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Variation in Bilateral Investment Treaties: What Leads to More 'Flexibility for Development'?

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Variation in Bilateral Investment Treaties: What Leads to More 'Flexibility for Development'?

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Abstract

This research project is a quantitative analysis of variation in the content of bilateral investment treaties (BIT) over time and across signatory country pairings. Specifically, this dissertation builds upon the "flexibility for development index" (FFID) first put forth by UNCTAD and substantiated by Haslam (2007). This index measures the degree to which international investment agreements maintain a balance between investor protection and preservation of host country policy flexibility. I apply this index to BITs signed between two developing countries, or a developed and developing country between 2003 and 2018. The purpose is to understand how the dyadic relationship between signatories affects variation in BIT provisions. Precisely, *when* and *why* do developing countries sign restrictive agreements that challenge their regulatory autonomy and opportunities for independent economic development?

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Abbreviations and Acronyms

BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FFID	Flexibility for Development Index
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured-Nation Treatment
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
UNCTAD	The United Nations Conference on Trade and Development

Introduction

The international investment regime comprises a set of norms, rules, and principles governing the flow of international investment. The central principle underlying the international investment regime is that greater flows of foreign direct investment will increase prosperity for all parties involved (Salacuse, 2010; Kerner, 2009). This supports the notion that the protection of property rights increases these flows and benefits, and that the maintenance of investment treaties and flows is critical to the promotion of a liberal world order (Bonnitcha et al., 2017). With the resurgence of industrial policy (Stiglitz, 2016) however, greater numbers of academics and policymakers have come out in opposition to the assumptions maintained under the guise of neoliberalism (Chang et al., 2014; Mkandawire, 2015; Saunders & Caramento, 2018). This is because the fundamental principle underlying the international investment regime is based on the assumption that the increase of investment flows automatically translates to development, despite a lack of evidence to support this claim (Simmons, 2014; Bonnitcha et al., 2017; Saunders & Caramento, 2018).

A relatively understudied subset of the international political economy; the international investment treaty regime, is riddled with the contentious discourse centred around the role of international investment agreements in regulating the flow of international investments (UNCTAD 2018; 2019; 2015). In recent years, BITs have been at the centre of debates on investment policy reform (Haslam, 2007; Poulsen, 2010; UNCTAD 2000). The United Nations Conference on Trade and Development (UNCTAD) has been at the forefront of this debate. It has proposed several reform options to balance a liberal investment regime with host state flexibility for development, which provide the foundation for this research project.

Under the current global economic order developing countries face a political economic climate that restricts their flexibility to act autonomously regarding their economic development trajectories (Simmons, 2014; Sachs & Sauvant, 2009; Neumayer & Spess, 2005). This includes restrictive entry provisions to the World Trade Organization (WTO), remnants of structural adjustment programs, and excessive debt burdens that maintain an asymmetric power balance between developed and developing countries (Mkandawire, 2015). Critics of the investment regime would argue that this reductive liberal perspective undoubtedly promoted by the wealthy and advanced industrialized states fails to account for the adverse effects of foreign investment

on host state development, noting that prosperity is not synonymous with development (Vandevelde, 1998).This paper will display that in addition to pre-existing constraints on developing countries' regulatory autonomy, the international investment treaty regime presents further barriers to developing countries' policy flexibility.

Even though critics of BITs and arguments of how they constrict host state's regulatory power are gaining more and more prominence in the international investment discourse, FDI continues to play a central role in economic development prospects for lower-income countries, making up the largest component of net resource flows to developing countries (Tobin & Rose-Ackerman, 2005). Because BITs serve as the primary mechanism for regulating and institutionalising FDI between countries, we *must* gain a more in-depth understanding of variation across countries and over time. At their onset, BITs were designed to provide basic protections for foreign investors, such as expropriation protection and guarantees of compensation in the event of seizure of property or investment. They have now evolved beyond their early application and provide extensive protections for foreign investors, enforced by influential investor-state dispute settlement (ISDS) provisions (Peinhardt & Wellhausen, 2016). The number of BITs concluded since 1959 has grown to almost 3,000, with an increasing number signed between two developing countries, herein referred to as South-South treaties (UNCTAD, 2018). This growing number of treaties between two developing countries necessitates research projects to understand how these differ from their traditional North-South counterparts.

Although several studies have been conducted to understand the effects of BITs on FDI flows, the body of literature centred on understanding the causes of variation within BIT provisions remains limited. The central objective of this research is thus to understand the conditions in which developing countries sign BITs that constrict their flexibility options for development. I hypothesise that BIT variation can be explained by examining power asymmetries between the capital-exporting and capital-importing country. To test this theoretical proposition, I quantitatively code BITs based on Paul Haslam's (2007) flexibility for development index. In a regime in which the rules, norms, and principles have typically been set by and favouring the interests of capital-exporting states, quantifying BITs allows us to see how South-South treaties are altering the investment paradigm.

I expect the BITs that will feature the most extreme investor protections (and thus limit host state regulatory autonomy and development flexibility) will be those in which the power differential between capital exporter and importer is most extreme. Second, I expect that these differences will gradually decrease over time, as the cost of BITs for host states becomes more widely understood. Finally, I expect that South-South BITs will be better balanced than those signed between a developed and developing country.

Literature

A Historical Overview

Jandhyala, Henisz and Mansfield (2011) argue that there are three clearly identifiable BIT diffusion periods. Their findings suggest that there is a natural categorization of BITs based on the period during which they were signed, with the first wave of "traditional" BITs beginning in the 1960s and is characterized by BITs that include the most basic of provisions, notably admission and establishment conditions for the investment, standards of treatment and dispute settlement (Buthe & Milner, 2008). These early BITs were seen as a rational solution to high transaction costs and subsequently used to provide a credible commitment to investors that their investments would be secure and protected in the host State.

From the 1980s to the 2000s, the second wave of BITs is when the pool of treaties grew exponentially. Not surprisingly, this coincides with the global spread of the neoliberal doctrine supported by the Washington consensus. Whereas during the first wave of BITs it was rare for there to be more than 20 BITs concluded in one year, during the second wave, the annual average of treaties signed was approximately 100 per year (Jandhyala et al., 2011). However, many of these treaties, notably those signed between a high-income and low-income country, resulted in extensive investor protections not clearly understood at the time. Furthermore, this period also saw a significant rise in South-South treaties, rather than the traditional North-South or North-North model.

Given the characteristics of the second wave, developing countries were faced with an onslaught of costly arbitration claims regarding breaches of investor rights. This led to the third wave of BITs, which began in the early 2000s. Between 2000 and 2007, the number of investor-state disputes filed jumped from 38 to approximately 300. It follows the growth of investor-state

arbitration cases that leads UNCTAD to develop an investment policy reform program, which instructs the future of investment treaty negotiations. The third wave – or modern – BITs are therefore based on a heightened awareness of the costs of investment agreements and a greater emphasis on a balance between investor protection and the preservation of host state regulatory autonomy. This third wave is effectively the focus of this research project, as it is the period in which we see the greatest variation in agreements with regards to provisions designed to both encourage investment and lead to productive and sustainable development in the host state.

Empirical Evidence

How do BITs Influence FDI Flows?

The body of literature surrounding BITs and international development is centred around the effect of BIT signing on FDI flows (Elkins et al., 2008; Hummer, 2008; Buthe & Milner 2008; Salacuse & Sullivan 2005; Neumayer & Spess, 2005; Tobin & Rose-Ackerman, 2005). Although many studies have attempted to understand this relationship, they have yet to produce any clear and unambiguous results (Sauvant & Sachs, 2009; Kerner, 2009; Tobin and Rose-Ackerman, 2010). Scholars have typically relied on two causal mechanisms to explain how BITs would increase FDI flows to developing countries. The first is commitment theory, in which BITs increase FDI because the treaty serves as a guarantee for the investor that the host state is committed to protecting investments. For example, Lesher and Miroudot (2006) find that although BITs do not increase FDI through commitment effects, Preferential Trade Agreements (PTA) do.

Similarly, Busse, Königer and Nunnenkamp (2010) find that BITs do increase FDI flows through commitment effects. The second is signalling theory, which argues that BITs affect FDI by signalling to all foreign investors (not just those covered in the treaty) that the host state is serious about protecting FDI. For example, Buthe and Milner (2008) found that BITs do increase FDI to developing countries through signalling effects, though Danzman (2016) found that BITs increase infrastructure investments through signalling, they do not increase overall FDI inflows to developing countries.

Although this aspect of BITs has received a significant amount of attention within the literature, the macroeconomic effects of IIAs through changes in government decision- making,

as well as a juridical analysis of BITs has received significantly less attention (Bonnitcha et al., 2017; Dixon & Haslam, 2016; Poulsen, 2010; Neumayer et al., 2016). Some studies have gone beyond looking at the simple presence of BITs and how it might affect FDI flows and measured how the difference in treaty "strength" interacts with the flow of investment (Yackee, 2008; Allee & Peinhardt, 2011), yet come up with inconclusive findings. In part, this is because when it comes to looking at the substantive nature of an international investment agreement, the literature frequently assumes a greater degree of homogeneity than exists (Haslam & Dixon, 2016). What emerges from the absence of unambiguous findings of BITs on FDI is a need to better understand developing countries' motivations for BIT diffusion and variation in specific BITs (Haslam & Dixon, 2016).

Furthermore, these studies of BITs on FDI are overwhelmingly fixated on the North-South model (Poulsen 2010, Kim et al., 2015; Haslam, 2010). Although earlier BITs were typically between a developed and developing country, South-South treaties are becoming increasingly prevalent, with over 40% of current concluded between two developing countries (UNCTAD, 2010). This means that South-South BITs provide an entirely new dynamic to the investment treaty regime, which has typically been dominated by developed countries' interests (Bonnitcha et al., 2017; Crystal, 2009). Poulsen (2010) therefore looked specifically at the difference between the inclusion of free transfer clauses between North-South and South-South treaties and found a noticeable difference between the use of transfer clauses and the national treatment provision between the two. For this reason, it is difficult to fully understand the degree to which BITs impact domestic policymaking, though we can expect that the threat of arbitration acts as a significant deterrent for host governments to breach investor protections (Neumayer & Spess, 2005). Therefore, there is a need for an index that will allow us to quantify and compare IIAs based on their actual content.

Understanding BIT Diffusion and Variation

In terms of understanding BIT diffusion determinants, researchers have traditionally used a binary outcome variable of whether or not a BIT was signed, rather than looking at variation within its judicial content. One of the most widely cited of these is Elkins, Simmons and Guzman's (2006) seminal theory of "competing for capital". Here, the authors build a spatial effects model measuring the likelihood of a BIT signing based on whether their competitors had

done the same. Ultimately this translates to a "race-to-the-bottom" in which developing countries increasingly adopt liberal provisions to compete for the pool of global capital. Their findings are two-fold; first, they find that developing countries will be more likely to sign BITs if their competitors have also signed BITs. Second, they find that countries characterized by more desirable investment climates will be less likely to sign a BIT than those who are more desperate to attract FDI.

Similarly, Neumayer, Nunnenkamp and Roy (2016) apply a theoretical approach to assess whether or not stricter investment agreements are contagious based on the competing for capital logic proposed above. Although they find evidence to support their findings, they fail to account for diversity and depth within BIT variation, and simply look at dispute settlement and national treatment clauses.

Mash (2000) takes a more political approach to understand variation in developing country IIA diffusion, in which he argued that bargaining power is the crucial mechanism for understanding. He argues that bargaining power for investment treaty negotiation can be understood through three central variables:

- a high discount rate (the host state is impatient to reach an agreement and will thus sacrifice their interests)
- political economy pressures (rapid pressure to achieve economic development)
- asymmetric information (the capital-exporting state/foreign investor has better information than the host state)

These bargaining power conceptions form a crucial part of my theoretical framework, and I detail them and their relevance for IIA negotiation below. This also follows a conception of how power works in international relations, along the lines conceived by Barnett and Duvall (2005), where structural power differences shape actors' conditions.

"Risky" investment conditions characterize many developing countries – this could be due to investor perception of insufficient property rights and government enforcement, creating high transaction costs for the investor (Rose-Ackerman and Tobin, 2005; Ndikumana & Boyce, 2003). This need for investment will thus increase their discount rate, decreasing their bargaining

power (Mash, 2000). Factors making developing states safer destinations for investment will be less incentivized to minimize these risks through BITs with strict investor protections.

Furthermore, because in "poor, high-risk environments, FDI is likely to be the major source of investment funds" (Tobin & Rose- Ackerman, 2005, p. 4), respective governments will likely be more desperate to sign agreements impatiently. Mash (2000) argues that countries with a significant degree of pressure to demonstrate rapid economic progress will also see a reduction in their bargaining power. Therefore, we should expect that developing countries, especially LDCs, will have a greater incentive to agree to BITs if they expect it will signal to foreign investors that they have a safe space for investment, following signalling theory. Finally, asymmetric information can reduce a developing country's bargaining power if there is an assumption that BITs will lead to increased FDI inflows based on capital-exporting countries' push for investment liberalization. Furthermore, countries with lower governance effectiveness and regulatory quality should have worse information and lower bargaining power.

Another influential study in BIT diffusion by Jeffrey Bergstrand and Peter Egger in 2013 used an econometric analysis to determine the factors leading to BIT diffusion, finding that the quality and size of the potential shared economic benefit between signatories will determine the likelihood of a BIT being signed. However, these studies again fail to account for variation in the actual content of the BITs. This is why my research fills such a crucial gap – because the international investment regime lacks a solid understanding of the effects of BITs on FDI, the role of differential provisions in this relationship. It is therefore vital that we quantify IIAs because it permits exciting opportunities to answer questions around negotiating modality and the content of IIAs, trends in the content of rules over time, the influence of content on FDI and flows, and for my purpose here, whether or not power asymmetries are exploited to provide better outcomes for wealthier and more powerful countries.

Finally, Neumayer, Nunnenkamp and Roy (2016) studied the degree to which economic competition, measured similarly to Elkins et al., affects ISDS provisions' strength. However, whereas Elkins, Simmons and Guzman assess the likelihood of BIT signing as a dummy variable, Nunnenkamp and Roy extend the analysis to the quality of provisions in the treaty itself. They ultimately find that the argument by Elkins et al. 2008 about the competition for FDI

leading to a race-to-the-bottom, can be further substantiated when it comes to stricter ISDS and NT provisions.

Opposing Interests

It is important to underscore the different interests of both developing and developed countries in signing BITs to see who benefits from heavily liberalized provisions. Developed countries have four central motivations for signing BITs: the promotion of business interests; the de-politicization of investment disputes; building customary international law; and using investment treaties for diplomatic and symbolic reasons (Bonnitcha et al., 2017). On the other hand, developing countries are primarily motivated to sign BITs as a tool for promoting and attracting foreign investment; the promotion of domestic reforms; and diplomatic and symbolic reasons. There is subsequently a dichotomous relationship between developed countries as capital exporters and developing countries as capital importers, which results in differing interests when it comes to the composition of IIAs (Neumayer & Plümper, 2010). The tension between these two groups of countries' interests is partially responsible for the failure to adopt a multilateral investment agreement (Bonnitcha et al., 2017). Although the central driver and logic of BITs are to increase prosperity through investment flows, it is not entirely clear that BITs always do have a positive relationship with FDI.

Furthermore, pure increases in FDI are not always a positive force for development, let alone sustainable development. Thus, the international investment regime is gaining prominence as a significant subset of the international political economy. The conflict between developing country interests and developed country interests is why efforts to develop a Multilateral Agreement on Investment (MAI) failed on the part of the OECD failed miserably in 1998 (Drezner, 2008).

Additionally, several distinctions must be made when assessing how the drivers of investment agreements determine BIT composition. First, it is important to underscore what constitutes a foreign investor in an IIA. There is a distinction between FDI and foreign portfolio investment, with the former constituting greater than a 10% share and the latter less than so. The type of investment plays a crucial role in determining the interests of both developed and developing countries. Types of investment could be either market- seeking or efficiency-seeking, both of which have differing developmental impacts for the host state. This is important for

understanding how defining investment can determine the scope of protection and the risk for host state liabilities in arbitration claims.

Finally, Haslam (2007) compiled a framework through which researchers can quantitatively code IIA provisions based on the concept "flexibility for development", which instructs the outcome variable used in this study. The more a developing country permits the inclusion of strict investor protections in their BITs, the more they will experience a reduction in the range of policy options available to them. This is because the liberalization of FDI policies consists of two aspects – building standards of treatment and reducing market distortions (UNCTAD, 2000), which must reduce the flexibility and autonomy for developing countries to pursue their development goals. For example, reducing market distortions corresponds to limiting restrictions on entry and establishment, ownership, and incentives for targeted development, which prevents the state from playing a decisive role in the market or through state-led development (tax advantages, for example) (UNCTAD, 2019). Ultimately, the liberalism paradigm is intrinsically problematic for states seeking to adopt a state-led development program.

Theory

Building off the existing literature, I take an approach that measures the strength of developing countries bargaining position to assess the level of flexibility permitted under its provisions. Thus, it is quintessential to understand the factors affecting variation in investment treaty provisions and why states agree to provisions that most limit the space their flexibility for development. I compose a theory of BIT diffusion that emerges primarily from those detailed in similar studies above. I argue that stiff competition for capital means that those countries with the greatest need for FDI will also be the most likely to be pressured into signing BITs that are heavily restrictive for their development flexibility.

UNCTAD's proposal for investment policy reform directly engages with the provisions most heavily criticized for restricting policy space and creating significant problems for developing countries (UNCTAD, 2018). Thus, the balance between investor protection and host state regulatory space underlies nearly every aspect of the conversation for BIT reform. Over time, however, I expect that the increasing number of BITs between two developing countries

will decrease the effects of this power imbalance, as the interests of capital-importing and exporting states are blurred. Several scholars have tried to highlight this difference, however none on a sizeable quantitative basis. The following section will detail the foundations of my argument, including its underlying causal mechanism.

The question underlying my research is when and why developing countries sign more restrictive BITs, specifically those that prioritize foreign investors over domestic policy space. I follow from the logic of the theory outlined in "competing for capital" to indicate that FDI competition negatively impacts developing countries by locking them into restrictive BITs designed to serve foreign investors rather than the developing country. I build off of Mash's conception of bargaining power to determine the factors contributing to the capital importing country's desirability as a foreign direct investment destination. Therefore, the explanatory variables include measures for factors indicating high discount rates, political economy pressures, and asymmetric information. I apply the findings of previous scholars who have studied the determinants of BIT signing to operationalize the explanatory variable into quantitative indicators. The explanatory variables are thus designed to measure the strength of the developing country's bargaining position relative to the signatory partner. I hypothesize that weaker bargaining power will result in lower levels of flexibility on the outcome variable.

Conceptualizing Flexibility for Development in IIAs

To measure the degree to which a BIT protects investors or preserves the host State's regulatory autonomy, I follow Haslam's framework for coding investment treaties based on the concept of flexibility for development. Whereas traditional measures for the strength of BITs emphasize dispute resolution mechanisms, this approach fails to capture variation in other crucial provisions such as standards of treatment and scope of application, as noted above (Haslam & Dixon, 2016). Thus, the FFID is a practical and reliable measure for quantitative analyses of IIA strength – particularly when it comes to understanding the impact on host state development prospects. For my purpose, "flexibility" is understood based on UNCTAD's (2004) definition, which "refers to the extent to which investment agreements permit governmental policy autonomy" (p.8).

Therefore, the index is a scale based on the coding of elements consistently emphasized within IIA reform debates and frequently used in arbitration claims. The provisions used are also those that appear in most BITs and display a certain degree of variation among the pool of available treaties. Following Haslam's model, I standardize the index based on a 0-1 scale, in which a higher score corresponds to a greater degree of flexibility, and a lower score provides higher investment protection at the cost of host state regulatory space. The index captures four general categories of provisions: overall objectives (preamble); scope of application (definition of investment); right of establishment; treatment standard (national treatment, most-favoured-nation and fair and equitable treatment); expropriation standard; use of operational measures and advantages (performance requirements); freedom of transfer; promotional measures; dispute settlement type; and rationae materiae limitations (exceptions). Generally, host states will benefit when treaties feature clear and specific provisions, limiting ambiguity when interpreting treaties in an arbitration setting (Gazzini 2014; Haslam, 2007; UNCTAD, 2018). Similar to Haslam's model, each variable is weighted equally[1]. The remainder of this section will detail the components of the index adapted for my purpose here and provide evidence for the scoring[2].

Preamble

Gazzini (2014) indicates that the preamble is the part of an investment agreement that sets the overall tone of the agreement. The preamble of a treaty is therefore integral and "must be looked at in order to elucidate the object and purpose of the treaty with a view to reaching a balanced interpretation, or as a contextual element contributing to the establishment of the meaning of the provisions to be interpreted" (Gazzini, 2014, p. 943). The majority of BIT preambles follow a similar structure, in which they will most certainly contain a phrase relating to the promotion of investment facilitation, economic development, and cooperation between the

[1] UNCTAD Methodology disclaimer "The mapping results included in the IIA Mapping Project database serve a purely informative purpose. The mapping of treaty provisions is not exhaustive, has no official or legal status, does not affect the rights and obligations of the contracting parties and is not intended to provide any authoritative or official legal interpretation. While every effort has been made to ensure accuracy, UNCTAD assumes no responsibility for eventual errors or omissions in the mapping data. Methodology available at https://investmentpolicy.unctad.org/uploaded-files/document/Mapping Project Description and Methodology.pdf"

[2] Specific scoring for each indicator is included in the appendix, as well as average presence in BITs over time.

parties (Gazzini, 2014). However, with the third wave of investment agreements underway, preambles and their interpretation become increasingly refined. A more significant number of treaties now include a reference to regulatory autonomy, or the "right to regulate", sustainable development, human rights, and environmental protection. For this research project, a preamble's relevance is based on whether or not it clearly includes a reference to the host state right to regulate.

Definition of Investment

The definition of investment is a critical element of the scope of an investment treaty. This provision effectively determines what will be covered by the investment agreement, and thus has important implications for the host State's flexibility for development. The two definitions of investments found in BITs are enterprise-based and asset-based. An asset-based definition is broad, and generally includes coverage for intellectual property, short- term, speculative, portfolio, goodwill, and direct investment. Although this may theoretically be justified under the guise of creating a greater opportunity for attracting investors, the open-ended nature can render the host States more liable to investment arbitration claims (UNCTAD, 2018). On the other hand, enterprise-based definitions are much more restrictive and narrower and feature a rejection of the broad-based definition of an asset-based definition. An enterprise-based definition is a central recommendation by UNCTAD for IIA reform, as it provides host states with a greater degree of flexibility in terms of their ability to regulate investment in the public interest; thus, I score this provision higher for enterprise-based, and lower for asset-based (Haslam, 2007).

National Treatment & MFN

The most-favoured-nation (MFN) and national treatment (NT) provisions are relative standards of treatments. This means that they apply relative to other investors, rather than absolute to investors from either the home or host country. The role they play in the flexibility for development index is based on their terms of establishment (UNCTAD, 2007; 2018; 2019). The national treatment clause protects covered investors against nationality-based discrimination and guarantees them a level playing field with comparable domestic investors. For several reasons, countries may be interested in limiting the scope of the national treatment principle, particularly developing countries. For example, States may wish to accord more favourable

treatment to socially or economically disadvantaged minorities or ethnic groups. When an NT or MFN clause is post-establishment, a state retains the right to screen investors before establishing their investment, which provides them with greater flexibility than when the option is pre-establishment. Furthermore, states have the option to include a clarifying clause to the NT provision, which is to include that the principle of non-discrimination applies only in "like circumstances" (UNCTAD, 2018).

FET

The fair-and-equitable treatment (FET) clause is arguably the most contentious within the international investment regime discourse and is central to reform discussions (UNCTAD 2015; 2018; Haslam, 2007; 2010; 2016). UNCTAD writes that "in actual practice, the FET standard, especially as it has been drafted in traditional IIAs, has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem unfair. In fact, almost all ISDS cases to date have included an allegation of a FET breach" (UNCTAD, 2015, p. 35). Furthermore, due to the lack of clarity within the specific legal application of the terms "fairness" and "equity", this clause frequently creates headaches for host states in ISDS cases (Bonnitcha et al., 2017). Therefore, critics have argued that the FET clause interferes with a country's freedom to adopt appropriate investment-related policies for their development goals (UNCTAD).

That being said, the FET clause is subject to controversial debates within the international investment regime partially given the evidence both for and against its inclusion in treaties. Proponents of the FET clause emphasize that it requires host governments to provide investors with a minimum level of procedural transparency when it comes to the implementation of new policies (Dolzer, 2006) – though this is based on the assumption that governments are internalizing BIT provisions, which is far from proven (Bonnitcha et al., 2017). Therefore, following UNCTAD's reform recommendations, a treaty is scored lower if it has an unqualified FET clause that lends itself to open interpretation, but higher if it balances out the FET clause with reservations and qualification specifications.

Expropriation

The expropriation clause in an investment agreement stipulates how investors will be compensated in the case of a host state seizure of property that deprives investors of their

investment value (Jandhyala et al., 2011). The critical distinction for the purpose here is between direct and indirect expropriation. The vast majority of IIAs will include a clause on direct expropriation; a clearly identifiable physical seizure of the investment (Bonnitcha et al., 2017). However, indirect expropriation is far more ambiguous and leads to substantial difficulties for the host state in arbitration. Investors have claimed indirect expropriation in 45% of all investment treaty arbitrations (Bonnitcha et al., 2017). This has led to a highly contentious debate around the reform and inclusion of indirect expropriation in investment treaties. Although the investor must have experienced substantial deprivation of their investment to satisfy the indirect expropriation criteria, there is quite a fine line between what was and was not within the host state's legitimate public policy interest. Several examples of cases of indirect expropriation highlight these issues, such as in Metalclad v. Mexico (2000), in which "the tribunal held that a local government's refusal to issue a construction permit to a landfill that had been approved by all other levels of the Mexican government amounted to an indirect expropriation" (Bonnitcha et al., 2017, p. 107).

UNCTAD has proposed numerous policy options within their investment reform package to minimize the risks concerning regulatory autonomy that host states experience concerning indirect expropriation. These policy recommendations are centred on a higher degree of clarity surrounding the inclusion of the indirect expropriation clause in the treaty or omitting it altogether. Host states concerned with indirect expropriation problems can, therefore; not include it in their treaties, refine what constitutes indirect expropriation, include a carve-out clause, or include a compulsory license carve out. Treaties are thus coded based on the degree to which they leave host states exposed to potential claims of indirect expropriation.

Performance Requirements

Performance requirements are a tool with which developing countries can “maximize the contribution of foreign direct investment to local industrialization” (Haslam, 2007, p. 264). Some developed countries, notably the USA and Canada, explicitly forbid the use of performance requirements in their investment agreements. Because performance requirements are a crucial policy tool for developing countries to encourage targeted industrialization, prohibitions of their use in BITs is a clear impediment to their flexibility for development space. There is also a debate between developed and developing countries surrounding restrictions on performance

requirements, which materialized at talks around the MAI (Elkins et al., 2008). For example, a document produced by CARICOM countries states that developing countries "should not accept any restriction on the use of performance obligations and that they should retain the right to nationalize and to determine at the time of nationalization the quantum of compensation and the terms of payment" (UNCTAD, International Investment Instruments: A Compendium, n.d). Therefore, the restriction of performance requirements negatively affects the index and renders a treaty more in favour of investor protections than host state rights.

Transfer Clauses

Transfer clauses, which provide investors with an assurance that they will not be subject to capital controls, are included in nearly every BIT. However, what is essential for development flexibility is the inclusion of exceptions regarding these transfer clauses, which allow host states to implement capital controls in the case of macroeconomic instability or balance-of-payments crises. Therefore, treaties that include an exception allowing host states to manage crises are scored higher on the FFID than those that do not permit the host state with any flexibility, which can have a "significant development impact" (Haslam, 2007, p. 262). Certain countries have consistently included an exceptions clause in their model agreements, such as Chile, which includes that capital must stay one year before allowing free transfer out of the country (Poulsen, 2010). This provides host governments with an opportunity to mitigate the adverse effects of capital flight on domestic resource mobilization and ensure that foreign investment contributes positively to local economic development (UNCTAD, 2007; Ndikumana & Boyce, 2003; Denters & Gazzini, 2019).

Critics of FDI's ability to stimulate economic development also highlight that it can reduce currency reserves and negatively impact employment in the host state (Vandevelde, 1998). Therefore, it is fundamental to acknowledge provisions in BITs that either facilitate or prevent this effect, such as exceptions to transfer clauses or the permitting of performance requirements on foreign investors. Thus, the more "liberal" an investment treaty, the more likely it is to prevent a host state from engaging in industrial policy or nationalist economic doctrines. This is notably ironic based on Ha-Joon Chang's (2008) findings in *Kicking Away the Ladder;* the very same arguments against protectionism put forth by developed countries are in direct contradiction with how they met development milestones in the past.

Carve-outs, Exceptions, and Overview

Any carve-outs, refining, clarifying, or exception clauses attached to the above standards of treatment increase the host state's degree of flexibility. First, if and when there is an arbitration claim made by investors, clarifications always help the host state. Second, in their very nature, carve-outs and exceptions provide host state with more flexibility to breach provisions if they would like to do so for developmental purposes. Poulsen (2010) also finds that South-South treaties are more likely to include carve-outs to balance out restrictive standards of treatment. UNCTAD (2018).

Exceptions are crucial to providing host states with the flexibility needed to determine their development goals. Therefore, I code five broad-based exceptions that apply to the entire treaty, distinct from those provisions clarifying specific provisions. ISDS provisions are generally relatively standard, though if a treaty implies implicit consent, it is scored lower than if a treaty requires case-by-case consent, which would provide the host state with greater flexibility (Haslam, 2007). However, because ISDS has received significant attention in the literature, the focus here is more on the treaty's other judicial elements.

Institutional Mechanisms for Investment Partnership

The investment promotion aspect of the index measures the presence or absence of three different institutional mechanisms designed to promote investment partnership, and better balance the power asymmetries between signatories. These are specific provisions designed to promote and facilitate an investment partnership are present within a BIT. Although these are distinct from investor protections and elements designed to safeguard the right to regulate, they provide an opportunity for FDI to improve capacity building and technological spillovers (Neumayer & Plümper, 2010; Rose-Ackerman & Tobin, 2010). Including institutional mechanisms for consultation or technical capacity building in BITs better balances the asymmetric relationship between capital-exporting and importing states. These institutional mechanisms can encourage FDI without going above and beyond the minimum level of investor protection deemed necessary, such as joint bodies that will meet regularly to consult and discuss opportunities for investment at workshops or conferences (UNCTAD, 2015). Furthermore, the technical capacity provision can ensure that investment fosters desirable spillovers by helping SMEs acquire more than just investment from capital-exporting states.

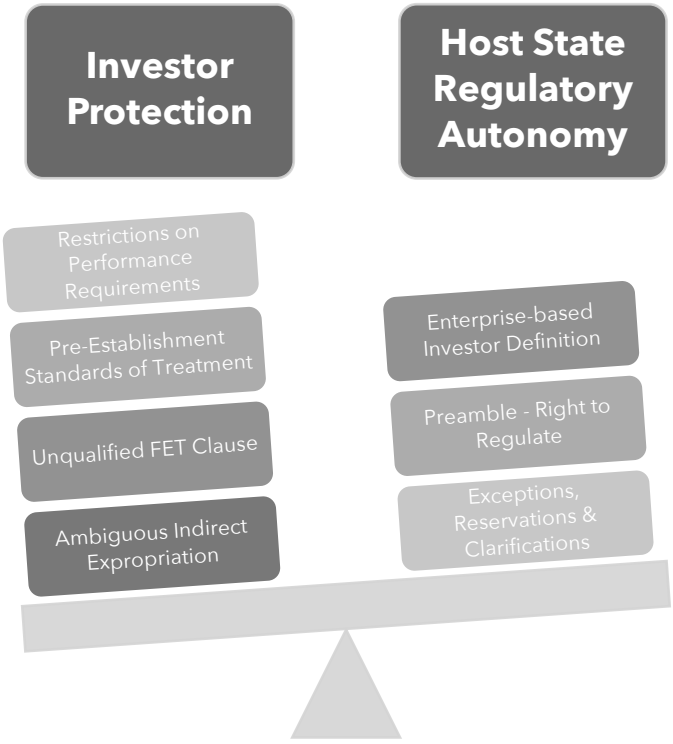

Figure 1 presents a visualization of the balance between investor protection and host state regulatory autonomy.

Theoretical Application & Testable Hypotheses

I argue that capital-exporting countries are exploiting the power asymmetries inherent in the current global economic order to sign BITs that favour foreign investors over host countries' developmental prospects. Therefore, I compile several explanatory variables that measure host state FDI competitiveness to see if they contribute to weaker FFID scores across the sample I use. These variables are difference in GDP per capita between capital importing and exporting countries, the year of signing, the capital importing country's trade as a percentage of GDP, the capital importing country's GDP growth at the time of signing, estimates of the capital importing country's regulatory quality, the rule of law, government effectiveness, control of corruption, political stability and violence, the capital importing country's FDI inflows as a percentage of GDP lagged by one year, the capital importing country's natural resource dependency, and the capital-exporting country's FDI outflows as a percentage of GDP lagged by one year. The following section details the testable hypotheses for each of these variables in the context of the FFID.

Neumayer, Nunnenkamp and Roy (2016) argue that whilst two wealthier countries may have "stronger incentives to enter contractual arrangements...richer source countries and poorer host countries are likely to result in a more unequal dyadic relationship, which in turn may make the signing of a BIT (with strong investment provisions) more likely, following the bargaining perspective" (p. 19). Therefore, I first proxy for the difference in development levels between the capital-exporting and capital importing country, split into quantiles for comparative measurement.

> *H_1: As the difference in GDP per capita between signatory partners increases, the FFID score of that BIT will be lower than that of a country grouping with more similar GDP per capita figures.*

Second, I use the year in which the BIT was signed as an indicator of the learning and information available to the host country regarding the potential costs of BITs due to arbitration claims. Because there was a significant shift in BIT diffusion following the onslaught of arbitration cases in the early 2000s, developing countries began to gain a deeper understanding of the potential costs and risks of liberal BIT provisions. Thus, I argue that with the return of industrial policy (Stiglitz, 2016), we should expect developing countries to have more information that will increase their bargaining power and lead to more flexible BIT provisions. This follows from the proliferation of BITs emerged based on the assumption that foreign investment increases prosperity and are thus “quintessentially liberal documents” (Vandevelde, 1998, p. 635), which is increasingly being rejected by developing countries.

> *H_2: Over time, the predicted value of the mean FFID score for any particular BIT will be higher.*

Third, I measure the economic desirability of the host state for an FDI destination. I highlight the capital-importing country's GDP growth the year that the particular BIT was signed to indicate that country's investment desirability, due to its prosperity and rapid growth. I also measure the capital importing country's share of GDP coming from FDI inflows to indicate the degree to which they are already receiving FDI. Like GDP growth, this is a proxy for the host's attractiveness for foreign capital, taken from Elkins et al. model. The measure of FDI as a percentage of GDP has been used by multiple scholars to partially proxy for market size (Haslam, 2010; Elkins et al., 2008). I also control for the capital importing country's trade as a

percentage of GDP as an indication of trade openness. Following Büthe and Milner (2008), this is a measure of economic desirability and the differences between horizontal and vertical FDI determinants to the host country.

H_3: When host country market size (GDP growth, FDI inflows as a % of GDP) is greater, the predicted value of the FFID score will also increase.

Fourth, I rely on WGI estimates of regulatory quality, the rule of law, government effectiveness, control of corruption, and political stability and violence to indicate the degree to which a potentially high-risk environment may deter investors. Weak governance indicators should thus necessitate a developing country wishing to attract FDI will actively seek BITs to mitigate their unfavourable investment climate. The use of the governance indicators is designed to test whether or not host governments with greater "indigenous credibility" (Elkins et al., 2008, p. 834) will be less willing to sacrifice sovereignty for the potential benefits of a BIT signing. Other scholars have relied on proxies of corruption and democracy indicators, though I argue that the use of all five estimators offers a more accurate picture of a host state's overall regulatory strength.

H_4: When host country governance estimates are higher, the predicted value of the FFID score will also increase.

Fifth, I rely on a measure of natural resource dependency, the share of GDP coming from natural resource rents. I use this variable as a quantile to make it comparable to the other countries in the sample, following from the need to assess developing countries as a group of states competing for the limited pool of global capital. This builds from Elkins, Guzman and Simmons (2008) 's findings, which display that countries that rely on manufacturing rents are far less competitive than those with an abundance of natural resources. This is because the share of countries with an abundance of natural resources faces less competition than those who rely on manufacturing, meaning their bargaining power is heightened (Elkins et al., 2008).

H_5: When host country natural resource dependency is higher, the predicted value of the FFID score will also increase.

I also control for the capital-exporting state's share of GDP composed of FDI outflows the year before the BIT signing to indicate the degree to which they are a major foreign investor.

I expect that high outflows as a share of GDP make the capital-exporting country more desirable as a BIT partner due to greater FDI inflows' potential benefits to the capital-importing country.

> *H_6: When home country FDI as a percentage of GDP is greater, the predicted value of the FFID score will decrease.*

Estimation and Data

Observations

The sample includes 353 BITs signed between 2003 and 2018, using UNCTAD's mapping methodology. I include only those BITs signed between two developing countries (South-South) or a developing country and a developed country (North-South). Though it is necessarily contentious to classify what is and is not a developing country, I follow the World Bank's classification based on GDP per capita. Within each country pairing, partners are classified as either capital-exporting or capital-importing, following Poulsen's (2010) model and Elkins et al. (2008). This leaves 128 countries included in the sample. Below I provide descriptive statistics for the explanatory variables used in the primary model, with source data in the appendix.

Summary Statistics for Explanatory Variables

Variable	Mean	Std. Dev.	Min	Max
Difference in GDP PC[4]	24,000.078	2,921.21	405.37	63,650.903
	(7.98)		(1)	(15)
Mean Natural Resource Rents	6.2	.5	.086	46.77
as a % of GDP[5]	(5.47)	(2.8)	(1)	(10)
CI GDP Growth	5.659013	3.903637	-5.28574	33.62937
CI Trade as a % of GDP	66.35285	40.03451	0	194.3508
Regulatory Quality: Estimate[6]	-0.4258251	0.6280552	-2.213595	1.45913
Rule of Law: Estimate	-0.5213405	0.5616406	-1.852296	1.28952
Government Effectiveness: Estimate	-0.4287197	0.556012	-1.735644	1.238987
Control of Corruption: Estimate	-0.5373934	0.5242956	-1.616428	1.31124
Political Stability and Violence Estimate	-0.5611528	0.8006841	-2.677004	1.115456
FDI Inflows (CI) % GDP	3.871131	4.40566	-4.89496	34.4637
FDI Outflows (CE) % GDP	4.798195	12.41866	-2.16947	180.0415

Table 1 Provides details of summary statistics for the explanatory variables

Model Specification

I take the standardized FFID score and run an OLS regression to test the explanatory variables' effects detailed in the hypotheses above. My model testing the degree to which factors characterizing both the host state, the home state, and their dyadic relationship on the FFID score takes the following form:

$$y = a + \beta_1 d_{b,t} + \beta_2 g_{i,t} + \beta_3 T_{i,t} + \beta_4 r_b + \beta_5 q_{i,t} + \beta_6 l_{i,t} + \beta_7 c_{i,t} + \beta_8 v_{i,t} + \beta_9 p_{i,t}\, \beta_{10} f_{i,t-1} + \beta_{11} o_{i,t-1} + \delta$$

The dependent variable is tested against the difference in the level of development by quantiles of GDP per capita difference (*d*) for the combination of signatories (*b*) at the time (*t*) of the BIT signing, the host country's (*i*) GDP growth (*g*), the host country's trade as a percentage of GDP (*T*), natural resource dependency (*r*), estimates of the host country's regulatory quality (*q*), the rule of law (*l*), control of corruption (*c*), government effectiveness (*v*), political stability (*p*), the host country's FDI inflows as a percentage of GDP lagged by one year (*f*), as well as the home country's FDI outflows as a percentage of GDP lagged by one year (*o*), followed by the region fixed effects (δ). Further, I run a regional fixed-effects model to indicate the degree to which these differences are potentially a result in regional BIT preferences – reflecting the findings of Paul Haslam (2010) in the evolution of IIA diffusion across the Americas' similarities among European and North American BITs.

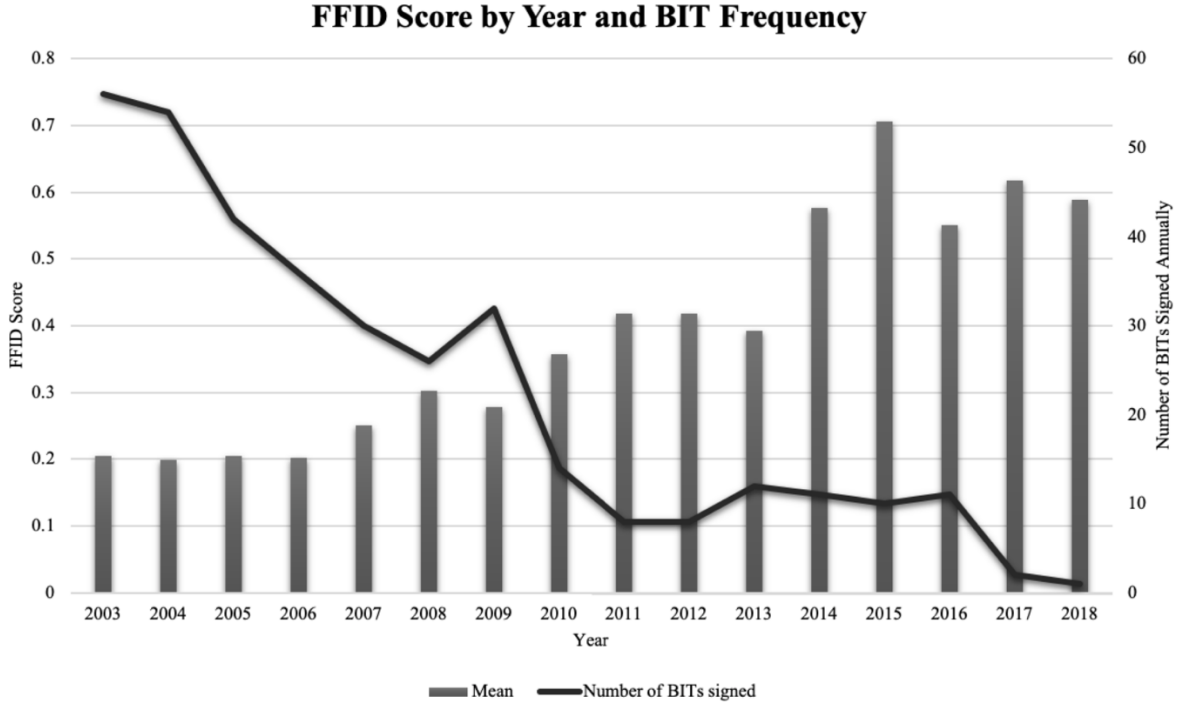

Figure 2 details the average FFID score standardized on a 0-1 scale by year, accompanied by the number of treaties signed that year.

Figure 2 listed above details the mean FFID score per year and the number of BITs concluded annually. This table initially provides support for hypothesis 2, indicating that the mean FFID has increased over time. However, it is also clear that the average number of BITs concluded annually faces a sharp decline, indicating that countries are increasingly sceptical of signing BITs. However, we can see that UNCTAD's policy reform package corresponds with a noticeable shift around 2009 when the treaties become much more flexible on average.

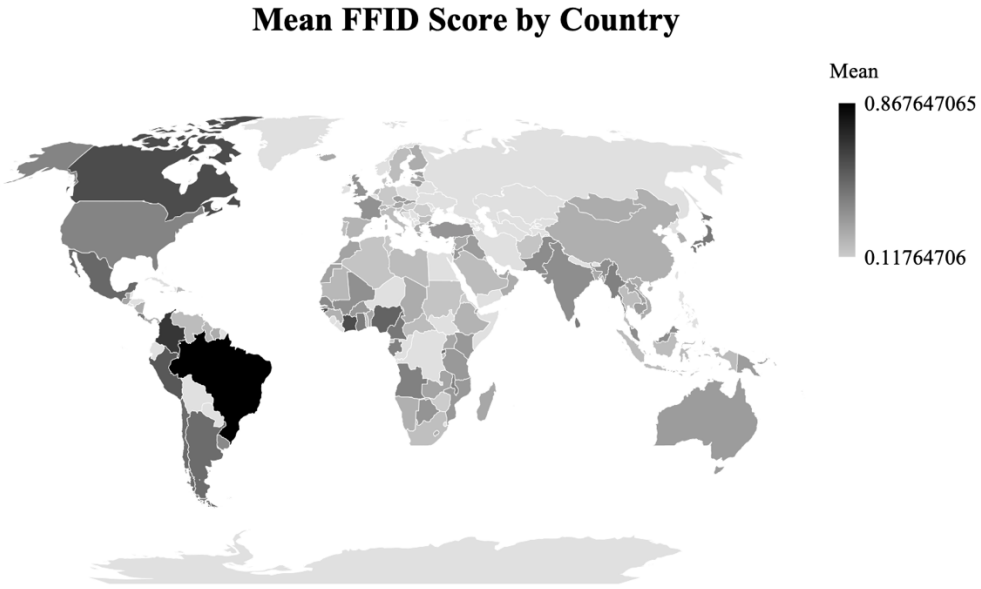

Figure 3 Indicates the average FFID score by each country included in the analysis. The Latin American treaties clearly display a greater degree of flexibility on average than those from Europe or East Asia.

Figure 3 above indicates the variation that exists amongst country BIT programs. Most countries do not have a high score, partially because BITs typically favour investors far more than host states. This mapping visualization also corresponds accurately with what we already know about BIT programs – the Canadian BITs traditionally score higher due to the exceptions they maintain for developing countries, the Brazilian BITs are notoriously progressive, as well as the Colombian BITs. The European BITs are generally quite vague, and thus leave room open for interpretation. This provides not only a picture of the overall weakness of the investment treaties that have been signed but that Latin American countries are far more progressive with their BIT signing and provide opportunities for other countries to adopt similar BIT programs.

Regression Output

From the two models I ran testing the effects of the explanatory variables on the FFID in order to test each of the hypotheses listed above, I present the regression output below.

TABLE 2: Regression Output for Models 1 and 2

VARIABLES	(1) Basic Model	(2) Fixed-Effects
Quantiles Difference in GDP Per Capita	-0.00302*	-0.00672***
	(0.00178)	(0.00211)
Year	0.0310***	0.0277***
	(0.00241)	(0.00234)
CI Trade as a % of GDP	-0.000680***	-0.000734***
	(0.000194)	(0.000186)
CI GDP Growth	0.00133	0.00268
	(0.00190)	(0.00185)
Regulatory Quality: Estimate	0.0571**	0.0213
	(0.0272)	(0.0257)
Rule of Law: Estimate	0.0120	0.0693**
	(0.0319)	(0.0296)
Government Effectiveness: Estimate	-0.0516	-0.0508
	(0.0369)	(0.0356)
Control of Corruption: Estimate	0.0428	0.0182
	(0.0312)	(0.0309)
Political Stability and Violence Estimate	-0.00681	-0.0160
	(0.0124)	(0.0109)
FDI Inflows (CI) % GDP	0.000470	0.000522
	(0.00156)	(0.00136)
FDI Outflows (CE) % GDP	-0.00126***	-0.000954**
	(0.000310)	(0.000371)
Quantiles Nat Resource Dependency	0.00497**	0.00484*
	(0.00240)	(0.00264)

Capital Importer Europe and Central Asia		-0.0619*
		(0.0360)
Capital Importer Latin America and Caribbean		0.0772***
		(0.0282)
Capital Importer Middle East and North Africa		-0.0201
		(0.0236)
Capital Importer South Asia		-0.00871
		(0.0380)
Capital Importer Sub-Saharan Africa		-0.0131
		(0.0232)
Capital Exporter Europe and Central Asia		-0.0124
		(0.0224)
Capital Exporter Latin America and Caribbean		0.137***
		(0.0473)
Capital Exporter Middle East and North Africa		-0.0920***
		(0.0249)
Capital Exporter North America		0.136***
		(0.0360)
Capital Exporter South Asia		-0.0580
		(0.0376)
Capital Exporter Sub-Saharan Africa		-0.0710**
		(0.0314)
Constant	-61.78***	-55.17***
	(4.822)	(4.697)
Observations	353	353
R-squared	0.474	0.617

Robust standard errors in parentheses

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

Results

Model 1 runs the basic model without the fixed effects for signatory regions, and model 2 runs a fixed-effects model on the signatories' region. For hypothesis 1, the regression output indicates the expected direction for the effect of the difference in GDP per capita on the FFID score, yet the effect's strength is minimal and would not correspond to substantial differences in BIT composition. In the first model, the difference between the minimum and maximum values predicts less than a .01 FFID increase – though this increases to .10 in the fixed-effects model. However, this effect is not strong enough to reject the null - that differences in development do not explain differences in the FFID score. Dynamics between host and home state may be far less important than the simple BIT program of the capital-exporting country and for this reason, the fixed-effects regional model holding the signatories constant accounts for omitted variable bias. Because the primary explanatory variable is measured as a quantile of difference in development by GDP per capita, each one-point increase corresponds to a minimal level of change on the FFID, holding all other variables constant.

The output for the coefficient at the year of signing is significant, indicating a substantial increase in the overall level of flexibility for BIT provisions over time. Thus, the regression output indicates support for hypothesis 2, enough to reject the null that time has not had a significant effect on the nature of BIT provisions. The first BIT in the sample was concluded in 2003, and the last is in 2018. The regression's output shows that moving over this period corresponds to a .46 increase on the FFID. This .46 difference separates a treaty that heavily protects investors, such as a US model BIT, from one that provides the host state with substantial flexibility for development, such as the Brazilian model BIT. This finding is substantial because it indicates that the level of flexibility included in the average BIT has increased considerably over time. This is by far the most significant and visible effect from the model output, which indicates that there has been a shift in the international investment regime towards more flexible BITs. This finding provides crucial insight concerning the future of the international investment regime, and suggests that there is a positive trend towards creating more flexible, and equitable, investment agreements.

Natural Resource Dependency

The natural resource dependency quantiles variable exists to assess whether countries with higher natural resource factor endowments are likely to see a pattern flexible BIT provisions. The model indicates that a country with a greater degree of natural resources signs BITs with greater flexibility, corresponding to an increase of .0484 between the minimum and maximum values. This complements Elkins et al., (2008) findings that countries who have an abundance of natural resources are more competitive in terms of attracting foreign investment than states that are dependent on manufacturing. Furthermore, Tobin and Rose-Ackerman (2010) findings also support the view that resource-rich countries are likely to have greater bargaining power due to their natural resource abundance.

CI Trade as a % of GDP

For trade as a percentage of GDP, measuring the degree to which an economy depends on trade, I find the expected decrease of .000734. This has a substantial effect on the change from the minimum to maximum values, though this effect is puzzling. Perhaps countries with a higher proportion of trade as a percentage of GDP are more dependent on foreign investors, decreasing their bargaining power.

FDI Outflows/Inflows

Controlling for the FDI outflows (as a percentage of GDP) displays the strength of the capital-exporting country's position as a foreign investor. When the home country is a significant source of global foreign investment based on the percentage of their GDP from FDI outflows, they are more of a desirable partner for developing countries seeking FDI. This variable's coefficient displays the expected relationship – countries that are significant exporters of FDI have lower flexibility scores or stronger investor protections. Though the effect decreases slightly across the two models, it remains statistically significant and robust. Based on the regression output, I am confident that the greater the home country's FDI outflows as a percentage of their GDP, the higher the discount rate will be for the host country and the more likely they will be to sign a treaty that is less flexible because they will be more likely to have a high interest in joining with that country as an investment partner.

Ironically, this follows from Elkins, Guzman and Simmons (2008), that greater competition for capital is antithetical to development objectives. Even if BITs increase FDI inflows, and it is not entirely clear that they do, if BITs are unbalanced and weigh heavily in favour of investors, they pose a threat to autonomous state-led development, which has implications for industrial policy prospects and positive spillovers.

Governance Indicators

I include the governance estimates of the host state in both of the linear regression models. Although they do not indicate any statistically significant effects in the regression, controlling for them facilitates a greater understanding of the central explanatory variable's effects. For the rule of law variable, which is one proxy for the degree to which a host state might be more dependent on using a BIT to attract FDI, I also find the expected result. A higher score on the rule of law indicates that countries can bargain for better BIT provisions regarding development flexibility. Although most quantitative studies rely on WGI for measuring governance indicators, there are fundamental problems in adopting such broad indicators of governance, particularly an endogeneity concern.

Overall, the regression output indicates support for hypotheses 1-3, and 5-6, though I find less support for hypothesis 4. When taken together, the estimates of factors explaining variation in host country bargaining power do indicate a relationship between bargaining strength and FFID outcomes.

Conclusion

The purpose of this study was to develop an initial picture of how power asymmetries are exploited in the international investment treaty regime. I built off of UNCTAD's concept of "flexibility for development" and coded 353 BITs based on the FFID. This provided an opportunity to see treaties that provided the most significant degree of flexibility for host states and those that failed to do so. This is a crucial area of study as we need to comprehend how BITs affect FDI flows and how economic and political factors influence BITs themselves. Although foreign direct investment does present developing countries with an opportunity to promote

economic development, it is fundamental that the agreements regulating those flows reflect developing country interest.

A few critical limitations must be taken into account when assessing the validity and generalizability of my findings:

1. Quantifying bargaining power is notoriously tricky, and it is based on the assumption that developing countries are internalizing their economic weaknesses in BIT negotiations.
2. The issue classifying which countries are capital-exporting or capital-importing is a methodological limitation, and future studies ought to work to develop more concise ways to measure this dichotomous relationship.
3. Because I rely on UNCTAD's pool of mapped BITs and those available in either English or French, more recent agreements are excluded, which could skew the findings.

This study's question was when and why developing countries sign BITs antithetical to their ability to retain development flexibility. Conclusively, as time goes on and developing countries have learned the costs of investment agreements, they are signing less and less restrictive agreements. This finding provides crucial insight into the implications of power asymmetries for the international investment regime's future. Researchers must continue to study the underlying motivations and interests of emerging markets in BIT negotiations. This research project displays that the push for reform *has* provided a noticeable shift in the types of treaties concluded, particularly in the flexibility they leave for developing countries. Though my findings indicate a certain level of optimism can be had regarding the investment treaty regime's future, change is slow to come, and the vast majority of BITs still favour investors over host states. Furthermore, when the difference in development between signatories is most remarkable, the relative flexibility permissible within an agreement will be comparatively low.

There is no indication that the effect of the global competition for capital is subsiding, meaning that the race-to-the-bottom for liberalization provisions still poses a significant threat for developing countries. There has been a shift in the general content of BITs over time, and the increasing number of treaties concluded between two developing countries may be playing a role in creating better treaties – however, more research will be required to make firm conclusions

about this relationship, particularly regarding the interests and motivations of capital-importing countries. Future studies should also consider dynamics at BIT negotiating tables and more in-depth analyses of host country preferences and where they diverge.

There remains a substantial amount of work to be done to preserve host country regulatory autonomy, and developed countries should be cautious of the power imbalances that allow unmitigated FDI flows with no recognition of developmental impact. Though the central principle underlying the international investment regime is that greater FDI flows will increase prosperity for all parties involved, this study displays that developing countries are increasingly skeptical of this assumption, and are acting accordingly.

Appendix I: FFID Scoring

SCOPE, EXCEPTIONS, OVERVIEW

Indicator	Options	Scoring
Essential Security Exception	Yes	1
	No	0
Exception defined	Yes	1
	No	0
Exception self-judging	Yes	1
	No	0
Public Health & Environment	Yes	1
	No	0
Other Public Policy Exceptions	Yes	1
	No	0
Preamble - Reference to right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations)	Yes	1
	No	0
Label list Definition of Investor	Asset	0
	Enterprise	1
ISDS (Included)	Yes	0
	No	1
ISDS Alternatives	Voluntary ADR	1
	Compulsory ADR	1
	None	0

INVESTMENT PROMOTION

Indicator	Options	Scoring
Institutional Issues (Mech for consultation)	Yes	1
	No	0
Institutional Issues (Framework)	Yes	1
	No	0
Institutional Issues (Technical Capacity)	Yes	1
	No	0
Investment Promotion	Yes	1
	No	0

STANDARDS OF TREATMENT

Indicator	Options	Scoring
*National Treatment (Type)*type MFN*	Pre-Establishment	-1
	Post-Establishment	0

	None	1
National Treatment (Reference to like circumstances)	Yes	1
	No	0
Type of FET Clause	Unqualified	-1
	Qualified	0
	None	1
FET Qualified (by listing FET elements)	Yes	1
	No	0
Expropriation (Scope of Measures Covered)	Indirect Expropriation Not Mentioned	1
	Indirect Expropriation Mentioned	-1
	No Expropriation Clause	1
Expropriation Refining (Indirect, defined)	Yes	1
	No	0
Expropriation Refining (Carve out)	Yes	1
	No	0
Expropriation Refining (Compulsory licences carve out)	Yes	1
	No	0
Exceptions to transfer of funds (BOP)	Yes	1
	No	0
Exceptions to transfer of funds (Other)	Yes	1
	No	0
Prohibition of PR	Explicit	-1
	No Explicit	0
Prohibition of PR (Type)	TRIMS Ref	1
	List of Prohibited	1

Appendix II: GDP Per Capita and Natural Resource Dependency Measurements

Difference GDP Per Capita Quantiles by GDP pc Difference	Mean	Std. Dev.	Freq.
1	405.43746	271.73995	24
2	1518.5291	347.39084	24
3	3580.7047	845.63235	23
4	5808.1226	840.28058	24
5	8941.0134	840.1538	23
6	12576.741	1932.6413	24

7	18009.632	1047.0303	23
8	24078.792	2921.2661	24
9	29267.85	701.56182	23
10	33012.809	1342.619	24
11	36001.917	710.88618	23
12	38716.74	787.41928	24
13	43243.471	2692.3123	23
14	51623.877	2380.9479	24
15	63650.903	6738.4473	23
Total	24611.279	19060.279	353

Quantiles Natural Resource Dependency		STD. DEV.	FREQ.
	1	0.08666064	0.10146776	36
	2	0.76405339	0.3157895	35
	3	2.1756369	0.51129286	36
	4	4.2230914	0.51608791	35
	5	5.8730614	0.50514731	35
	6	7.3264178	0.59908395	36
	7	10.514443	1.4067607	36
	8	15.586354	2.1263562	34
	9	25.641751	4.2490159	35
	10	46.778114	9.6148288	35
TOTAL		11.808647	14.161072	353

DV

Appendix III: Frequency of BIT Provisions by Year

CLAUSE	Mapping Options	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Totals
Preamble - Right to Regulate	No	56	53	42	36	28	25	32	14	8	7	12	10	3	8	1	1	336
	Yes	0	1	0	0	2	1	0	0	0	1	0	1	7	3	1	0	17
Exception Included	No	50	46	36	32	23	12	23	4	2	4	6	1	4	4	1	0	248
	Yes	6	8	6	4	7	14	9	10	6	4	6	10	6	7	1	1	105
Exception Defined	No	53	50	39	35	26	19	25	9	3	4	6	5	7	5	2	0	288
	Yes	3	4	3	1	4	7	7	5	5	4	6	6	3	6	0	1	65
Exception Self-Judging	No	55	50	39	35	29	20	27	10	2	4	6	4	7	4	2	0	294
	Yes	1	4	3	1	1	6	5	4	6	4	6	7	3	7	0	1	59
Exception Public Health & Environment	No	54	49	39	34	29	22	27	11	5	4	5	2	5	6	0	0	292
	Yes	2	5	3	2	1	4	5	3	3	4	7	9	5	5	2	1	61
Exception Other Public Policy Exceptions	No	50	49	35	33	23	23	27	12	5	8	8	3	6	8	1	1	292
	Yes	6	5	7	3	7	3	5	2	3	0	4	8	4	3	1	0	61
Definition of Investor	Asset-based	56	54	42	35	29	26	31	14	8	8	10	6	8	9	2	1	339
	Enterprise-based	0	0	0	1	0	0	1	0	0	0	2	5	1	2	0	0	12
	No Definition	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	2
Type of National Treatment Clause	Pre- and Post-Est	2	3	6	2	4	4	1	3	2	0	5	5	2	1	0	0	40
	Post-Est	51	47	35	33	25	21	28	10	5	8	7	6	8	9	2	1	296
	None	3	4	1	1	1	1	3	1	1	0	0	0	0	1	0	0	17
Type of MFN Clause	Pre- and Post-Est	2	3	6	2	4	4	3	2	3	0	5	6	5	3	1	0	49
	Post-Est	54	50	35	34	26	22	29	11	4	8	7	5	5	8	1	1	300
	None	0	1	1	0	0	0	0	1	1	0	0	0	0	0	0	0	4
FET Qualification	FET	47	46	35	29	17	18	24	10	4	2	3	1	1	1	0	0	238
	Unqualified																	

	FET Qualified	8	8	6	7	12	8	7	4	4	6	8	10	3	9	2	1	103	
	No FET Clause	1	0	1	0	1	0	1	0	0	0	1	0	6	1	0	0	12	
By Listing FET Elements (Exhaustive or Indicative List)	No	53	54	39	36	25	23	27	11	7	7	10	8	4	7	0	1	312	
	Yes/NA	3	0	3	0	5	3	5	3	1	1	2	3	6	4	2	0	41	
Scope of Measures Covered (Expropriation)	Indirect Mentioned	56	53	42	36	30	24	31	13	8	8	12	11	4	10	2	1	341	
	Indirect Not Mentioned	0	1	0	0	0	2	1	1	0	0	0	0	6	1	0	0	12	
Indirect Expropriation Defined	No	54	51	40	34	30	20	26	8	6	8	8	3	8	5	0	1	302	
	Yes	2	3	2	2	0	6	6	6	2	0	4	8	2	6	2	0	51	
Carve-Out for General Regulatory Measures	No	56	53	41	34	29	20	27	9	4	4	6	3	8	7	2	0	303	
	Yes	0	1	1	2	1	6	5	5	4	4	6	8	2	4	0	1	50	
Balance of Payments Exception	No	43	45	36	26	17	19	23	10	3	1	5	0	1	2	0	0	231	
	Yes	13	9	6	10	13	7	9	4	5	7	7	11	9	9	2	1	122	
Other Specific Exceptions (e.g. to protect creditors etc)	No	48	51	35	29	23	18	23	9	5	5	4	2	3	0	0	0	255	
	Yes	8	3	7	7	7	8	9	5	3	3	8	9	7	11	2	1	98	
Includes Prohibition of Performance Requirements	Explicit Prohibition	3	3	2	2	4	3	4	1	3	1	7	5	3	3	0	0	44	
	No Explicit Prohibition	53	51	40	34	26	23	28	13	5	7	5	6	7	8	2	1	309	
Alternatives to Arbitration	No Alternatives	43	43	34	31	26	15	26	9	6	7	11	7	3	8	0	1	270	
	Voluntary Alternatives	13	11	8	5	4	11	6	5	2	1	1	4	1	3	2	0	77	
	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	6	0	0	0	6	
Type of Consent to Arbitration	Provides Consent	55	54	41	36	30	25	32	12	8	7	12	10	4	11	2	1	340	
	Case-by-Case/No ISDS	1	0	1	0	0	1	0	2	0	1	0	1	6	0	0	0	13	
Mechanism for Consultation	No	36	38	26	24	19	20	20	13	4	7	6	6	6	6	1	1	233	

between Parties	Yes	20	16	16	12	11	6	12	1	4	1	6	5	4	5	1	0	120
Institutional Framework (Committee)	No	54	51	41	35	28	24	31	13	6	7	7	10	4	9	2	1	323
	Yes	2	3	1	1	2	2	1	1	2	1	5	1	6	2	0	0	30
Technical Capacity Building	No	56	54	41	35	28	26	31	13	8	7	12	10	4	10	2	1	338
	Yes	0	0	1	1	2	0	1	1	0	1	0	1	6	1	0	0	15

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