalisation of Current Invisible Operations. See OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations, http://www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html (last visited Jan. 26, 2008). The codes “constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions (mostly services).” *Id.* Compliance is encouraged through what the OECD calls “peer pressure exercised through policy reviews and country examinations to encourage unilateral rather than negotiated liberalization.” *Id.*

140. See, e.g., Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova, arts. 29, 31(d), 47(2) & 47(4), Nov. 28, 1994, 1998 O.J. (L 181) 3 (non-discriminatory treatment in article 29, establishment rights in article 31(d), free transfer of capital in article 47(2), and calls to improve FDI and investment climate in article 47(4)).

retically self-conscious manner the extent to which such instruments might make BIT commitments redundant or unnecessary as credible commitment devices.¹⁴¹ For example, a PCA with the European Union, combined with the property protection provisions of the ECHR, comes perilously close to providing exactly the same guarantees as partial pre-consent BITs. It is exceedingly hard to justify reliance on the latter treaties as theoretically meaningful but not the former.

C. The Need to Consider Non-Treaty Means of Credible Commitment

The need to consider non-treaty means of credible commitment presents the greatest challenge to empirical studies of BITs. The problem is one of identifying the proper comparison. Most BIT analysts seem to presume that the relevant comparison is between going out in the world well protected—i.e., protected by a BIT—or not protected at all. This presumption is particularly evident in Guzman's elaboration of his cartel theory of the reasons why LDCs sign BITs that hurt them.¹⁴² As presumptions go, this one is particularly unfounded; the reason why bears repeating: other kinds of treaties—multilateral rather than bilateral, commercial rather than investment-only—may contain provisions largely equivalent to those traditionally provided in BITs. Furthermore, as will be explored below, states may provide BIT-like guarantees of both a substantive and procedural nature through formal non-treaty instruments such as municipal law and individual investment contracts. These treaty alternatives also have strong potential to function as substitute credible commitment devices.

1. Municipal Law

Recall that BITs perform two logically separate functions—they are devices through which host states extend favorable substantive promises and through which host states make those promises credible. Non-specialists might assume that a host state's decision to enter a BIT is a decision to significantly liberalize FDI policy—that is, that signing and ratifying a BIT extends to investors significantly more favorable substantive promises than were offered absent the BIT. With the potential excep-

141. In some instances the acceptance of an international institutional alternative to BITs may legally preclude a host state from also securing an investment treaty. For example, French law prohibits the French government from signing BITs with African states that have the CFA currency. See Patrick Juillard, *Les conventions bilatérales d'investissement conclues par la France* [Bilateral Investment Conventions Concluded by France], 106 J. DROIT INT'L 274, 282–83 (1979) (Fr.).

142. See Guzman, *supra* note 13, at 644.

tion of U.S. BITs, which have long required national treatment at the pre-investment stage,¹⁴³ this is simply not the case. Most BITs do not require host states to accept more investment, nor do most BITs prevent host states from imposing burdensome performance requirements on investors as a condition of entry. Instead, the liberality of a host state's FDI regime is primarily determined by promises extended to investors through municipal law. For example, municipal law may define which sectors of the economy are open to foreign investment and on what particular terms—it can determine tax rates, the availability of investment incentives, and conditions of operation.¹⁴⁴ The bulk of what matters legally to foreign investors is supplied by municipal law; indeed, this is unavoidable because BITs, as brief and general statements of the law applicable to investments of all types, are unable to provide investors or host states with a sufficiently detailed and self-contained legal regime. It is unsurprising that for much of recent history investment framework laws have been the primary means of promoting and controlling foreign investment in the developing world.¹⁴⁵

Municipal law is thus a necessary complement to BITs. However, municipal law may also provide the same substantive guarantees as BITs, and it can do so much more broadly. For example, domestic laws often contain fairly favorable rules concerning compensation for expropriation generally.¹⁴⁶ Domestic laws may also specify that foreign investors in most sectors shall enjoy “national treatment.”¹⁴⁷ Over the past decade host states have also used domestic law to greatly liberalize their capital

143. See Patricia McKinstry Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 947 (1984) (discussing Article II of the official U.S. “prototype” BIT, which “provides that signatory countries will accord national treatment to the admission or establishment of investments”). Robin notes that this aspect of the U.S. BIT program was one of the more “controversial.” *Id.*

144. See UNCTAD, TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS: AN OVERVIEW, *supra* note 2, at 35–38.

145. See A.A. Fatouros, *The Quest for Legal Security of Foreign Investments—Latest Developments*, 17 RUTGERS L. REV. 257, 268–69 (1963) (discussing the “great number of statutes relating to the regulation and encouragement of foreign investments” that came into effect in the developing world in the early 1960s).

146. The most obvious example is Fifth Amendment to the United States Constitution, which provides that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend V. For a detailed and useful (if dated) comparative examination of domestic expropriation regimes in the Americas, see EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY (Andreas F. Lowenfeld ed., 1971).

147. See, e.g., Republic of Mozambique, Assembly of the Republic, Law No. 3/93, art. 4 (June 24, 1993), reprinted in INVESTMENT LAWS OF THE WORLD, at Binder VI (Int'l Center for Settlement of Inv. Disputes ed., Oceana Publications 2002) (providing that “foreign investors . . . will enjoy the same rights . . . applicable to nationals”).

accounts, allowing foreign investors much greater freedom to repatriate assets and income.¹⁴⁸ And unlike BITs, which provide their guarantees only to investors from a single home state, municipal law guarantees are extended to investors from the world over.

From the investor's perspective, the main problem with municipal law is the relative ease with which the host state may be able to change the laws in adverse ways. Presumably, BITs serve to reduce state incentives to change municipal law in ways unfavorable to the foreign investor by providing causes of action for regulatory takings and the like. Nonetheless, the potential utility of BITs in this regard does not mean that favorable municipal law promises may not be made sufficiently credible by other means.

On the one hand, municipal law itself may make changes in the law difficult to achieve. This is particularly the case where, for instance, guarantees of compensation for expropriation are embedded in the national constitution, as they have been in most Latin American countries for some time.¹⁴⁹ A more unusual example is provided by Greece, which in the past has used a special legal procedure to grant investment-related laws special quasi-constitutional status that constrains the government's ability to amend the laws absent a constitutional amendment.¹⁵⁰ On the other hand, host states may use municipal law to explicitly promise investors that the relevant legal regimes will remain stable as to their current investments. Article 9 of Russia's 1999 Federal Law on Foreign Investment, which bears the unwieldy title of "Guarantees to Foreign Investors and Companies with Foreign Investment Against Unfavorable Changes in the Legislation of the Russian Federation," is one example.¹⁵¹

There is, of course, no magical power of commitment in a host state's unilateral legislative declarations that foreign investors are welcome on such and such terms. A state that greatly values change in the status quo is unlikely to be dissuaded from vigorously pursuing such change, even if municipal law inconveniently stands in the way. That said, it is reasonable to presume that a state that has explicitly and publicly made pro-

148. See generally Elizabeth Asiedu & Donald Lien, *Capital Controls and Foreign Direct Investment*, 32 *WORLD DEV.* 47 (2003).

149. See generally EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY, *supra* note 46, at 313 (noting that each of the seven Latin American countries studied "has a written constitution which speaks expressly to the subject of expropriation").

150. This aspect of the Greek investment law is discussed in A.A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* 121 n.208 (1962).

151. See The Russian Federation Federal Law on Foreign Investment in the Russian Federation, art. 9, July 2, 1999, *reprinted in* INVESTMENT LAWS OF THE WORLD, at Binder VII (Int'l Center for Settlement of Inv. Disputes ed., Oceana Publications 2002).

investor promises in an investment law may be more likely to think twice about adversely changing the regulatory regime than one that has not, even absent a binding commitment to international arbitration. In other words, reputation has a potentially meaningful role to play here, especially if breaches of municipal law promises, because of their relative clarity of meaning and application, are more easily detectable than breaches of vague treaty law. But regardless of the role that reputation might play in naturally stabilizing certain kinds of favorable municipal law promises, host states may also use municipal law to provide investors with guaranteed access to international arbitration, where claims of unfair changes in the substantive domestic legal regime (or other claims) can be litigated. Greece appears to have been one of the first states to embed a promise to arbitrate in its municipal foreign investment laws,¹⁵² but it is certainly not the only example. Fatouros's excellent 1963 survey of investment guarantees found that states anxious to develop their petroleum resources were especially likely to provide for international arbitration of investment disputes through domestic laws.¹⁵³ A more recent survey has found that approximately twenty national foreign investment laws include generic consent provisions to arbitrate disputes with foreign investors under the ICSID Convention.¹⁵⁴ These municipal law pre-consents even occasionally produce published arbitral awards.¹⁵⁵

152. FATOUROS, *supra* note 150, at 186.

153. *Id.* at 187 (discussing municipal law-based promises to arbitrate disputes related to investments in the petroleum sector in India, Pakistan, Greece, Libya, Morocco, Iran, and Mali).

154. See Lovells, *Protecting Investments Overseas: Bilateral Investment Treaties, Foreign Investment Laws and ICSID Arbitration*, at 2, Aug. 1, 2006, http://www.lovells.com/NR/rdonlyres/4D91D0A5-8303-4844-8D978DB8F7A2C94F/8634/4152_D4.pdf; Ibrahim F.I. Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV. FOREIGN INVEST. L.J. 299, 303 (1999). However, this count excludes investment laws that contain state promises or pre-consents to non-ICSID arbitration; thus it is not a complete picture of the prevalence of arbitration for these disputes. For example, Ghana's 1994 Investment Act and 1986 Minerals and Mining Law both "provide for arbitration when disputes cannot be settled by other means." See Investment Act, 1994, § 29(2) (Ghana); Minerals & Mining Law, 1986, § 8(3) (Ghana). Additionally, municipal law pre-consents have occasionally produced published arbitral awards. See, e.g., *Southern Pacific Properties (Middle East) v. Arab Republic of Egypt*, Decision on Jurisdiction, 3 ICSID Rep. 142/3 (Apr. 14, 1988); *Tradex Hellas S.A. (Greece) v. Albania*, 14 ICSID REV. FOREIGN INV. L.J. 161, 165 (1996).

155. See, e.g., *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 3 ICSID (W. Bank) 131, ¶¶ 72–75 (Apr. 14, 1988). A Canadian mining company has recently initiated arbitration against the Kazakh government under that country's foreign investment law. See Luke Eric Peterson, *Can-*

This ability to use municipal law to provide investors with effective pre-consents to binding international arbitration is what makes municipal law a plausible BIT substitute.

2. Investment Contracts

Municipal law is not the only plausible BIT substitute. Foreign investors, unlike private parties engaged in international trade, are often placed in the position of explicitly bargaining with host states over the terms under which they will be allowed to establish their investment and to continue operations.¹⁵⁶ This is especially so in the natural resources sector,¹⁵⁷ in which the host state usually owns the natural resources to be extracted, and in the public utilities or infrastructure sectors,¹⁵⁸ where the investor is called upon to provide an essential public service like electricity or a highway. It is also true of the manufacturing sector, where the foreign investor is typically required to contract with the host state in order to receive special treatment like tax incentives or the right to operate in an export processing zone ("EPZ").¹⁵⁹

Many early investment framework laws explicitly envisioned that foreign investment would need to be approved by the host state in order to

dian Uranium Miner Sues Kazakhstan under Foreign Investment Law, INV. TREATY NEWS, July 12, 2007, available at <http://www.iisd.org/investment/itn/archive.asp>.

156. In the typical international sales transaction, the relationship is an arms-length one between private parties that, individually speaking, have "minimum impacts upon the policy or other interests of the states with which the transaction would come into contact. It is not an intrusive transaction in that very little conduct relating to it takes place in either country and the duration of the course of that transaction is short." M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 228 (2000). Thus, the importing state typically has little incentive to invest in costly contracting with individual traders as to the importing state's obligations in regard to that particular trade, and is content to set trade policy on the national level while granting the private parties to the trade transaction relatively complete autonomy to structure their deal in the way the parties see fit. *See id.* The one principal exception to this rule was the socialist states' state trading entities practice of including arbitration agreements in their international trade contracts. *See* HENRY CATTAN, *THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 142 n.8 (1967).

157. Burnett, *supra* note 119, at 237. For an in-depth discussion of natural resources investment contracts, see generally DAVID N. SMITH & LOUIS T. WELLS, JR., *NEGOTIATING THIRD-WORLD MINERAL AGREEMENTS: PROMISES AS PROLOGUE* (1975); ERNEST E. SMITH ET AL., *INTERNATIONAL PETROLEUM TRANSACTIONS* (2d ed. 2000).

158. *See generally* J. LUIS GUASCH, *GRANTING AND RENEGOTIATING INFRASTRUCTURE CONCESSIONS: DOING IT RIGHT* (2004).

159. *See* MUCHLINSKI, *supra* note 46, at 230-33; David Wall, *Export Processing Zones*, 10 J. WORLD TRADE L. 478, 479 (1976).

receive certain legal protections or policy concessions.¹⁶⁰ Even today, some states still require government approval of investments in order to obtain BIT benefits.¹⁶¹ The approval process does not necessarily entail a contract, but the approval process does give the investor an informal opportunity to ask for a formal agreement. Latin American states in particular have preferred historically to grant rights to foreign investors directly through bargaining, rather than indirectly through treaties with the investors' home states.¹⁶² Some of those states still seek to encourage investor-state contracting by making access to favorable guarantees and benefits contingent upon it.¹⁶³ Home states have also long encouraged investors to contract directly with host states. For example, investors will often be legally precluded from accessing the home state's government sponsored investment insurance absent the host state's formal approval of the investment.¹⁶⁴ Some home state investment insurance programs may even require an actual investment agreement.¹⁶⁵

160. See, e.g., Foreign Investments Protection Act, (1964) Cap. 35 § 3(1) (Kenya), reprinted in 4 INT'L LEGAL MATERIALS 241 (1965).

161. See, e.g., Agreement on the Promotion and Protection of Investments, Sing.-Sri Lanka, art. 2, May 9, 1980, 1202 U.N.T.S. 333 (requiring "approval in writing" by government officials). Sornarajah notes that "most" East Asian BITs limit their protections to officially approved investments. SORNARAJAH, *supra* note 6, at 266.

162. As Tawil explains:

En general, los países de la región [of Latin America], han preferido la negociación directa, con los inversiones, aduciendo, que tales tratados con los países industrializados no resultan equilibrados, obligándolos a asumir costosos compromisos a largo plazo, sin imponer responsabilidades similares a sus cocontratantes.

Guido Santiago Tawil, *La crisis latinoamericana y algunas perspectivas de cambio en la regulación de las inversiones extranjeras en la región* [*The Latin American Crisis and Some Perspectives on Regulatory Change of Foreign Investors in the Region*], LA LEY 1988-A, 871 n.17.

163. Peru, for instance, gives investors who enter an investment contract with the state the right to benefit from a special legal regime guaranteeing "legal stability" as to tax, currency repatriation, and national-treatment laws for ten years from the date of contract execution. See Decreto Legislativo No. 662 Aprueba Régimen de Estabilidad Jurídica a la Inversión Extranjera, Título II [Legislative Decree No. 662 Aprueba Regime of Foreign Investment Legal Stability] (1991) (Peru). The availability of the "stability regime" depends on the investor's willingness to contractually undertake certain obligations relating to the size of the investment and its employment and export effects.

164. See THEODOR MERON, INVESTMENT INSURANCE AND INTERNATIONAL LAW 62, 126 (1976) (noting the requirement for host-state approval in regard to the U.S. and Canadian investment insurance programs).

165. France, for example, has conditioned availability of its insurance on a host state's willingness to enter a "specific engagement" with the investor, which must contain the

The opportunity to bargain is important because it provides the foreign investor with the occasion to induce the host state to clarify the terms of the investor's entry and operation or to improve upon the promises offered under municipal or international law through an investment contract (often called an investment agreement). For example, host states may enact relatively unfavorable national investment laws, which are intended only as a prelude to the possibility of more favorable treatment extended on a project-by-project basis. In this case, municipal law represents the first stage in a bargaining process between the host state and the foreign investor. This appears to have been the case for the members of the Andean Common Market in the 1970s, which largely for domestic political reasons adopted an outwardly hostile policy toward foreign investors, but was willing to grant foreign investors much more favorable terms of entry and operation on an ad hoc basis.¹⁶⁶

Early contracts between host states and investors tended to be "rather simple documents,"¹⁶⁷ but these contracts have become significantly more detailed and complex over time.¹⁶⁸ Importantly, foreign investment contracts are not a phenomenon limited to the infrastructure or natural resources sectors. For example, Intel's practice when deciding whether to construct new semi-conductor manufacturing facilities is to enter into intensive haggling with potential host states over a variety of fine-grained matters and to insist that any resulting deal be committed to a written contract prior to any investment.¹⁶⁹

host state's consent to ICSID arbitration. *See, e.g.*, Convention on the Protection of Investments, Fr.-Tunis., art. 2, June 30, 1972, 848 U.N.T.S. 143.

166. *See generally* FRANCOIS J. LOMBARD, *THE FOREIGN INVESTMENT SCREENING PROCESS IN LDCs: THE CASE OF COLOMBIA, 1967-1975* (1979). As Lombard concludes, "foreign investors have to be aware that behind the strict rules there exist possible ways to reach operational agreements." *Id.* at 126. This situation has been described as one of "carrot and stick" whereby "[i]n essence, a bargaining process is created; both sides probe for maximum advantage until a deal acceptable to both is struck." *U.S. Policy Toward International Investment: Hearings Before the Subcomm. on International Economic Policy of the S. Comm. on Foreign Relations*, 97th Cong. 14 (1981) (prepared statement of C. Fred Bergsten, Senior Associate, Carnegie Endowment for International Peace).

167. SMITH & WELLS, *supra* note 157, at 31.

168. *Id.* at 37-53. For example, in a recent, prominent international arbitration, the water services concession contract at issue was 111 single-spaced pages, "consisting of 16 articles plus 25 lengthy appendices" and was the product of two years of negotiation. *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic*, ICSID Case No. ARB 97/3, 16 ICSID (W. Bank) 141, ¶¶ 25-26, available at http://www.worldbank.org/icsid/cases/ada_AwardoftheTribunal.pdf.

169. Debora Spar, *Attracting High Technology Investment: Intel's Costa Rican Plant*, FOREIGN INVESTMENT ADVISORY SERVICE 10-11 (1998).

Unsurprisingly, investment agreements between foreign investors and host states often contain the state's pre-consent to international arbitration. Investment framework laws sometimes expressly provide that investment contracts shall contain arbitration clauses,¹⁷⁰ and the home state's investment guarantee treaties may require arbitration clauses in investment contracts as a condition for insuring the project.¹⁷¹ French BITs have also required host states to promise to insert arbitration clauses into investment contracts upon the investor's request.¹⁷² In other cases the investor may succeed in convincing the host state to agree to contract-based arbitration even in the absence of any legal requirement to do so.¹⁷³ Even Latin American states, which have long required investors to submit to the exclusive jurisdiction of municipal courts, appear to have relaxed their attachment to that particular contractual term.¹⁷⁴

From the investor's perspective, the effect of contract-based arbitration agreements is substantively identical to that of BIT-based arbitration agreements. For example, nothing prevents an investment contract from providing the investor with guaranteed access to ICSID; indeed, ICSID

170. Landau notes that the early investment framework laws of a number of African countries required or provided for the possibility of arbitration in "establishment agreements" (investment contracts) with foreign investors. Henry Landau, *Direct Foreign Investments in Developing Countries*, 4 J. L. & ECON. DEV. 182, 199 n.48 (1969).

171. See Convention on the Protection of Investments, Fr.-Tunis., *supra* note 165.

172. See e.g., Agreement between the French Republic and the Republic of Indonesia on the Encouragement and Protection of French Investments in Indonesia, Fr.-Indon., art. 8, June 14, 1973, 985 U.N.T.S. 258.

173. From the perspective of the petroleum-sector investor, "recourse to national courts is unthinkable and unrealistic [irréalisable]," making arbitration clauses a fundamental necessity in the contracts. Jacques Logie, *Les Contrats Pétroliers Iraniens*, 1 REVUE BELGE DROIT INT'L 392, 410 (1965). For an early discussion of the use of investment contracts in contract-based economic development agreements between multinational corporations and developing states, see Maurice Bourquin, *Arbitration and Economic Development Agreements*, in SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS 99 (Fred B. Rothman & Co. 1973) (1964). Bourquin claims that "[a]rbitration is generally included" in these agreements and provides several examples. *Id.* at 109. Alfred Verdross makes a similar argument. See Alfred Verdross, *The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses*, in SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS 117, 137 (Fred B. Rothman & Co. 1973) (1964). Fatouros suggests that by the early 1960s, investor-state arbitration clauses were "frequently included in agreements between states and foreign nationals or companies . . . usually describ[ing] in detail the procedures to be followed in case of dispute." FATOUROS, *supra* note 150, at 187.

174. See generally Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169 (1995).

arbitration clauses appear to be a relatively common feature of modern investment contracts.¹⁷⁵ And an ICSID award rendered under a contract-based agreement has the same force worldwide as an award rendered under an investment treaty because the ICSID Convention's recognition and enforcement provisions do not distinguish between treaty-based and contract-based arbitration (nor any of the Convention's other provisions).¹⁷⁶ Contract-based arbitration and contract-based substantive guarantees more generally, are not simply poor cousins to BIT-based guarantees. Putting aside the fact that the substantive guarantees contained in an investment contract will most likely not be identical to the substantive guarantees of "fair and equitable treatment" and the like in a BIT,¹⁷⁷ investment contracts that include arbitration agreements are fully effective substitutes for strong BITs.

Investment contracts may even be preferred by investors, not because contract-based arbitration itself is superior (though the investor may wish to have access to a particular arbitral forum not provided for in the relevant BIT), but because the investment contract provides the investor with the opportunity to spell out his rights and obligations vis-à-vis the state with far greater precision and completeness than the rights and obligations contained in the typical BIT, the latter of which represents a one-size-fits-all solution that is unlikely to ideally suit all investors.¹⁷⁸ For example, investors are often particularly anxious to receive the host state's explicit guarantee of "stabilization," whereby the host state guarantees that the legal or regulatory regime will not change in ways adverse

175. Schreuer maintains that an agreement between the host state and investor "recorded in a single instrument," e.g., an investment contract, "is the most common form of consent." SCHREUER, *supra* note 64, at 194. After the Convention's entry into force, "[p]rovisions referring to arbitration under the ICSID Convention quickly became a standard feature of international investment contracts." Ibrahim F.I. Shjihata, *Foreword to SCHREUER, supra* note 64, at xv.

176. See ICSID Convention, *supra* note 4, arts. 53–55.

177. Although nothing prevents an investor and host state from providing BIT-like substantive guarantees in an investment contract per se. For example, it is perfectly conceivable that the parties to a BIT might subject the contract to international law as such or might include provisions dealing with the amount of compensation due if the host state expropriated the investor's property. For an example of a reference to international law in an oil concession contract, see Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 481–82 (1981).

178. As West argues, "The critical focal point in political risk assessment and management should be the [foreign] investor and the specific [foreign] investment. . . . [T]he objectives and uniqueness of each individual investor should largely determine how one assesses risk and seeks to manage it." Gerald T. West, *Managing Project Political Risk: The Role of Investment Insurance*, J. PROJECT FINANCE, Winter 1996, 5, at 6.

to the investor's interests.¹⁷⁹ Likewise, the international lenders that finance the largest and riskiest foreign investment projects often demand that investors secure such a guarantee as a condition to funding the investment project.¹⁸⁰ Because BITs do not contain the equivalent of stabilization clauses, investors desiring or requiring them will necessarily have to enter into an investment agreement of some sort with the host state.¹⁸¹

In sum, the continuing relevance of investment contracts matters for BIT analysts for much the same reason that municipal law matters—it suggests that the presence or absence of a BIT, by itself, is an insufficient measure of the extent to which a host state has extended credible and favorable promises to investors.

CONCLUDING OBSERVATIONS

This Article has made two modest but important points. The first is that all BITs are not created equal and analysts need to do a much better job of sorting wheat from chaff. UNCTAD's list of BITs, relied on by many, is inappropriate for most empirical studies of the BIT phenomenon. To the extent that empirical BIT analysts are interested in BITs as potentially effective law-based credible commitment devices, any analysis that relies on BITs that lack an enforcement mechanism, especially access to international arbitration, is over-inclusive. An example of this is found in UNCTAD's list of BITs, which includes a large number of treaties that offer investors no access or incomplete access to effective dispute settlement procedures.

Second, I have argued that host states have long had access to alternative credible commitment devices—particularly municipal law and investment contracts—that can serve the same essential credible commitment functions as BITs. They may even better serve those functions, and in this regard investment contracts in particular stand out. Analysts also must be sensitive to other international treaties and agreements, such as the Energy Charter Treaty, the European Convention on Human Rights, or association agreements with the European Union, that either singly or in combination offer BIT-equivalent guarantees.

179. See generally Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996).

180. *Id.* at 229.

181. See generally *id.* While most BITs do provide guarantees against uncompensated expropriation, such guarantees are not as broad and thus not as valuable to the investor as typical stabilization guarantees.

The principal implication is that empirically minded BIT analysts should take considerably more care to properly define their main theoretical concept of interest and to ensure that their quantitative measures of the phenomenon adequately match the definition. BIT analysts are typically not interested in BITs because UNCTAD has listed a particular treaty as a BIT—they are interested in BITs as a measure of the degree to which a particular host state has used formal legal means to attempt to credibly commit to treat investors favorably. Merely quantifying a host state's UNCTAD-listed BITs as some sort of index of host state credible commitment, as Neumayer and Spess¹⁸² and others do, is inadequate.

This Article has not, however, demonstrated as an empirical matter that the correlations identified by existing analyses of the causes and effects of BITs would disappear if those analyses more properly took into account important differences in BIT design and the use of BIT substitutes. In lieu of such a demonstration, which entails a larger research agenda than can be presented here,¹⁸³ there are two paths of research that would be worth pursuing.

First, studies of the effects of BITs on foreign investment flows need to focus more explicitly on disentangling the causal effects of BITs—if any—from the causal effects of changes in host state foreign investment policy that may have coincided simultaneously with the decision to enter into BITs. Over the past fifteen years, many host states have dramatically modernized and liberalized their foreign investment laws—opening up new sectors to foreign involvement (often by privatizing state-owned enterprises and contracting out basic governmental services),¹⁸⁴ relaxing joint venture requirements, eliminating investment screening boards and performance requirements, establishing investment promotion agencies and EPZs,¹⁸⁵ and so on. It is undeniable that investors have attached con-

182. See *supra* notes 8–10.

183. For an initial attempt to advance that agenda, see generally Yackee, *supra* note 84.

184. On trends in privatization, see Sunita Kikeri & Aishetu Fatima Kolo, *Privatization: Trends and Recent Developments* 1–31 (World Bank, Policy Research Working Paper Series No. 3765, 2005).

185. The World Bank characterizes EPZs as a “major mechanism used to attract [export-oriented manufacturing] FDI” that “proved to be a popular way to attract FDI because they enabled foreign investors to reduce production costs, specifically their labor costs.” MIGA’s FDI Promotion Center: Resources For Investment Promotion Practitioners, Lessons Learned About National FDI Policies, www.fdipromotion.com/toolkit/user/content_page.cfm (Section 2.4, Lessons Learned About National FDI Policies) (last visited Mar. 5, 2008). EPZs essentially function as policy enclaves that provide export-oriented manufacturing investors willing to locate within the zones and to engage in desired activities with favorable treatment (primarily

siderable value to these changes when they have taken place.¹⁸⁶ For instance, in 1993 Mexico enacted an ambitious new Foreign Investment Law¹⁸⁷—a “crown jewel” achievement representing an unprecedented “repudiation” of Mexico’s historically ambivalent and often hostile policies toward foreign investors.¹⁸⁸ At virtually the same time, Mexico bound itself to chapter 11 of NAFTA, the free trade agreement’s investment chapter, and joined the OECD and its international investment instruments.¹⁸⁹ Which policy change was responsible for the resulting increase in Mexico’s foreign investment inflows? Would U.S. investors have flocked to Mexico absent NAFTA but with the protections and guarantees of the 1993 law? Are the contemporaneous OECD commitments safely ignored? There is some indication that Mexican authorities viewed NAFTA chapter 11 and the 1993 domestic legal changes as largely substitutable because NAFTA chapter 11 was largely redundant with what Mexico had already done unilaterally.¹⁹⁰

tax breaks and relaxed administrative requirements) that is unavailable to foreign investors more generally. See MUCHLINSKI, *supra* note 46, at 228–38; Wall, *supra* note 159, at 479–80.

186. A headline in the *Wall Street Journal* heralding changes in Brazil’s constitution illustrates the point: *Multinational Miners Really Dig Brazil—Catalyst is the Easing of Curbs on Foreign Ownership*. Matt Moffett, *Multinational Miners Really Dig Brazil—Catalyst is the Easing of Curbs on Foreign Ownership*, WALL ST. J., Jan. 22, 1997, at A10.

187. Ley de Inversión Extranjera [L.I.E.] [Foreign Investment Law], *as amended*, Diario Oficial de la Federación [D.O.], Dec. 27, 1993 (Mex.).

188. Ewell E. Murphy, Jr., *Access and Protection for Foreign Investment in Mexico under Mexico’s New Foreign Investment Law and the North American Free Trade Agreement*, 10 ICSID REV. FOREIGN INVEST. L.J. 54, 58 (1995).

189. See Paula S. Gibbs, Comment, *Prospects for Sustainable Liberalization of Foreign Investment Laws as a Concomitant of Hemispheric Integration in the Americas*, 28 U. MIAMI INTER-AM. L. REV. 95, 107 n.58 (1996). Gibbs observes:

Mexico became a member of the Organisation of Economic Cooperation and Development (OECD) and adhered to the OECD’s Code of Liberalisation of Capital Movements on May 18, 1994. As a new member of the OECD, Mexico committed to work toward eliminating all capital controls still preserved in the same sectoral exemptions and restrictions on inward direct investment as in Chapter Eleven of the NAFTA.

Id.

190. Mexico accepted chapter 11 and NAFTA more generally because it “desire[d] to implement a radical agenda of economic restructuring within Mexico. NAFTA was the cornerstone of this policy, and many of the measures that Mexico was called on to take in the NAFTA were ones that Mexican leaders had already decided to undertake anyway.” MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 123 (2000). Additionally,

One solution to the problem of multiple causation, and probably the best one, is to eschew the use of multivariate regression for the decidedly less sexy but potentially far more appropriate methodologies of case study and survey. In other words, if the hypothesis is that foreign investors really care about BITs and that BITs meaningfully influence their decisions, why not ask them if this is indeed the case? We currently have little real sense of what actual role, if any, BITs play in the investment decision-making process.¹⁹¹

Second, empirical studies of the causes of the BIT phenomenon need to broaden their focus beyond the current and narrowly functionalist explanation of the treaties as the inevitable consequence of a rational competition for capital. What is missing from this standard account is any sustained comparative analysis of why the treaties, as one potential credible commitment device among several others, are better suited to performing the task. The discussion above focused on several relatively formal ways in which host states might make such commitments, even absent a BIT. In particular, domestic laws and investment contracts might be used to make favorable substantive promises; to the extent that reputational concerns alone fail to make these promises credible, binding commitments to arbitrate disputes may be appended. Other mechanisms for coping with the problem of the obsolescing bargain, although not discussed in detail above, should not be forgotten. The widespread availability of home state investment insurance is especially significant, as is the availability of private ordering solutions in which the investor structures its relationship with the host state, perhaps by creating an "economic hostage," to make breach a less attractive option.¹⁹²

[t]he policies [embedded in NAFTA] were, however, policies that could have been undertaken anyway, if not under the NAFTA, then under the auspices of the GATT, or even in some cases unilaterally. In some ways, NAFTA was simply the culmination of a process of dramatic economic and social restructuring that had occurred, or was occurring, . . . in each country.

Id. at 125.

191. For an example of the great potential that case studies offer in this regard and one of the first studies to systematically document the contours of developing state competition for FDI, see STEPHEN GUISENGER & ASSOCIATES, INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 19–54 (1985).

192. See Oliver Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AMER. ECON. REV. 519, 519 (1983) (discussing use of economic hostages as credible threats whereby one party can take advantage of its position over another, usually by means of a system of incentives, to more efficiently enforce terms of the contract between the parties).

The real question, then, is what do BITs add to what was already available? BITs are hardly the inevitable solution to the insoluble problem of obsolescing bargain that they are often made out to be. In one of the more subtle and perceptive evaluations of the treaties, Wälde argues that:

Before the advent of [modern BITs], the treaty drafters expected investors to be able to negotiate their own dispute settlement method by way of agreement with the host State.

. . . [T]he treaties, in effect, added a direct investor right without relation to underlying dispute settlement arrangements in order to create an investor right that was independent of the *ad hoc*, individual negotiation, licensing or other parts of the investment process. *This was done under the assumption that investors should not have to rely on their own negotiating strength and ability* but be able to rely on a general treaty-provided remedy . . . granted by law, not waivable and not dependent on an individual jurisdiction agreement with the State.

. . .

. . . [The treaties] thus partly replace[] the need to negotiate in the contract with the host State an internationalization regime consisting of stabilization, arbitration and an international law clause.

Modern investment treaties have further developed this approach. They include methods of property and contract protection which individual investors, in an often more difficult negotiating context, might not have been able to negotiate on their own.¹⁹³

If Wälde is correct—and in my opinion, he is—what BITs bring to the table is far different from what BIT analysts typically assume. Take, for instance, Guzman’s claim that BITs are of great theoretical importance principally because they “allow potential investors to negotiate for whatever protections and safeguards they feel are needed.”¹⁹⁴ What Guzman means, in other words, is that BITs work by supporting the enforceability of investment contracts, a claim repeated by Bubb and Rose-Ackerman, who, citing Guzman, argue that BITs have the potential to attract foreign investment by supporting enforceable contracts through the establishment of a norm of *pacta sunt servanda*.¹⁹⁵ This understanding of BITs is highly misleading. As we have already seen, host states have long had access to formal legal credible commitment devices that are, in theory,

193. Wälde, *supra* note 13, at 204–06 (emphasis added).

194. Elkins et al., *supra* note 7, at 644.

195. Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT’L REV. L. & ECON. 291, 291–92 (2007).

potentially as effective as BITs. The BIT phenomenon has done little to directly enhance or promote the enforceability of contracts in particular because investors were allowed to negotiate with states well before BITs rose to prominence. While the enforceability of investment contracts has certainly improved over time, that improvement is due to other institutional innovations (particularly the New York Convention and the ICSID Convention)¹⁹⁶ that allowed investors to secure the fruits of those negotiations with contract-based access to meaningful dispute settlement and award enforcement procedures.¹⁹⁷ Indeed, one could make a presentable argument that BITs have undermined parties' ability to contract, not helped it, by creating considerable confusion as to the proper doctrinal relationship between contract- and BIT-based claims.¹⁹⁸

More fundamentally, BITs may interfere with investor-state negotiation by granting investors unwaivable protections and safeguards that they might or might not have been able to convince a host state to grant them in direct negotiations. This is the point that Wälde's analysis brings to the forefront, and it is immensely important because it suggests that the main function of BITs is to limit host state bargaining power from the outset. The obsolescing bargain theory, which posits that host state power is at its weakest at the time of initial contracting and that the investor will usually have no trouble convincing the host state to promise it the world and more, is truly turned on its head because it is precisely at this point that there should be the least objective need for a treaty to specify the particular terms of the deal. If an investor cares enough about a particular promise, procedural or otherwise, the investor can bargain for it. BITs remove a good part of the bargaining space by forcing the host state to offer particular terms to all comers, even those who would invest without the treaty.

Why then might host states enter into BITs? Three possibilities deserve further inquiry.

BITs as Reducing Bargaining Costs. If we are wedded to narrow economic-functionalist understandings of BITs, then it is worth considering whether their primary useful function might be to reduce bargaining costs rather than to permit credible commitment. Arguably, BITs elimi-

196. See ICSID Convention, *supra* note 4; New York Convention, *supra* note 72.

197. See *supra* note 72 and accompanying text (describing the enforcement tools provided by the New York Convention and the ICSID Convention).

198. See Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 835–36 (2005). The relationship between investment contracts and BITs “expose[s] some of the more difficult theoretical and practical uncertainties underlying modern international investment law.” *Id.* at 835.

nate the need for investors and host states to engage in costly direct bargaining by providing the parties with default rules to govern their relationship, thereby eliminating the need to formally negotiate these rules on a project-by-project basis.

Conceiving of BITs as default rules is attractive in large part because recently many host states have begun dismantling or scaling back their investment-approval institutions,¹⁹⁹ thereby eliminating opportunities for investors and states to easily enter into direct privity. This understanding of BITs also raises a number of problems. First, the default rules provided by BITs are too vague for most important foreign investment projects, such as mining ventures or manufacturing facilities. In those cases, the foreign investor will almost always bargain with host state authorities and will be well-positioned to demand what BITs have to offer. Second, from a default-rules perspective, it is quite difficult to justify the tendency of BITs to prevent host states and investors from bargaining around BIT rules. If BITs require host states to extend to investors offers that exceed the value of the investment to the host state, the host state will reject the investment. The surprising implication is that in some cases BITs might actually be expected to discourage investment by preventing host states and investors from reaching a mutually acceptable bargain. Third, if BITs are best viewed as reducing bargaining costs, and if bargaining costs in the absence of a BIT are slight compared to the overall value of the typical investment project, then the competitive advantage that BITs can be expected to provide to developing states is correspondingly slight, and BITs should not be associated with very significant increases in investment flows. If this is indeed the case, we should be extremely suspicious of empirical studies that purport to find otherwise.

BITs as Ideas. A more convincing theory would emphasize the possibility that host states have simply been sold a bad bill of goods.²⁰⁰ They have been advised and have accepted the idea that BITs are of decisive importance to many foreign investors and the costs of signing the treaties are low. For the vast majority of the history of BITs, there was no statistical or case-study evidence of the effects of the treaties on FDI flows, and only recently have the costs of the treaties—meaning the extent to which a wide variety of host state policies might be successfully challenged before arbitral tribunals—become clear. For example, as noted

199. Salacuse & Sullivan, *supra* note 10, at 76–77.

200. For an example of this approach, see generally Yackee, *supra* note 25 at 216–23 (discussing an “ideational approach” to explain BIT enthusiasm and describing how empirical evidence to support many of the claims made about BITs is “slim”).

above, in 2004 Argentina faced international legal claims of approximately \$16 billion.²⁰¹ Argentina's travails will likely make developing countries think long and hard about signing new BITs containing strong dispute settlement provisions.²⁰²

An ideational theory of BITs suggests the quasi-formal mechanisms by which multilateral finance organizations, particularly the World Bank, advise developing countries on FDI policy are worthy of far more scrutiny than they have so far received.²⁰³ The World Bank is deeply involved in investment arbitration (through ICSID) and in foreign investment insurance (through the Multilateral Investment Guarantee Agency ("MIGA")).²⁰⁴ It would not be surprising to find that World Bank advice to developing countries typically emphasizes the importance of signing BITs with pre-consents to ICSID arbitration and that developing countries that have sought World Bank advice on the subject are likely to follow it.²⁰⁵

BITs as Bribes. The third avenue of inquiry requires that we recognize that BITs are by definition *interstate* agreements, and that host states that

201. See *supra* note 5 and accompanying text. See also R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims—First Lessons from Argentina*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES, AND CUSTOMARY INTERNATIONAL LAW 425, 425 (Todd Weiler ed., 2005).

202. As a Washington, D.C.-based trade lawyer recently told the *Financial Times*, "The US business community clearly still likes BITs. But why Brazil or any other country would agree to sign one after looking at Argentina defeats me." Alan Beattie, *Concern Grows Over Global Trade Regulation*, FIN. TIMES, Mar. 12, 2008, available at http://www.ft.com/cms/s/0/1a56fc64-efd8-11dc8a170000779fd2ac.html?nclick_check=1.

203. For example, the United States Department of State notes that Ghana, as part of its efforts to attract FDI, has set up the Ghana Investment Advisory Council ("GIAC"), "which was established with the help of the World Bank, [and] helps shape government policy aimed at creating an enabling investment environment. The GIAC consists of multinational and local companies and institutional observers (IMF [International Monetary Fund], WB [World Bank], UNDP [United Nations Development Program])." U.S. Dep't of State, Ghana 2007: Investment Climate Statement, <http://www.state.gov/e/eeb/ifd/2009/1008873.htm> (last visited Apr. 4, 2008).

204. The World Bank also offers FDI policy advice through its Foreign Investment Advisory Service. Foreign Investment Advisory Service—Core Advisory Services, http://www.ifc.org/ifcext/fias.nsf/Content/Advisory_Services (last visited Mar. 19, 2008).

205. Its investment insurance arm, the Multilateral Investment Guarantee Agency ("MIGA"), provides host states with advice relating to "investment promotion." See World Bank Foreign Direct Investment Promotion Center, About FDI Promotion Center, <http://www.fdipromotion.com/index.cfm?pageID=2> (last visited Mar. 11, 2008); Press Release, Multilateral Investment Guarantee Agency World Bank Group, MIGA Launches Online FDI Promotion Center (Jan. 29, 2004), http://www.miga.org/news/index_sv.cfm?stid=1506&aid=147.

sign the treaties may in large part be attempting to please home state governments—and not necessarily home state investors—that are in a privileged position to control the flow of a wide range of benefits. Much neglected in existing functionalist accounts of the treaties are the ways in which capital exporting states have tended to make the availability of home state insurance contingent on a host state's willingness to sign a BIT.²⁰⁶ The World Bank's MIGA appears to have informally followed this lead. UNCTAD reports that MIGA “has also encouraged the adoption of BITs as a test to ensure that investments are sufficiently protected” to merit the provision of insurance.²⁰⁷ This suggests the rather ironic possibility that host states may have signed certain BITs not because the treaties reduce the investor's risk, but because signing the treaties allows the investor to insure against the risk.²⁰⁸ The United States has also long made the availability of foreign aid contingent upon a willingness to settle investment disputes by arbitration and in at least one case has used its influence in a multilateral development bank to block funding for a project because the host state (Costa Rica) was resisting an investor's demand for arbitration in an unrelated dispute.²⁰⁹ Whether simi-

206. This is (or was) the case with the German, French, Swedish, and Swiss BIT and investment insurance programs. See MERON, *supra* note 164, at 40–41 (discussing the French, German, and Swedish programs); Klebes, *supra* note 46, at 63 (discussing Germany); Matthias-Charles Krafft, *Les Accords Bilatéraux sur la Protection des Investissements Conclues par la Suisse*, in FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 72, 88 (Detlev Chr. Dicke ed., 1987) (Switz.); Juillard, *supra* note 141, at 282–83. Klebes says that while signing a BIT was not an absolute precondition to receiving German investment insurance, it was an “important criteria,” and apparently often a decisive one. See Klebes, *supra* note 46, at 63, 70–73. Klebes also notes that signing a German BIT could also unlock access to state-sponsored “credit facilities and certain fiscal advantages.” *Id.* at 63. French and Swiss authorities also appear to have had some measure of discretion in deciding whether to insure a project in the absence of a BIT, though the extent of the discretion or its exercise is unclear.

207. UNCTAD BITS IN THE MID-1990S, *supra* note 2, at 1 n.3. The Convention Establishing the Multilateral Investment Guarantee Agency requires MIGA to “satisfy itself as to . . . the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.” World Bank: Convention Establishing the Multilateral Investment Guarantee Agency art. 12(d)(iv), Oct. 11, 1985, 24 I.L.M. 1598.

208. See Patrick Juillard, *Le réseau français des conventions bilatérales d'investissement: à la recherche d'un droit perdu? [Bilateral Investment Treaties Entered into by France: Remembrances of Law Past?]* 13 DROIT ET PRACTIQUE DU COMMERCE INT'L [D.P.C.I.] 9, 57–9 (1987) (Fr.).

209. Charles N. Brower & Jarrod Wong, *General Valuation Principles: The Case of Santa Elena*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 747 (Todd Weiler ed., 2005).

lar pressures encourage states to sign BITs with the United States remains less than fully explored, but the U.S. business lobby, in voicing its support for the U.S. BIT program, has explicitly urged the government to “consider the extent to which countries’ investment policies may have foreclosed development by private capital” before extending official aid or supporting loans from multilateral development institutions.²¹⁰

In closing, it is important to emphasize that empirical research on BITs is admirable and welcome. Empirically minded BIT analysts have laid a strong foundation on which future research can and should build, but future empirical work must be carefully designed to reflect important differences in the content of BITs and the availability of BIT substitutes. Until the concerns highlighted above are adequately addressed, credible commitment stories of the causes and consequences of BITs, and the statistical evidence that supports such stories, will remain much less persuasive than they otherwise might be.

210. *U.S. Policy Toward International Investment: Hearings Before the Subcomm. on International Economic Policy of the S. Comm. on Foreign Relations, 97th Cong.* 173 (1981) (prepared statement of Richard W. Roberts, President, National Foreign Trade Council, Inc., New York, N.Y.). Other kinds of linkages are plausible as well. For instance, many Belgian BITs are signed as part of a “‘package deal’ consisting of several other treaties concerning different subjects and they are aimed at expressing the good relationship between the two countries.” Willem Van de Voorde, *Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment*, 44 *STUDIA DIPLOMATICA* 87, 93 (1991). More generally, it is easy to speculate that the Eastern European states were primarily motivated to sign BITs with their Western European neighbors in order to signal their suitability for membership in the European Union and with the United States to signal the completeness of their rejection of Communism and their suitability for post-Soviet foreign aid. See Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 *MICH. J. INT'L L.* 621, 634–35 (1993) (documenting the United States’s post-1989 efforts to “encourage[]” ex-Communist states to “negotiate and conclude” BITs as a way to advance broader U.S. foreign policy goals).