Virginia Journal of International Law

Volume 51 — Number 2 — Page 397

Article

Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence

Jason Webb Yackee

Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence

JASON WEBB YACKEE*

One of the most important empirical questions today in international economic law is whether bilateral investment treaties (BITs) are likely to promote inflows of foreign direct investment (FDI). This Article presents a novel, multi-method examination of that question. Using regression analysis, I show that BITs are not meaningfully correlated with measures of political risk. Using survey evidence, I show that providers of political risk insurance do not reliably take BITs into account when deciding the terms of insurance. Nor do in-house counsel in large U.S. corporations view BITs as playing a major role in their companies' foreign investment decisions. In contrast to existing empirical studies, which claim to prove that BITs can have massive positive impacts on FDI, my results suggest that such results may be spurious. It appears that BITs are unlikely to significantly drive foreign investment.

* Assistant Professor of Law, University of Wisconsin Law School. Thanks to the University of Wisconsin Center for World Affairs and the Global Economy for providing financial assistance, to John Matthew Linstroth and Naya Mukherji for excellent research assistance, and to Darian Ibrahim, Mark Weidemaier, Anuj Desai, Rachel Brewster, and Amanda Perry for helpful comments. Susan Franck provided valuable encouragement as well. Earlier versions of this research were presented at the UW Law School Ideas and Innovations Seminar Series, the Midwest Political Science Association 2010 National Conference, the Law and Society Association's 2010 Annual Meeting, and a workshop at the London School of Economics and Political Science that was organized by Anthea Roberts. I may be contacted at jason.yackee@alumni.duke.edu.

INTRODUCTION

In recent years, a remarkable number of countries have entered into bilateral investment treaties (BITs) as an ostensible means of protecting and promoting inward foreign direct investment (FDI). Today, more than two thousand such treaties have been signed,[1] involving countries of all levels of development and from all corners of the globe, and investors are increasingly using the treaties to sue host state governments before international tribunals for alleged violations of treaty provisions.[2] One of the key empirical questions that has emerged from the BIT phenomenon is whether the treaties "work." The central premise of investment treaties is that states that agree to the disciplines and rigors of international investment law will enjoy benefits that offset the various costs. In exchange for giving up what might be called "policy space," or some measure of regulatory autonomy, host states expect, or hope, to receive increased flows of investment.[3]

Scholars have devoted substantial energy to examining whether this so-called "grand bargain" has in fact been realized.[4] Most of these studies follow a common research design. The number of BITs that a state has signed or ratified is counted up, with the resulting independent variable regressed against country-level FDI flow data — such as that

1. *See* U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2006, at 26, U.N. Sales No. E.06.II.D.11 (2006).

2. *See* discussion *infra* Part I.

3. By "policy space," I mean a government's freedom to choose a particular policy instrument as a means to (attempt to) achieve a given policy goal. *Cf.* Jörg Mayer, *Policy Space: What, For What, and Where?* 27 DEV. POL'Y REV. 373, 373–95 (2009) (originally appeared as UNCTAD Discussion Paper No. 191, U.N. DOC. UNCTAD/OSG/DP/2008/6 (Oct. 2008)). As Mayer points out, "policy space" is not the same as "policy effectiveness," and it is possible that international legal limits on policy space may actually enhance policy effectiveness. *Id.* at 378.

4. On the "grand bargain," see 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, 75–79 (2005). The empirical literature on BITs and FDI is very helpfully summarized in U.N. CONF. ON TRADE AND DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009).

included in the World Bank's World Development Indicators[5] — usually using a pooled cross-sectional time series design.[6] Unfortunately, the results of these various statistical exercises are inconsistent. Some studies show that BITs can have massive positive impacts on foreign investment;[7] others show modest positive impacts;[8] still others show no impact at all,[9] or even a negative impact.[10] While this inconsistency may in part derive from the fact that the various studies differ in data sources, model content, and precise statistical methodology,[11] it is nonetheless discouraging that scholars have not yet been able to provide anything close to a definitive answer of whether BITs indeed achieve their central purpose: increased flows of investment.

In this Article, I approach the basic question of whether BITs work from a novel evidentiary perspective. As I have argued elsewhere, the ability to persuasively answer the "Do BITs work?" question using traditional large-sample statistical methods and existing data are probably limited.[12] The "best" answer is likely to remain an inconsistent and uncertain one unless scholars begin to approach the study of the impact of BITs on foreign investment decisions by focusing on different data, different methods, and different levels of analysis. While these alternatives will suffer their own potentially severe methodological and conceptual problems, combining results across approaches may allow triangulation toward something approaching an accurate understanding of how much, if at all, investors care about BITs when deciding whether and where to invest.[13]

I pursue three avenues of inquiry. First, I examine whether investment treaties appear to influence rankings of "political risk" provided by for-profit business consultants. If investment treaties are

5. *See* INDICATORS, WORLD BANK, http://data.worldbank.org/indicator (last visited Nov. 5, 2010).

6. *See* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1568 (2005).

7. *See id.* at 1582.

8. *See* Salacuse & Sullivan, *supra* note 4, at 105.

9. *See* Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 827–28 (2008).

10. *See* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* 19 (World Bank, Dev. Research Grp., Policy Research Working Paper No. WPS 3121, 2003), *available at* http://tinyurl.com/3akk3af.

11. *See* discussion *infra* Part II.

12. *See* Yackee, *supra* note 9.

13. On the benefits of multi-method and within-method triangulation, see Todd D. Jick, *Mixing Qualitative and Quantitative Methods: Triangulation in Action*, 24 ADMIN. SCI. Q. 602 (1979).

important elements in the foreign investment decision-making process because they protect against the risk of adverse political actions (like expropriation), it might be expected that companies whose line of business is to gauge such risks will incorporate the presence or absence of treaties into their evaluations. In other words, I use political risk rankings as a dependent variable, in substitution for FDI inflows, the more commonly used dependent variable.

Second, I present results from a small e-mail survey of providers of political risk investment insurance, in which I asked respondents to describe the extent to which investment treaties entered into their underwriting decisions. I posit that if BITs matter to investors because they successfully reduce political risk, we might expect insurers to take the treaties into account when deciding whether to issue investment insurance on particular terms.

Third, I present results from an original, mail-based survey of general counsel (GC) in large U.S.-based corporations, in which I ask respondents whether investment treaties influence their companies' decisions to invest. I propose that if investment treaties meaningfully impact FDI, that influence is likely to flow into a corporation's decision-making process through its GC's office, which acts as a repository of legal knowledge within the corporation, and which is typically tasked with advising on the legal implications of corporate decisions. If the GC's office has little knowledge or appreciation of BITs as risk-reducing devices, it is unlikely that non-lawyer corporate decision makers factor the treaties into their investment decisions.

The results of these three lines of inquiry provide evidence that BITs do not meaningfully influence FDI decisions. BITs are not strongly correlated with political risk rankings, and providers of political risk insurance only inconsistently take BITs into account when making underwriting decisions. Indeed, the majority of providers surveyed do not view BITs as relevant to their underwriting decisions. Finally, general counsel report relatively low corporate familiarity with, or appreciation of, BITs as risk-reducing devices.

These results by no means definitively prove that BITs never matter to investors when they decide whether and where to invest. Nor do they prove that BITs will not matter more to investors at some time in the future, as knowledge of BITs and confidence in the strength of their protections grows. What the study does suggest, however, is that grandiose claims about the empirically demonstrated ability of BITs to promote investment should be consumed with caution. BITs may influence certain investment decisions, but the results presented below suggest that they do not seem to influence many others. BITs have probably not been the primary cause — and perhaps not even a partial cause — of the massive increase in foreign investment to the developing world that began in the 1990s.

I. BACKGROUND

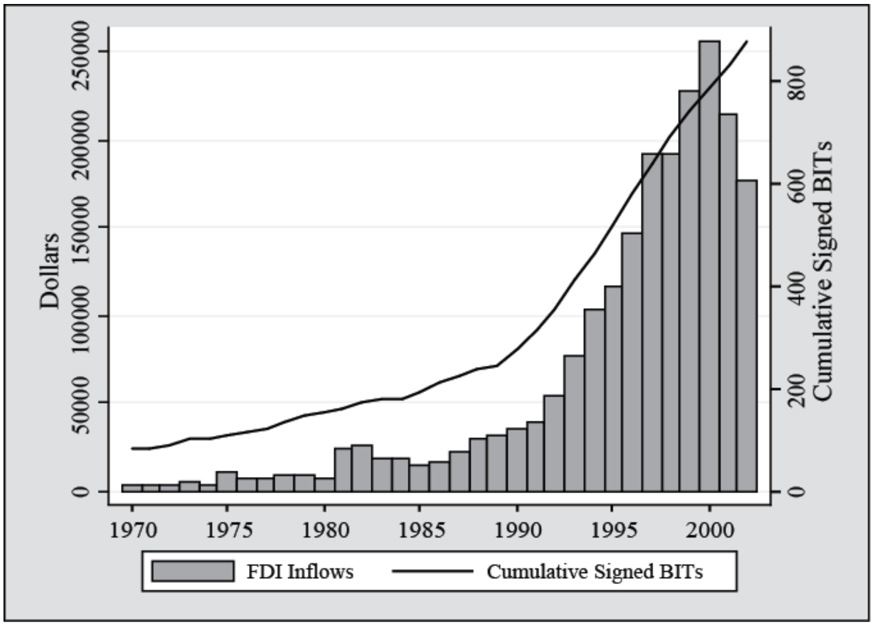
The history of the BIT phenomenon has been told in detail in a good number of books and articles, and I cover only the basics here.[14] A 1959 treaty between Germany and Pakistan is typically cited as the first BIT.[15] Since 1959, states have signed over 2500 broadly similar agreements, with the vast bulk of those treaties signed since the early 1990s. Figure 1 illustrates the cumulative number of BITs signed since 1979, along with the annual dollar amount of FDI flowing into the developing world.[16]

14. The scholarly literature on BITs has been expanding at a ferocious rate in recent years. For example, a search of Westlaw's JLR ("journals and law reviews") database prior to 1996 returns 217 articles that include the phrase "bilateral investment treaties." A search from 1996 through 2010 returns 1125 articles. For useful entries into this literature, see Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 641 n.2 (1998) (providing citations to helpful introductions to BITs).

15. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 436 (2008). In fact, however, the Germany–Pakistan BIT was preceded by a number of broader commercial ("friendship, commerce, and navigation," or "FCN") treaties that contained investment provisions substantively identical to those in the Germany-Pakistan treaty. *Id.* at 429, 438.

16. FDI STATISTICS INTERACTIVE DATABASE, UNCTAD, http://tinyurl.com/y8os4bm (last visited Oct. 6, 2010). FDI figures are in millions of current U.S. dollars. I have argued elsewhere that UNCTAD's list of BITs is problematic as a stand-alone measure of the extent to which a given state has "credibly committed" to treating investors favorably, though it does serve as a useful general indicator of overall trends. *See* Yackee, *supra* note 15, at 409–10.

FIGURE 1: CUMULATIVE WORLD BITS (SIGNED) & FDI INFLOWS TO THE DEVELOPING WORLD



BITs share a number of common elements. The treaties are, obviously, bilateral. They involve two states, often a capital-exporting (developed) and a capital-importing (developing) state.[17] They are formally reciprocal; the Germany–Pakistan treaty applies equally to German investors in Pakistan and to Pakistani investors in Germany. The treaties deal more or less exclusively with investment issues — excluding, for example, trade-related provisions[18] — and they typically define "investment" very broadly, even to the point of including portfolio investment. Most BITs extend to investors a common core of substantive promises of favorable treatment. For instance, investors are typically guaranteed freedom from discriminatory treatment (vis-à-vis domestic investors or foreign investors from third states), freedom from "unfair," "inequitable," or "arbitrary" treatment, freedom from

17. Yackee, *supra* note 15, at 405. There is no logical or legal reason why the treaties *must* be bilateral, however. While the OECD's attempt to create a Multilateral Agreement on Investment (MAI) famously collapsed in the aftermath of the ill-fated Seattle World Trade Organization Ministerial in 1999, multilateral BIT-like instruments exist in the form of the Energy Charter Treaty and in free trade agreements, like NAFTA, whose Chapter 11 is, essentially, a BIT embedded in a tripartite trade treaty. *See* Yackee, *supra* note 15, at 434–36.

18. In contrast, the older FCN treaties dealt with trade and investment. The United States has moved back to an FCN model, embedding modern BITs as "investment chapters" in free trade agreements, like NAFTA. *Id.* at 436–44.

uncompensated expropriation, and the right to freely transfer assets out of the host country.[19]

Not until the 1980s, however, did BITs begin to routinely couple these substantive promises with an important procedural guarantee: the right of the investor to initiate binding, enforceable international arbitration against the host state for alleged treaty breaches. It is the coupling of substantive guarantees with effective procedures for international enforcement that makes the treaties theoretically useful to investors.[20] Given the vagueness of most BIT promises, authoritative adjudication is necessary to give the promises meaning and to apply the promises to often murky sets of facts.[21]

Virtually all modern BITs now contain state consents to investor-initiated arbitration,[22] and the predictable result has been an explosion in BIT-based disputes. The World Bank's International Centre for the Settlement of Investment Disputes (ICSID), which is charged by many BITs with resolving treaty disputes, has seen its caseload expand dramatically. ICSID began operations in 1966, and in its first thirty years registered just thirty-five cases.[23] Today, the total number of registered cases stands at over 300.[24] Nearly half of those cases have been concluded, many resulting in final awards on the merits.[25]

While many BIT lawsuits ultimately fail, with disgruntled investors receiving little, if anything, in financial compensation, investors do sometimes win meaningful awards.[26] In a growing number of cases,

19. *Id.* at 415–17.

20. *See id.* at 420–22, 432–33; *see also* Thomas W. Wälde, *The "Umbrella" Clause in Investment Arbitration — A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVESTMENT & TRADE 183, 190, 194 (2005) (arguing that arbitration is the key to BIT effectiveness).

21. Put somewhat differently, BITs tend to consist of standards rather than rules, and standards, by definition, require further elaboration (by a court or arbitrator, or by an administrative agency) before they can be applied to a given set of facts. On distinguishing between rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

22. *See* Yackee, *supra* note 15, at 423–33 (providing an empirical analysis of dispute settlement provisions in BITs).

23. *See ICSID Cases*, ICSID, http://tinyurl.com/35jf4cn (last visited Oct. 6, 2010). This website provides a comprehensive list of concluded and pending cases, and the figures cited above were compiled from this list. Data on ICSID's caseload over time can also be found in ICSID, THE ICSID CASELOAD — STATISTICS 2010-2 (2010), http://tinyurl.com/2dcsjw7. For example, page seven of the report provides a helpful graph of annual case registrations since 1972.

24. THE ICSID CASELOAD — STATISTICS 2010-2, *supra* note 23, at 7.

25. *See List of Concluded Cases*, ICSID, http://tinyurl.com/24jq8vf (last visited Oct. 11, 2010).

26. *See* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 49 (2007) (finding that approximately 58% of investment treaty awards resulted in a win for the state respondent). Franck also finds that the average damage

investors are using BITs to bring highly ambitious and politically explosive claims that seek to push international investment law far beyond its customary origins.

For example, Dow Chemical, a United States corporation, is currently using a BIT embedded in the North American Free Trade Agreement (NAFTA) to challenge a Québec environmental regulation that bans the cosmetic use of certain herbicides on residential lawns. Dow's claim seeks to read into international investment law a requirement that environmental regulations be based purely on scientific analysis, with little or no room for political considerations.[27] The case has received significant public attention in Canada, and it threatens to reopen the debate over whether NAFTA's investment chapter improperly limits the ability of states to regulate in the public interest.[28]

Perhaps more dramatically, Argentina has recently faced over thirty BIT-based arbitrations, comprising claims of billions of dollars in damages, from investors disgruntled by Argentina's policy responses to its 2001 currency crisis.[29] The arbitral onslaught has raised important and sensitive questions about the role that international law and international adjudication should play in regulating state responses to economic emergencies.[30]

To summarize, despite the growing popularity of BITs over the last two decades, fundamental questions about their efficacy remain in

---

award for cases won by investors was over \$10 million, but that awards of over \$10 million are relatively rare. *Id.* at 58–60. Franck argues that amounts awarded are typically much lower than the investor's initial damage claims. *Id.* at 59–60.

27. Howard Mann, *DOWning NAFTA?*, INVESTMENT TREATY NEWS (May 3, 2009, 4:34 AM), http://tinyurl.com/cj6sh5.

28. In the early years of NAFTA, environmental organizations devoted significant worry to the development of a broad "regulatory takings" doctrine under the treaty's investment chapter. Those worries have so far proved largely unfounded, as NAFTA tribunals, like BIT tribunals more generally, have tended to avoid using expropriation provisions in the treaties to preclude states from enacting non-arbitrary, non-discriminatory regulatory changes, even if those changes impair the profitability of foreign investment. For an overview, see generally Jessica C. Lawrence, Note, *Chicken Little Revisited: NAFTA Regulatory Expropriations After* Methanex, 41 GA. L. REV. 261 (2006).

29. 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, 432–35 (Todd Weiler ed., 2005).

30. On the challenges that Argentina poses for the ICSID system, see generally Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449 (2007). One of the key doctrinal issues to emerge from the crisis is whether escape-valve provisions in the treaties — the so-called "non-precluded measures" provisions — should be interpreted broadly or narrowly. *See* William W. Burke-White & Andreas vos Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 314–15 (2008).

dispute. For example, analysts disagree as to whether BITs improve FDI flow, or to what degree, a question to which I turn in the next Part.

II. REVIEW OF PRINCIPAL EMPIRICAL STUDIES

The lawsuits discussed in the previous Part seem to provide clear evidence that BITs can impose significant costs on host states.[31] BIT dispute resolution is expensive,[32] and adverse awards, though relatively rare, are sometimes quite substantial, especially in relation to the public fiscs of small, developing countries.[33] The threat of BIT lawsuits may also force states to reverse or avoid implementing desired policies.[34] Whether these costs are worth bearing depends on whether the treaties offer any countervailing benefits. Developing countries ostensibly enter BITs in the hope that by granting international legal protections to investors, investors will accordingly be more likely to invest. Developmentally speaking, more investment may be a good thing.[35]

---

31. A small number of states have begun to question whether membership in the BIT system is desirable. *See* Kate M. Supnik, Note, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 355–57 (2009) (discussing Bolivia's withdrawal from ICSID, Ecuador's attempts to limit exposure to ICSID arbitration, and the failure, at Australia's insistence, of the United States–Australia Free Trade Agreement to include binding arbitration in the FTA's investment chapter). Even the United States has sought to scale back its potential liability under international investment law by modifying its model BIT to provide investors with less generous rights. Wenhua Shan, *From "North-South Divide" to "Public-Private Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 650 (2007).

32. Susan Franck, *Rationalizing Cost Awards in Investment Treaty Arbitration*, 88 WASH. U. L. REV. (forthcoming 2011) (on file with the Virginia Journal of International Law) (citing reports of investment treaty arbitrations with total costs of approximately $20 million). Franck finds that the typical investment treaty arbitration probably costs in total something closer to $1.5–2.0 million (including lawyers' fees and tribunal fees). *Id.*

33. For example, Ecuador recently received an adverse award of $700 million, equivalent to approximately 20% of the country's 2009 foreign exchange reserves. Ben Casselman, *Ecuador to Pay Chevron Damages*, WALL ST. J. (Mar. 30, 2010, 9:06 PM), http://tinyurl.com/2fdcudx.

34. BIT tribunals typically award monetary damages for treaty violations. This practice suggests that investment treaties do not "prevent" states from regulating or otherwise acting as they wish. Instead, the treaties merely impose a price for treaty-violative actions. States that are willing to pay that price can implement any policy that they were able to implement prior to entering into BITs.

35. Surprisingly, however, a link between FDI and economic growth appears to be relatively weak. *See* Maria Carkovic & Ross Levine, *Does Foreign Direct Investment Accelerate Economic Growth?*, *in* DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? 195 (Moran et al. eds., 2005) (reporting evidence that FDI does not independently impact growth rates). FDI may also make it more difficult for countries to achieve other non-growth policies, such as distributional fairness, environmental sustainability, or macroeconomic stability. Put somewhat differently, the case for FDI as an alloyed "good" is, empirically, weaker than one might otherwise expect it to be.

Why might investors be more likely to invest with the protections of a BIT? Observers typically suggest that the treaties help to create a secure regime of "property rights" for investors.[36] Less abstractly, one can view BITs as providing investors with theoretically enforceable promises that the host state will not interfere with the profitability of the investment in certain relatively vaguely defined ways. As already discussed above, most of the treaties seek to restrain uncompensated "expropriation" of foreign investments, or to prevent "discriminatory" or "arbitrary" interference. One highly contentious and largely unresolved issue with many BITs is the extent to which such guarantees create a "property right" to be free of "regulatory expropriation" — that is, the extent to which the treaties might require a host state to pay damages to an investor when a generally applicable regulation in the public interest happens to harm the investment, as in the Dow Chemical case mentioned above.[37] The debate over international regulatory takings doctrine illustrates the point that BITs do not simply "protect" pre-existing "property rights." They may serve in part *to create* property rights (or, at least, to provide an adjudicatory venue in which to argue for or against the creation of property rights) that investors previously did not enjoy.

Do investors base their investment decisions on BIT-based promises of favorable "property rights"? A casual graphic examination of the growth in popularity of BITs and the corresponding increase in FDI to the developing world suggests that an empirical link between the two might not be difficult to find. Figure 1, shows two upward-trending series. The number of signed BITs increased from 165 in 1979 to 2625 in 2006, the last year for which the United Nations Conference on Trade and Development (UNCTAD) dataset provides BIT data. FDI to the developing world increased from $8.990 billion in 1979 to $620.733 billion in 2008 — a factor of seventy-seven. A simple regression of the two series returns an R^2 of 0.89, with the cumulative number of signed BITs proving a highly significant predictor of FDI inflows.[38]

36. *See, e.g.*, Salacuse & Sullivan, *supra* note 4, at 103; Hallward-Driemeier, *supra* note 10, at 2. Others suggest that investors care about BITs because BITs provide international legal support for the norm of *pacta sunt servanda*, thereby allowing investors and host states to enter into legally binding contracts. I have criticized this latter view. Jason Webb Yackee, Pacta Sunt Servanda *and State Promises to Foreign Investors in the Era Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550 (2009).

37. On BITs and regulatory takings, see Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 87–143 (2003).

38. An r-squared statistic represents the proportion of variability in the dependent variable explained by the model. It serves as a helpful measure of model fit. R-squared values can range from 0 (0%) to 1.0 (100%), with 1.0 indicating perfect fit. The coefficient on the independent

Surprisingly, however, analysts have had great difficulty reliably demonstrating a statistically significant, substantively meaningful correlation between BITs and FDI using more sophisticated multivariate frameworks. In the remainder of this Part, I present a brief summary of the principal existing studies.[39]

UNCTAD provided the first important econometric study of the relationship between BITs and FDI.[40] In a 1998 publication, UNCTAD reported results of a cross-sectional time-series model of the determinants of bilateral FDI inflows. The study covered seventy-two host states over twenty-three years. The authors found that the relationship between BITs and FDI was statistically weak, both in the sense of statistical significance and in the sense of magnitude of effect, and they concluded that BITs could be expected to only "marginally increase" FDI.[41]

A 2003 study by Hallward-Driemeier, a World Bank researcher, reported somewhat more pessimistic results.[42] Hallward-Driemeier conducted an analysis of twenty years of bilateral FDI flows from Organisation for Economic Co-operation and Development (OECD) countries to developing countries. In most of this study's models, BITs are either insignificantly correlated with FDI or are significantly and, counter-intuitively, *negatively* associated, implying that BITs might actually harm a country's FDI prospects.[43] Other models in the study showed a statistically significant, positive correlation, but only for countries that already had strong domestic property-rights regimes — countries that, Hallward-Driemeier suggests, are "the least in need of a BIT to signal the quality of their property rights."[44] Hallward-Driemeier concludes that there is "little evidence that BITs have stimulated additional investment."[45]

In a 2005 study, Salacuse and Sullivan analyzed the effects of BITs on aggregate (rather than bilateral) FDI flows, focusing in particular on

---

variable (cumulative count of world signed BITs) is 122; p is <0.01.

39. For a helpful and more comprehensive review of empirical studies of BITs and FDI, see U.N. CONF. ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009).

40. *See* U.N. CONF. ON TRADE & DEV., BILATERAL INVESTMENT TREATIES IN THE MID-1990S, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998).

41. *Id.* at 105–22.

42. Hallward-Dreiemer, *supra* note 10.

43. *Id.* at 19. An alternative implication of Hallward-Driemeier's findings of a negative correlation between BITs and FDI is that the countries that tend to sign BITs may be those that are relatively unattractive to investors, and that BITs do not sufficiently "work" to overcome that unattractiveness.

44. *Id.* at 23.

45. *Id.* at 22.

the effects of signing a BIT with the United States.[46] They reported a statistically significant and massive positive effect: Entering a BIT with the United States is associated with an "increased global FDI to a given country in a given year by 77%–85% (at a 1%–5% significance level)."[47] In other words, entering a BIT with the United States might nearly double a country's FDI inflows. Curiously, however, Salacuse and Sullivan reported that entering BITs with other OECD countries had no significant effect on FDI.[48] The authors suggested that the source of the differential effect is the comparative liberality of United States BITs.[49]

Neumayer and Spess present another important econometric study of BITs and FDI.[50] The authors reported evidence that BITs have a highly significant and substantively important positive impact on FDI inflows, such that, for example, a country might nearly double its FDI by signing BITs with a large number of capital-exporting countries.[51] However, the authors also found some evidence that this relationship may be conditional on the strength of domestic political institutions in the host state. Host states with domestic institutions that are ineffective at protecting the property rights of foreign investors may be more likely to see a significant impact on FDI upon signing a BIT, and that positive effect may decline as domestic institutions improve.[52] The authors concluded that BITs may be useful "substitutes" for domestic political reform.[53]

Neumayer and Spess's positive results are roughly consistent with results of a 2004 study by Egger and Pfaffermayr that used a different source of FDI data. Egger and Pfaffermayr found that ratifying a BIT is associated with a 30% increase in outflows from the capital-exporting country to the ratifying country.[54] They concluded that "BITs exert a

46. Salacuse & Sullivan, *supra* note 4, at 96–115.

47. *Id.* at 120.

48. *Id*. at 105 (reporting that "the addition of a new [non-U.S.] OECD BIT has a weak positive effect" on FDI, but that this effect "[lacks] statistical significance").

49. Unlike most European BITs, United States BITs give investors a right to "establish," or make, an investment. European BITs tend to provide guarantees of favorable treatment that are arguably applicable only after an investment has been made. It seems likely, however, that states that sign European BITs are also simultaneously opening their markets to greater investment through changes in domestic law. In other words, whether a host state has a liberal establishment regime for FDI is not necessarily dependent on whether it provides a right of establishment in a BIT.

50. Neumayer & Spess, *supra* note 6.

51. *Id.* at 1582 ("[A] country experiencing a one standard deviation increase in the BIT variable[] is predicted to increase its FDI inflow by between 43.7% and 93.2%.").

52. *Id.* (concluding that their study provides "some limited evidence that BITs function as substitutes for institutional quality" through this kind of conditional relationship).

53. *Id.*

54. Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on*

positive and significant effect on real stocks of outward FDI."[55] Büthe and Milner, both political scientists, likewise found a significant positive effect of BITs on FDI; in their base model, one standard deviation in the cumulative number of BITs signed resulted in a 29% increase in FDI as a percent of host country GDP.[56]

One potential problem with the studies discussed so far is that they typically failed to distinguish between differences in what might be called the "strength" of investment treaties.[57] As I suggested above, if investors are likely to see great utility in BITs, it is because the treaties give investors the right to sue states for treaty breaches. However, most BITs signed prior to 1985 do not contain investor-state arbitration provisions.[58]

In a 2009 article, I argued that if BITs impact FDI, that effect should most likely be seen in respect to "strong" BITs — that is, those BITs that provide for arbitration. In other words, perhaps the inconsistent results of existing studies are due to the fact that those studies lump together "strong" and "weak" BITs.[59] I found little evidence, however, that even strong BITs were correlated with FDI inflows. I suggested that these results cast doubt on the validity of the hypothesis that BITs should induce large inflows of foreign investment.[60]

In the most econometrically sophisticated study to date, Aisbett identified a number of serious methodological challenges that existing studies largely ignored, including problems of endogeneity, autocorrelation, and omitted variables.[61] She found that once these

---

Foreign Direct Investment, 32 J. COMP. ECON. 788, 790 (2004) ("We find a significant and positive impact of ratified BITs throughout. The estimated effect of BITs on real outward FDI stocks amounts to about 30% in the preferred specification.").

55. *Id.* at 801.

56. Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, *in* THE EFFECTS OF TREATIES ON FOREIGN DIRECT INVESTMENT 171, 196–99 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

57. The Salacuse and Sullivan study is a partial exception. As noted above, the authors explain their mixed results (a strong, significant positive effect on FDI for United States BITs and no significant effect for European BITs) on the basis of the strength of United States treaties. While it is certainly true that United States BITs are more aggressive in requiring host states to permit investments, in other areas, United States BITs may actually be *weaker* than their European counterparts. Over time, the United States has amended its model BIT in ways that serve to cabin the discretion of arbitrators to recognize expansive, pro-investor rights. *See* Shan, *supra* note 31, at 650 (discussing the "'gradual, relatively moderate (but unmistakable) weakening' in the United States of the traditional high standard of investment protection").

58. *See* Yackee, *supra* note 15, at 423–33.

59. Yackee, *supra* note 9. For a related study, see Jason Webb Yackee, *Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment*, *in* THE EFFECTS OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 56, at 379.

60. Yackee, *supra* note 9, at 827–28.

61. *See* Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation*, *in* THE EFFECTS OF TREATIES ON FOREIGN DIRECT INVESTMENT,

problems were addressed using appropriate statistical methods, significant correlations between BIT ratification and FDI inflows disappeared.[62]

On the other hand, a 2009 study by political scientist Andrew Kerner also explicitly recognized statistical problems of endogeneity, though he attempted to deal with these problems differently than Aisbett.[63] Kerner utilized a self-admittedly "controversial" instrumental variable methodology. He used the percent of a host state's neighbors that have ratified new BITs as an instrument — a statistical substitute — for the actual explanatory variable of interest: whether the host state itself has ratified any new BITs.[64] Kerner's results suggested that ratifying a BIT can induce a $600 *million* increase in annual FDI inflows from the home state.[65]

What can be taken away from these various studies? Considered collectively, econometric-minded analysts have failed to uncover any consistent evidence that BITs influence investment decisions — if analysts try to identify that influence by looking for statistically significant, substantively meaningful correlations between the number of BITs a host state has signed and FDI inflows.

But, as Aisbett noted, this is not quite the same as saying that we *know* that BITs do not work.[66] The studies reviewed above suffer from a number of potential problems or difficulties that may help to explain the failure to arrive at consistent conclusions. The potential problems are threefold: poor data quality, statistical issues, and problems of theory.

First, the quality of FDI flow data is notoriously poor.[67] States measure FDI in various, often incomparable, and time-inconsistent ways. Many developing states have limited administrative capacity to accurately measure FDI, no matter the methodology adopted.

Further, FDI data on a bilateral basis is surprisingly limited.[68] This makes it very difficult to examine, for instance, whether signing or

---

supra note 56, at 395.

62. *Id.* at 421 (concluding that previous findings of a positive relationship between BITs and FDI are probably due to "misspecification and insufficient attention paid to the endogeneity of BIT participation").

63. Andrew Kerner, *Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*, 53 INT'L STUD. Q. 73, 82–98 (2009).

64. *Id.* at 93 (noting the potentially "controversial" nature of his modeling choices).

59. *Id.* at 90.

66. Aisbett, *supra* note 61, at 422.

67. *See* Jimmy Zhan, *FDI Statistics: A Critical Review and Policy Implications*, WORLDWIDE ASS'N OF INV. PROMOTION AGENCIES (Oct. 2006), http://tinyurl.com/23laldb.

68. The best source of bilateral FDI data is *OECD International Direct Investment Statistics*, OECD ILIBRARY, http://tinyurl.com/2e8rbgr (last visited Oct. 11, 2010). However, while this database provides reasonably comprehensive data on bilateral FDI flows between OECD members, the database contains a great number of "missing" observations for country pairs

ratifying a French BIT leads to greater levels of French-origin FDI. As a result, most of the "Do BITs work?" literature is forced to present analyses of BITs on aggregate-level FDI inflows, an arguably second-best alternative to bilateral analysis.[69] Even if researchers had more complete bilateral FDI data, however, the practical realities of modern foreign investment, in which investments may be "round-tripped" or "trans-shipped" to achieve favorable tax or treatment, mean that it is often highly challenging to trace cross-border flows of capital back to their primary or "real" sources.[70]

FDI data are also aggregate in the sense that they fail to distinguish investments by sector. This makes it impossible to determine empirically whether the effects of BITs on FDI are strongest, or most obvious, in those sectors that might theoretically be expected to show an effect — natural resources, or other sectors in which the investment's high asset specificity and long timeline means a greater risk of opportunistic behavior by the host state. For example, one would hardly expect a foreign investor in a t-shirt factory to be all that concerned about the kind of mistreatment unambiguously outlawed by BITs (that is, undercompensated expropriation). On the other hand, it may be reasonable to expect an investor in a massive power plant to be quite worried. In these cases, a BIT may have differential effects. For the t-shirt factory, the BIT will be irrelevant to the decision to invest; for the power plant investor, it may be critical.

---

involving an OECD and a non-OECD country. Missing bilateral data is especially problematic in years prior to 2002. For example, the database contains data on Year 2000 bilateral French FDI outflows to just four African countries; data for the other African countries is listed as missing.

69. In other words, typical "Do BITs work?" studies count up a country's BITs with major capital exporting countries and analyze whether the BIT count is correlated with the total dollar amount of FDI flowing into the host country from all sources. The lack of bilateral FDI data thus makes it somewhat difficult to test whether BITs function more as "costly signals" of a favorable investment environment or as "credible commitments" to investors from specific countries.

70. *See generally* Zhan, *supra* note 67 (discussing the problems of current FDI statistical systems). "Round-tripping" refers to the practice of routing an investment to a foreign affiliate and then immediately transferring the investment back. Round-tripping may allow a company to benefit from host state investment incentives without actually inducing a "real" (as opposed to a paper) investment in the economy. *See id.* at 8. "Trans-shipping" refers to the routing of investments through business entities established in third-party countries, like Luxemburg, in order to take advantage of special tax treatment. *Id*. Interestingly, international lawyers now recommend that companies consider "trans-shipping" foreign investment precisely in order to benefit from BITs. Audley Sheppard, *Treaty Provides Another Layer of Security for Foreign Investors*, FIN. TIMES, Sept. 18, 2007, at Asia Edition 1 (advising foreign investors in India to "structure their investment in such a way that they can take advantage of the protection afforded by a [BIT]," and noting that "it costs very little to structure an investment to ensure BIT protection, while retaining tax or other advantages"); Stuart Dutson, *International Deal Structuring: Using International Structures to Protect and Enhance Foreign Investments*, METRO. CORPORATE COUNSEL, Aug. 2008, at 18 (providing similar advice).

I have argued elsewhere that investors in those sectors most likely to benefit from BITs are also those investors most likely to be able to protect their investments through non-BIT means, such as investment contracts.[71] If that is indeed true, BITs might be viewed as somewhat redundant to existing investor-protection mechanisms, and thus unlikely to spur great amounts of new investment even in risky sectors, such as power generation. But putting that issue aside, the main point is that existing FDI data simply does not allow us to examine whether the effects of BITs on investment decisions are sector-specific, as we might expect them to be.

The second problem (or the second complex of problems) is the one that Aisbett addresses so well in her article.[72] The "Do BITs work?" statistical studies discussed above are generally constructed as pooled cross-sectional time-series analyses, where the data are arranged in panels of host country years. By "panel," I mean that the dataset will include separate observations for each country in each year. There is nothing inherently wrong with using a panel research design, but panel research typically raises a number of serious statistical difficulties of the kind that Aisbett discusses.[73] Problems of endogeneity, autoregression, time trends, omitted variables, and the like seem to have pushed researchers toward more complicated modeling strategies, culminating, perhaps, with Kerner's instrumental variable analysis.[74] But even there, using the latest and greatest econometric approaches, analysts arrive at inconsistent results.[75] Not only are the most complicated models increasingly inaccessible to non-econometricians (itself a problem of sorts, as models require greater and greater manipulation of data, through "detrending," instrumentation of key variables, and the like), but the payoff from the complications appears elusive. We still do not "know" with any certainty whether BITs work.

Finally, empirical studies of the "Do BITs work?" question typically suffer from a number of theoretical problems. One such problem is that, with the exception of my 2008 study[76] and Kerner's,[77] the work

71. *See* Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121, 128–36 (2008).

72. *See* Aisbett, *supra* note 61, at 403–10.

73. *See id.*

74. *See* Kerner, *supra* note 63, at 82–98.

75. *Compare* Kerner, *supra* note 63, at 96–98 (concluding that BITs attract FDI), *with* Aisbett, *supra* note 61, at 421–24 (concluding that there is no significant correlation between BITs and FDI).

76. *See* Yackee, *supra* note 9, at 812–16.

77. *See* Kerner, *supra* note 63, at 95. Kerner actually uses a self-described "short-hand" method of distinguishing treaties with arbitration provisions from those without. *Id.*

discussed above lumps together BITs from the 1950s, 1960s, and 1970s with BITs from the 1980s and later, despite very important differences in treaty content across the two periods. For example, very few early BITs contained investor-state arbitration provisions, while virtually all modern BITs do.[78] This fact suggests that if investors care greatly about BITs as credible commitment devices, they probably do not or should not care about early BITs. If that is the case, empirical examinations of the "Do BITs work?" question should probably exclude early BITs from their estimations.[79]

Another theoretical problem is the tendency of empirical BIT analysts stubbornly to ignore the fact that BITs are not the only — or perhaps not even the best — means by which investors might protect their investments from opportunistic state behavior, or through which states might credibly commit to treat investors favorably. The existence of alternative commitment devices means that the marginal effects of BITs on FDI may be relatively slight. For example, if an investor in a major public utility concession already has the ability to access international arbitration to protect his investments through a contract with the host state, the fact that a state also guarantees access to arbitration through a BIT is unlikely to influence significantly the investor's willingness to invest in the concession. A BIT might be *helpful* to the investor in the sense that it adds to his confidence in the state's good intentions, but it is unlikely to be a decisive factor in the decision to invest.[80] The existence of alternative commitment devices helps to make the reported findings of some empirical studies of truly massive effects of BITs on FDI rather unbelievable. Neumayer and Spess's finding that BITs might nearly double aggregate FDI inflows,[81] or Kerner's finding that entering a BIT might increase FDI inflows into a typical host country by half a billion dollars per year,[82] are both much higher than anything that might reasonably be expected.

A final theoretical problem with existing studies is the failure to incorporate any sort of reasonably realistic theory of the investor decision-making process. Investors are portrayed as intensely worried about the limited kinds of political risk against which BITs might offer adequate protections, as hyper-rational in their willingness and ability to find out about BITs prior to deciding whether to invest, and as generally according the presence or absence of a treaty decisive importance in

78. *See* Yackee, *supra* note 15, at 423–33.

79. *See generally id*. (discussing different categories of BITs).

80. To be clear, I am not claiming that BITs and investment contracts offer precisely the same protections against host state misbehavior. They are not perfect substitutes for each other.

81. Neumayer & Spess, *supra* note 6, at 1582.

82. *See* Kerner, *supra* note 63, at 90.

their investment decisions. In fact, the best qualitative studies of investment decision making suggest that the process is often idiosyncratic and less than rational, and that investors care about many things besides, or in addition to, the kinds of risks against which BITs might protect.[83]

More generally, a long line of law and society research suggests that legal considerations (and BITs and BIT-based arbitration are certainly law-related) often play a surprisingly minor role in the organization and implementation of business affairs.[84] Those two strands of research — qualitative studies of the investment decision-making process, and law-and-society research on the intersection of law and business — imply that we should *not* expect to see that BITs have massive, or perhaps any, impact on foreign investment, a point that I return to in the Article's Conclusion. Again, the point is that studies purporting to find that BITs have huge FDI-inducing effects prove too much. Theoretically, we would not expect to see such huge effects.

Perhaps the lack of consistent positive or negative results is due to these kinds of problems. What does seem clear is that our ability to squeeze a more certain answer out of existing research methods is probably limited. In order to advance the empirical debate, I examine in the following Parts three alternative sources of evidence of an impact of BITs on foreign investment decisions. First, I will examine whether BITs are correlated with more favorable political risk ratings by for-profit risk-rating agencies. I will then turn to the effect of BITs on political risk insurance, and finally, I will discuss investor awareness and appreciation of BITs.

III. BITS AND POLITICAL RISK RATINGS

The PRS Group[85] and BERI S.A.[86] are two prominent private, for-profit providers of political risk ratings. Both organizations provide

---

83. *See, e.g.*, YAIR AHARONI, THE FOREIGN INVESTMENT DECISION PROCESS 14–46 (1966); AMANDA PERRY, LEGAL SYSTEMS AS A DETERMINANT OF FDI: LESSONS FROM SRI LANKA 86, 95 (2001); Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 106–17 (2003).

84. The classic citation is Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); *see also* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (reflecting on his earlier article and its continued significance). Macaulay's central insight is that "contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships." *Id.* at 467.

85. PRS GROUP, http://www.prsgroup.com (last visited Oct. 6, 2010). PRS is an acronym for "Political Risk Services."

business clients with qualitative analysis of business-related political and other developments in various countries. They also provide quantitative evaluations of various kinds of "risk."[87] For example, the PRS Group produces three "International Country Risk Guide" (ICRG) indices gauging levels of "political risk," "financial risk," and "economic risk." The political risk index is a 100-point index based on subjective in-house evaluations of a number of variables, such as the level of "ethnic tensions," the degree of "government stability," and the extent of "corruption."[88]

For present purposes, the most important component is a twelve-point sub-index of a country's "investment profile," which itself consists of expert evaluations of three further sub-categories of risk: the risk of breach of contract and expropriation, the risk of interference with the repatriation of investor profits, and the risk of delay in payments. I use the twelve-point investment-profile index in the analyses below.[89]

BERI produces a similar index of "operations risk" that is based on subjective evaluations by what the organization describes as a permanent panel of approximately 100 experts.[90] BERI's operations risk

---

86. BUSINESS ENVIRONMENT RISK INTELLIGENCE, http://www.beri.com (last visited Oct, 6, 2010).

87. The PRS Group and BERI indices of risk are generic in the sense that they are meant to provide an overall rating of country risk that is not specific to a particular sector or project. Some observers doubt the validity (and thus the utility) of this kind of exercise. Carlos Gustavo Arrieta Padilla, *Assessment of the Political Risk in a Country: A Practitioner's View*, 20 REV. GEN. DROIT 407, 417 (1989) ("[D]ue to the broad variety of business sectors and countries, it is unlikely that risk analysis can elaborate a standard model to fit specific corporate needs for specific activities in specific countries. A single, universal model for assessing political risk has not emerged simply because it is not feasible."); James M. Zimmerman, *Political Risk Assessment and the Expanding Role of the International Practitioner*, 11 SUFFOLK TRANSNAT'L L.J. 1, 30 (1987) ("The principal shortcoming of . . . BERI . . . is [its] failure to take industry-specific and product-specific factors into account. The evaluation of the macro environment, without more specific data, may be ineffective considering that the attitudes toward private investment vary by industry.").

88. Llewellyn D. Howell, *ICRG Methodology*, PRS GROUP, http://www.prsgroup.com/ICRG_Methodology.aspx (last visited Oct. 6, 2010). Howell explains, "The ICRG staff collects political information and financial and economic data, converting these into risk points for each individual risk component on the basis of a consistent pattern of evaluation. The political risk assessments are made on the basis of subjective analysis of the available information, while the financial and economic risk assessments are made solely on the basis of objective data." *Id.*

89. With the exception of the IRIS dataset, discussed below (*see infra* text accompanying notes 92–94), the PRS Group does not regularly publish the "the risk of breach of contract and expropriation" rating that forms part of the "Investment Profile" sub-index. The Investment Profile rating, however, along with other risk ratings, is available for purchase from the PRS Group's website, http://www.prsgroup.com. PRS Group risk ratings are also available on LexisNexis in the "PRSCRG" database.

90. The BERI data is available for purchase from BERI, as the "Historical Ratings Research Package," at http://www.beri.com/hrrp.asp.

index incorporates a sub-index that evaluates a country's "attitude" toward foreign investors, and I use that sub-index in the analysis below.[91]

I use the ICRG and BERI sub-indices because the organizations' aggregate political risk indices include a number of risk-related factors that are not directly related to the legal protections that BITs provide. In other words, I am examining the impact of BITs on political risk narrowly, as there is no theoretical reason to expect BITs to be associated causally with variables like political instability, risk of war or insurgency, or other factors that might form part of a more general definition of "political risk."

Unlike political risk insurers (discussed in more detail in Part IV), neither the PRS Group nor BERI insure against political risks, and neither company has a direct financial stake in the quality or accuracy of its evaluations. On the other hand, both organizations have an indirect financial interest in providing evaluations that are useful to corporate clients. If either organization consistently errs in its evaluations of risk, corporate clients will presumably stop using its services. That risk of loss of business provides the organizations with an incentive to produce accurate evaluations of risk.

These quantitative ratings of the investment-related aspects of political risk provide us with an alternative means of testing whether BITs promote FDI. If BITs work by reducing political risk (that is, risk of expropriation), then we might expect to see that organizations like the PRS Group or BERI systematically assign more favorable risk ratings to those states that enter into BITs. If foreign investors rely on these ratings when deciding whether and where to invest, then BITs may influence the investment decision-making process indirectly, or at least independently of any specific knowledge or appreciation of BITs by foreign investors themselves. Alternatively, we might view the process by which organizations like the PRS Group and BERI make political risk evaluations as likely to mirror the processes that businesses use when deciding whether to invest. If PRS Group and BERI experts take BITs into account, investors may do so as well.

To examine whether BITs affect political risk ratings, I regress the ICRG Investment Profile and the BERI Investment Attitude indices against a simple model of the determinants of political risk. Results are also included for a rating of "expropriation" risk, as developed by the

91. BERI does not compile a specific rating of "expropriation" risk. As a robustness check, I also ran the BERI models using the BERI "policy continuity" sub-index of its Operations Risk Index, as severe policy discontinuities may in some cases be akin to an expropriation or similar BIT-violative conduct. Results were substantively identical to those reported in this Article. The BERI policy continuity measure was not significantly correlated with BITs.

University of Maryland's IRIS Center and used by Knack and Keefer.[92] The IRIS measure is based on ICRG data, and it arguably provides a more specific measure of the kinds of risk that BITs might reduce than does the more aggregate ICRG "Investment Profile" measure. For all three measures, a higher rating means *less* risk (or, a higher rating means a more favorable investment climate). The ICRG Investment Profile variable has an observed range of 0 to 12, with a mean of 6.7;[93] the BERI Investment Attitude variable has an observed range of 0.2 to 4.8, with a mean of 2.4; and the IRIS variable has an observed range of 0.5 to 10, with a mean of 7.1.

My dataset is structured as a pooled cross-sectional time series (CSTS), meaning that data are organized by country-year. The sample of countries included in the models depends on the dependent variable used, but in all models is limited to developing (capital-importing) countries.

All models share a common suite of control variables. While the models have relatively few variables, adding more control variables would not necessarily reduce any potential problem of "omitted variable bias."[94]

Per capita GDP is included to control for the possibility that less developed countries may face increased incentives to expropriate foreign investment, and the annual inflation rate controls for incentives to expropriate during times of economic instability. Both variables are taken from the World Bank's World Development Indicators.[95] To control for a state's history of investor-unfriendly behavior, I include a dummy variable indicating whether a state was identified as a "mass expropriator" in Kobrin's classic empirical study of the determinants of expropriation in the 1960s and 1970s.[96] I also include a state's "birth year" to control for the possibility that newer states will face greater incentives to expropriate.[97] Finally, I include the Polity IV Project's

92. *See* Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995). The IRIS data is available for purchase on the PRS Group's website, http://www.prsgroup.com.

93. Reported means and ranges for the ICRG, BERI, and IRIS variables are calculated from purchased copies of each dataset and are based on the country years in my sample populations.

94. *See* Kevin A. Clarke, *The Phantom Menace: Omitted Variable Bias in Econometric Research*, 22 CONFLICT MGMT. & PEACE SCI. 341, 341–42 (2005).

95. *See* INDICATORS, *supra* note 5.

96. Stephen J. Kobrin, *Expropriation As an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329 (1984).

97. Birth years are taken from the Correlates of War Project dataset, available at http://www.correlatesofwar.org. This variable captures Ramamurti's argument that host states may be less likely to view multinational corporations as threatening as they become more secure in their independence. Ravi Ramamurti, *The Obsolescing 'Bargaining Model'? MNC-Host Developing Country Relations Revisited*, 32 J. INT'L BUS. STUD. 23, 27 (2001).

measure of democracy in the host state.[98] Political science scholarship suggests that the risk of expropriation and other forms of opportunistic anti-investor behavior are lower in democracies than in autocracies.[99]

The variable of principal interest in all of the models is a count of the number of strong BITs (or strong investment chapters in free trade agreements) that a state has in force with major capital-exporting countries. I consider a BIT to be "strong" if it contains the state's pre-consent to investor-initiated arbitration for a wide range of potential investor-state disputes.[100] This variable ranges from 0 to 15.

Figure 2 provides a preliminary graphical analysis that sets the stage for the more complex statistical analysis that follows. The figure shows scatterplots for the strong BITs variable (lagged one year) and the three measures of political risk. The data points are all country-years for which political risk data are available. The scatterplots show a generally modest positive correlation between the number of strong BITs in force and a country's level of political risk, as indicated by the upward sloping trend lines. We also see substantial variance around the trend lines, however, which suggests that BITs are, at best, a highly imperfect predictor of political risk ratings.

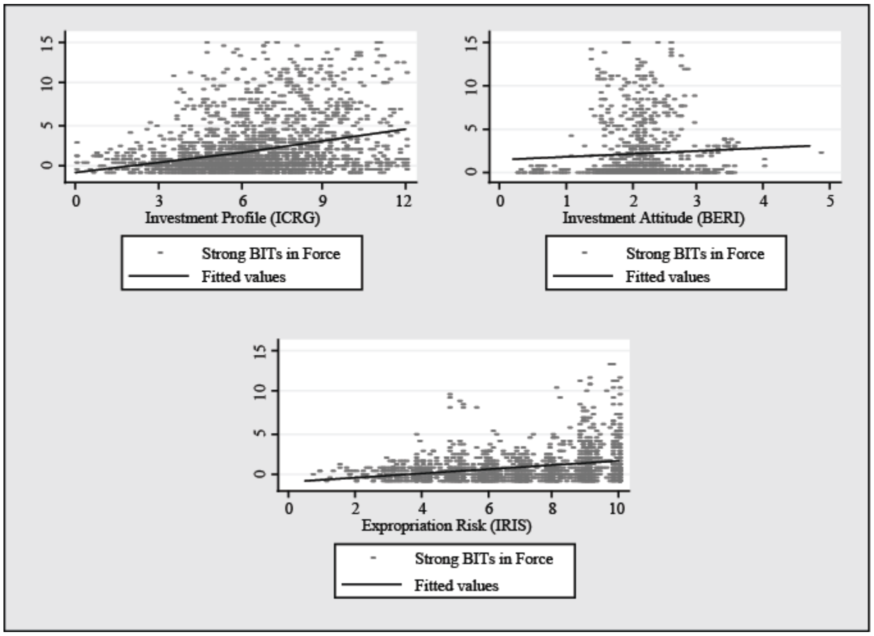
---

98. THE POLITY IV PROJECT, http://www.systemicpeace.org/polity/polity4.htm (last visited Sept. 28, 2010).

99. *See, e.g.*, NATHAN M. JENSEN, NATION-STATES AND THE MULTINATIONAL CORPORATION: A POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 80–81 (2006).

100. I describe the concept of "strong BITs" and my construction of the variable in more detail in Yackee, *supra* note 15, at 423.

FIGURE 2: STRONG BITS IN FORCE & POLITICAL RISK RATINGS



Results for the regressions are presented in Table 1. The Table 1 models were created using two alternative strategies: generalized least squares (GLS) with fixed effects (FE), a common approach for estimating CSTS models,[101] and a panel-corrected standard-error (PCSE) approach recommended by Beck and Katz for CSTS data.[102] All models include a lagged dependent variable (LDV) (the country's political risk rating in the prior year) in order to control for autocorrelation, as recommended by Keele and Kelly.[103] We can think of the LDV as controlling for the probability that a current year's risk rating will be influenced by the previous year's risk rating, the latter of which the expert rater will undoubtedly consult when evaluating the level of risk in the upcoming year.

101. A Hausman specification test indicated that fixed effects were preferred over random effects. Using random effects returned substantively identical results.

102. *See* Nathaniel Beck & Jonathan N. Katz, *What To Do (and Not To Do) with Time Series Cross-Section Data in Comparative Politics*, 89 AM. POL. SCI. REV. 634, 644–45 (1995). The models were estimated in Stata using the xtreg and xtpcse commands.

103. *See* Luke Keele & Nathan J. Kelly, *Dynamic Models for Dynamic Theories: The Ins and Outs of Lagged Dependent Variables*, 14 POL. ANALYSIS 186, 202–03 (2006).

TABLE 1: IMPACT OF BITS ON POLITICAL RISK RATINGS

	1. ICRG	2. ICRG	3. BERI	4. BERI	5. IRIS	6. IRIS
LDV: Political Risk (lag)	0.784*** (0.0156)	0.860*** (0.0471)	0.422*** (0.0328)	0.772*** (0.0537)	0.932*** (0.0134)	0.956*** (0.0296)
Per capita GDP (lag)	0.120*** (0.0256)	0.0241*** (0.00968)	0.00478*** (0.00622)	0.0111*** (0.00370)	0.00761*** (0.0199)	0.00368*** (0.00691)
Inflation (lag)	-0.0000169 (0.0000299)	-0.0000205 (0.0000334)	-0.0000539* (0.0000271)	-0.0000411 (0.0000253)	0.0000338 (0.0000183)	0.0000364 (0.0000209)
Mass expropriator	0 (.)	0.0224 (0.0470)	0 (.)	0.0163 (0.0198)	0 (.)	0.0454 (0.0381)
Birth year	0 (.)	0.00138* (0.000673)	0 (.)	0.000334* (0.000153)	0 (.)	0.000491 (0.000606)
Polity rating (lag)	0.0285*** (0.00672)	0.0187** (0.00652)	-0.00167 (0.00271)	-0.000919 (0.000945)	0.0367*** (0.00468)	0.0123** (0.00415)
Strong BITs in force (lag)	**0.0740*** (0.0124)**	**0.0375* (0.0178)**	-0.00201 (0.00352)	-0.00123 (0.00632)	0.0157 (0.0162)	0.0115 (0.0112)
Estimator	GLS-FE	PCSE	GLS-FE	PCSE	GLS-FE	PCSE
Years	1985–2003	1985–2003	1981–2003	1981–2003	1983–1997	1983–1997
Countries	110	110	35	35	97	97
Observations	1790	1790	743	743	1299	1299
R^2	0.87	0.78	0.20	0.71	0.87	0.92
Method	GLS-FE	PCSE	GLS-FE	PCSE	GLS-FE	PCSE

Coefficients with standard errors in parentheses.

The regression analysis provides little evidence that BITs meaningfully influence political risk ratings. The BITs variable is statistically significant in only two of the six models, those using the ICRG Investment Profile rating as the dependent variable. BITs are not a significant predictor of either the BERI measure of investment attitude or the IRIS measure of risk of expropriation, with the latter result especially notable, given that BITs are often said to work precisely by reducing the risk of expropriation.[104] In the ICRG models, where the BIT variable is significant and positively signed, the magnitude of the effect is nonetheless weak. For example, the coefficient on the BIT variable in the first model of 0.0740 implies that entering *ten* additional BITs with major capital-exporting countries might raise a country's ICRG Investment Profile rating by less than a single point on the ICRG's twelve-point index. The second model's coefficient of 0.0375 implies an even less impressive effect. Moreover, if we include a year variable in the ICRG models in order to control for time trends,[105] the BIT variable falls from significance, while the time counter is highly significant.

If BITs, then, do not meaningfully influence risk evaluations, what does? The LDV (the lagged value of the political risk variable, shown in the first line of Table 1) proves to be a highly significant and substantively important predictor of risk ratings. A country's perceived level of risk in 1989, for example, will strongly influence its perceived level of risk in 1990.

Risk ratings are, in other words, relatively "sticky," and that stickiness suggests that host states desiring greater investment should not expect relatively easy policy changes — like the decision to enter into BITs — to influence investor perceptions of risk, at least over the short term. Relatively consistent evidence shows that political democracy positively affects risk ratings, a finding in line with past research on democracy and foreign investment: The Polity variable is significant and positive in four of the six models (the ICRG and IRIS models), suggesting that greater levels of democracy are associated with less perceived political risk.

In brief, the Table 1 models suggest either that BITs have no statistically significant impact on political risk ratings, or, if they do have an impact, it is quite small. BITs do not appear to influence meaningfully subjective expert evaluations of political risk. These results appear consistent with the simple bivariate graphical analysis

104. *See, e.g.*, Kerner, *supra* note 63, at 76 ("Bilateral Investment Treaties are designed to reduce the risk of state-led expropriation.").

105. These results are not shown in this Article.

presented in Figure 2, which showed only a modest positive correlation between BITs and risk ratings.

IV. BITS AND POLITICAL RISK INSURANCE

Unlike political risk rating organizations like the PRS Group, which merely provide companies with investment-related analysis, political risk insurers provide foreign investors with insurance against certain adverse events, such as uncompensated expropriation by the host state, damage resulting from political violence, and currency inconvertibility. Political risk insurance (PRI) has traditionally been provided by public agencies of capital-exporting states (such as the United States's Overseas Private Investment Corporation (OPIC)). In recent years, private insurers have begun to offer the product as well.[106]

Political risk insurers provide us with another means of examining whether BITs succeed in promoting FDI.[107] First, if insurers take BITs into account when deciding whether and on what terms to issue PRI, that suggests that investors — who, like insurers, have direct financial incentives to gauge political risk before deciding whether to invest — are themselves likely to consider BITs as part of the investment decision-making process.[108]

Second, if PRI providers take BITs into account when deciding whether to issue insurance, BITs may indirectly promote FDI (regardless of investor knowledge or appreciation of BITs) by making PRI more available and more affordable.[109] An investor who will not invest absent PRI may be more likely to find affordable PRI — and thus to invest — if BITs impact the insurer's underwriting decisions.

Of course, that latter possibility assumes that investors investigate the availability and price of PRI at a relatively early stage in the investment

106. For an overview of the history of political risk insurance, see generally Jennifer M. DeLeonardo, Note, *Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT'L L. 737 (2005).

107. Susan Franck has also suggested this. *See* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,* 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 347 n.54 (2006).

108. It is important to note that the ability of political risk insurers to establish an actuarially sound basis for political risk premiums is probably limited. Events like expropriation (unlike car crashes or slip-and-fall accidents) are quite rare, and their origins are causally complex. Observers have questioned the ability of private insurers to "understand and assess political risks." DeLeonardo, *supra* note 106, at 743.

109. *Cf. id.* at 753 ("[A] host country's willingness to sign a [BIT] . . . publicly demonstrates that the country has committed to fostering a positive business environment. These commitments can be likened to advertising [that] performs an important signaling function that allows insurers and investors to efficiently sort risks . . . . [H]ost countries [thereby] increase insurers' abilities to offer favorable insurance terms to investors.").

decision-making process, before the investor's organization has become either formally or informally committed to a particular investment decision. This assumption may be unrealistic, as investors typically apply for PRI late in the investment process,[110] with PRI providers requiring such things as an underlying investment contract and other detailed information about the planned investment.[111] At that late stage, the professional and financial sunk costs may be so high that corporate decision makers are unwilling to back out of the decision to invest, even if PRI is unavailable or more costly than initially assumed.[112]

In any event, the question of whether PRI promotes investment is beyond the scope of the present Article. My main goal in this Part is rather to present results from a small e-mail survey of PRI providers that I conducted during the summer of 2008. E-mail surveys were sent to fifty-six companies across the globe. Responses were received from fourteen companies, for a response rate of 25%, and represented a mix of large and small public and private providers.[113] Respondents were asked two main questions: was it the firm's "standard practice to determine whether the investment project will be covered by a BIT before agreeing to issue the insurance policy?" and "Does the presence or absence of a BIT influence the premiums that your organization charges investors for expropriation insurance?" Respondents answering "yes" to the second question were then asked to provide an estimate of the magnitude of any effect on premiums. Respondents were also asked to provide explanatory comments if possible.

---

110. For example, applications for PRI typically require the investor to provide detailed information about the foreign investment, including the identities of lenders, the amount of the investor's equity contribution to the investment, a breakdown of the foreign investment's assets in the host country — including cash and securities, inventories, land, and buildings — estimates of the foreign investment's foreign exchange generating potential, and estimates of the number of local national employees. The applicant may also be required to certify that host country approval of the investment has been obtained and that all required approval documents are valid. These kinds of information will simply not be available early in the foreign investment decision-making process. For an example of a PRI application requesting these and other kinds of information, see CHARTIS, http://tinyurl.com/28yqok4 (last visited Oct. 11, 2010).

111. *See* S. Linn Williams, *Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK and Other Providers*, 5 PACE INT'L L. REV. 59, 99, 106–07 (1993).

112. It is well established that corporate decision makers will "frequently hesitate to make major changes in policy after negative outcomes have been incurred." Glen Whyte, *Escalating Commitment to a Course of Action: A Reinterpretation*, 11 ACAD. MGMT. REV. 311, 311 (1986).

113. Respondents included Ace Underwriting Agencies Limited; African Trade Insurance Agency; Ascot Underwriting Ltd.; Export Credit Insurance Organization (Greece); Export Credits Guarantee Department (UK); Export Development Canada; Hiscox; Islamic Corporation for Insurance of Investments and Export Credit; Liberty Syndicate Management Limited; Managing Agency Partners Ltd.; PWC Deutsche Revision AG; Slovene Export Corporation Inc.; and Zurich Emerging Markets Solutions. In addition, I received an informal response from the United States Overseas Private Investment Corporation, which indicated that BITs did not influence its PRI decisions.

Of the fourteen respondents, eight said that it was not standard practice to determine whether an investment would be covered by a BIT prior to issuing a policy, and nine indicated that BITs have no impact on rates charged for expropriation insurance. Furthermore, those respondents that indicated that BITs affect expropriation insurance rates suggested that the impact was often slight.

For example, a large private provider stated that it "rarely [got] info relating to a BIT until the later stages of any disclosure info." It added that BITs have "no direct influence — country risk factors may be affected a little but usually other factors [are] driving the price . . . [like] aggregate pressure, competition, [and] prices from [public providers]," and that BITs might impact pricing "less than 5%, if anything." Another private provider responded:

> In short, BITs don't effect [sic] pricing at all for me. I don't regard the process as being robust enough with enough of a successful track record. Furthermore, if one looks at Latin America at the moment countries seem to unilaterally pull out of international arbitrations, so ultimately we give the structure no credit.

This view of the limited utility of BITs and of international arbitration was echoed by another private underwriter:

> A BIT is only of any real value to us if it is supported by bonds or letters of credit lodged with a third party outside the country that may be drawn on relatively easily to compensate expropriation not otherwise adequately compensated by the country in question. Promises of arbitration and compensation not supported by realisable assets (and in most cases I suspect they are not) are not that persuasive in reducing premiums [in my opinion]. But then I am just a cynical underwriter . . . .
>
> [T]he BIT is not a deciding underwriting factor in most cases and other issues relating to the character of the government in power, local government . . . , semi-official corruption, the character of the foreign company, the social, employment and poverty situation in the country and economic issues regarding, say, any increase in commodity prices since a company won its license to drill or extract are far more important.

A fourth private provider indicated that BITs were taken into account, but they were "not always required" and their impact on premiums was only to "make the risk a bit more palatable."

Public providers also suggested that BITs were largely irrelevant to their decisions. A developed-country public provider commented that "the existence of a [BIT] is a comfort but does not itself influence premium pricing." Another developed-country public provider noted that "[BITs] are considered a 'minor factor' in assessing a government's attitude toward business and foreign investment," but "the premium rates quoted or charged are not influenced by the presence or absence of a BIT alone."

By contrast, one public provider responded that the presence of a BIT would have a relatively large impact on premiums, raising premiums from 0.5% of insured value up to 0.94% "depending on the project and country concerned."[114] A small private provider responded that "it is very important that a [BIT] exist," but suggested that the importance was due to the firm's "small investment book." Another public provider affirmed:

> [T]he Board of Directors take seriously into account the fact that a BIT exists . . . . [T]his is considered as a "positive" eligibility criterion for the Board of Directors' decision. On the other hand, if there is not a BIT, this does not mean that the application is rejected automatically. In that case, we evaluate more strictly the political situation in the Host Country, and of course, we set a lower percentage of cover and a higher annual premium.

However, the respondent added that it was impossible to indicate any general effect of BITs on premiums, because "we evaluate each application on a 'case-by-case' basis."

The number of respondents is too low to permit any sort of statistical evaluation, but the pattern of responses suggests, at a minimum, that BITs only imperfectly and inconsistently affect PRI decisions. For many underwriters, including large private providers motivated primarily by considerations of profit, BITs have no impact on insurance decisions. For others, that impact may be relatively slight.[115]

In short, the practices of PRI providers offer little evidence in support of the hypothesis that BITs have substantively meaningful impacts on FDI. If PRI underwriters do not highly value BITs, then it is unlikely

---

114. Perhaps relevantly, this public provider's BIT program was originally established in large part to support that country's investment insurance program, and BIT coverage has played in an important role in that country's insurance decisions since the early days of the treaties, even before the treaties contained the sorts of arbitration provisions that render them potentially effective reducers of political risk.

115. Importantly, these results are consistent with a recent and highly interesting interview-based study of PRI providers by Lauge Poulson. Lauge Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009/2010 (K. Sauvant ed., 2010) (forthcoming 2010). Poulson finds that "the vast majority of public and private agencies that price the risk of foreign investments rarely take them into account to any serious extent."

that foreign investors value them greatly. And if BITs do not systematically influence PRI availability or premiums, then the treaties are unlikely to promote FDI indirectly by making investments more readily insurable.

V. INVESTOR KNOWLEDGE AND APPRECIATION OF BITS

The hypothesis that BITs are likely to lead to large inflows of FDI typically seems to rely on a three-stage assumption about investor knowledge and behavior. First, potential investors are aware of the treaties. Second, investors appreciate the treaties either as actual, direct reducers of risk — and thus as enhancers of expected profitability — or as reliable signals of a low-risk environment. Third, investors base their investment decisions on the presence or absence of a treaty because of their risk-reducing or low-risk-signaling attributes.

But do investors really know or care much about BITs? Anecdotal and historical survey evidence suggests they might not. A small survey of business executives conducted in 1976 found that only 16% of respondents were "familiar" with the ICSID system generally, and that only 4% felt that the ICSID system provided "adequate safeguards."[116] A somewhat more recent study confirmed the continued validity of these results.[117] Even in the late 1990s, BITs and BIT-based arbitration appear to have remained an "often overlooked tool" in the legal arsenal of multinational corporations.[118] The international law firm Allen & Overy has recently advertised BITs to potential clients as entailing "rights you never knew you had."[119] Moreover, in a 1999 survey, "many chambers of commerce indicated that they had no familiarity with" the Energy Charter Treaty, a prominent multilateral "BIT" covering energy sector investments.[120]

In an attempt to arrive at a more scientifically sound basis for gauging investor awareness of BITs, I conducted a mail survey of general counsel (GC) in large U.S.-based corporations.[121] The survey was mailed to GCs in the top 200 U.S. corporations on the Fortune 500 list, with a second mailing sent to non-responders. The survey was purposefully short (one single-sided page) to promote responses, and a

116. John K. Ryans & James C. Baker, *The International Center for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 70–71 (1976).

117. *See* James C. Baker, *ICSID: An International Method for Handling Foreign Investment Disputes in LDCs*, 21 FOREIGN TRADE REV. 411, 411–21 (1987).

118. D.H. Freyer et al., *Arbitration Under Bilateral Investment Treaties: An Often Overlooked Tool*, 13 MEALEY'S INT'L ARB. REP., no 5, 1998 at 16, 16.

119. Franck, *supra* note 107, at 348.

120. *Id.* at 347–48.

121. A copy of the survey instrument is included as an Appendix to this Article.

small incentive was included in each mailing.[122] Respondents were promised that their identities and the identities of their corporations would not be revealed.

Using surveys to evaluate the extent to which BITs enter into corporate FDI decisions poses certain obvious difficulties; primarily, a corporation is a complex organization consisting of numerous individuals, each of whom may or may not possess relevant knowledge of the corporate practices with which the study is concerned. Identifying relevant contacts, and persuading those contacts to participate, can be challenging, especially when the goal is a survey covering a broad selection of corporations.

I chose to direct my survey at GCs for both practical and substantive reasons. First, contact information for GCs is readily identifiable in corporate documents, on corporate websites, and through mailing-list companies like InfoUSA. Second, GCs were more likely to respond to the survey than other high-ranking corporate officials, such as CEOs, who may be both busier and less inherently interested in a questionnaire probing the extent to which legal instruments influence corporate decisions. Third, and more substantively, there is good reason to expect that GCs are in a good position to gauge the importance of BITs to corporate decisions. In-house counsel increasingly enjoy significant power and prestige within large corporations, and they are frequently called upon to perform legal risk analysis of corporate proposals and decisions.[123] GCs are often part of the senior management team (or consult frequently with it), and Kobrin indicates that political risk analysis is often conducted at the senior management level or within in-house legal departments.[124] Furthermore, given the highly technical and relatively inaccessible nature of BIT jurisprudence, busy non-legal senior executives are unlikely to be in a position either to monitor or to evaluate BIT developments.[125] If news of BITs comes to the attention of FDI decision makers, it will probably be through an in-house lawyer.

---

122. The first mailing included a two-dollar bill; the second mailing contained a "University of Wisconsin Law School" pen. It is well established that such incentives significantly increase survey response rates, though they obviously raise the surveyor's costs. Mike Brennan & Jan Charbonneau, *Improving Mail Survey Response Rates Using Chocolate and Replacement Questionnaires*, 73 PUB. OPINION Q. 368, 374–76 (2009). Recipients were invited to keep the two-dollar bill for "considering" completing the survey, though I expected that most non-responders would return the bill in the postage-paid, pre-addressed return envelope. In fact, the majority of non-responders decided to keep the money.

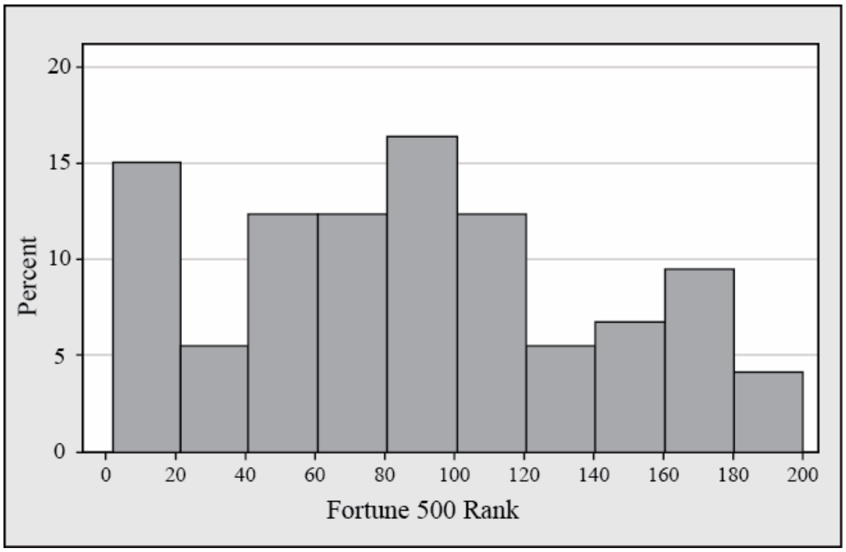
123. *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 474–77 (2000).

124. *See* STEPHEN J. KOBRIN, MANAGING POLITICAL RISK ASSESSMENT: STRATEGIC RESPONSE TO ENVIRONMENTAL CHANGE 92 tbl.6-2 & 93 tbl.6-3 (1982).

125. The mainstream U.S. media rarely report on BITs. For example, a LexisNexis search for

Seventy-five surveys were returned, for a response rate of 37.5%. This response rate is high, considering the nature of the respondents.[126] Responses were distributed across the top 200 of the Fortune 500, as Figure 3 illustrates.

FIGURE 3: DISTRIBUTION OF RESPONDENTS, BY FORTUNE 500 RANK[127]



Respondents were asked seven questions. The first six were answered on a scale of 1 to 5, where 1 was labeled "not at all familiar" (or its equivalent, depending on question wording) and 5 was labeled "very familiar" (or its equivalent); these included questions about how regularly companies considered investing in foreign ventures, lawyer and senior executive familiarity with BITs, perceived efficacy of BITs

---

the term " investment treaty" in the *Wall Street Journal* returns only fifty-seven hits from 1979 to the present, and only twenty-two since 2000. Most of the discussions are highly cursory. An identical search of the *New York Times* returns only forty-seven hits; a search of the *Washington Post*, just forty-three (and just eleven since 2000). A search of the Dow Jones Business News service returns only nineteen documents since 1997, with the majority of the documents discussing a single, complex lawsuit involving Ecuador. *The Economist* has mentioned "investment treaty" only sixteen times. *Forbes Magazine* has never mentioned the term. In other words, the mainstream media likely to be read by senior U.S. non-lawyer business executives do not offer extensive coverage of BITs.

126. In his important study of CEO perceptions of political risk in large U.S. corporations, Kobrin achieved a similar response rate of 42.4%, which he characterized as "high." KOBRIN, *supra* note 124, at 186.

127. Figure 1 does not include responses received from two organizations whose identities could not be determined. These two respondents removed the portion of the survey instrument that contained a tracking number.

at protecting foreign investments from expropriation and adverse regulatory change, and the importance of BITs to companies' decisions to make foreign investments. The last question, which was in "yes/no/don't know" format, asked whether companies have ever declined to invest in a foreign project because of the absence of a BIT.

Overall, the responses indicate a low level of familiarity with BITs, a pessimistic view of their ability to protect against adverse host state actions, and a low level of influence over FDI decisions. Table 2 presents the results in summary format.[128]

TABLE 2: MEAN & MEDIAN SURVEY RESPONSES

	Mean (Median) Response
1. Frequency of FDI	3.55 (4)
2. Own familiarity	2.51 (2)
3. Non-lawyer familiarity	2.04 (2)
4. Protection-expropriation	2.92 (3)
5. Protection-regulatory change	2.32 (2)
6. Importance to FDI	2.48 (2)
7. Declined to invest	n-47; y-4; dk-21

We see that the companies surveyed reported frequent consideration of foreign investment (median response of 4, where 5 indicated "frequently" and 1 indicated "never or rarely"). We also see that the median GC is fairly *unfamiliar* with BITs (2, where 1 indicated "not at all familiar" and 5 indicated "very familiar"). Non-lawyer senior executives were also unfamiliar with BITs, as the low median score (2) indicates. Respondents did not view BITs as particularly effective at protections against expropriation (a median response of 3, where 5 indicated "very effective" and 1 indicated "not at all effective").

The respondents were less impressed with BITs as an effective shield against adverse regulatory change (median score of 2). This latter result is important because expropriation, in the classic sense, has become an exceedingly rare phenomenon, and most investments are probably not at any significant risk of classic expropriation.[129] If BITs have an important role to play in reducing risk, it is probably at reducing the risk of so-called "regulatory expropriation" — that is, at protecting companies against adverse regulatory changes that amount to less than a full "taking" of the investment. In fact, GC skepticism about the ability of BITs to protect against regulatory change is consistent with the

128. A table showing correlations between question responses is in the Appendix.

129. *See, e.g.*, Michael S. Minor, *The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992*, 25 J. INT'L BUS. STUD. 177, 186 (1994).

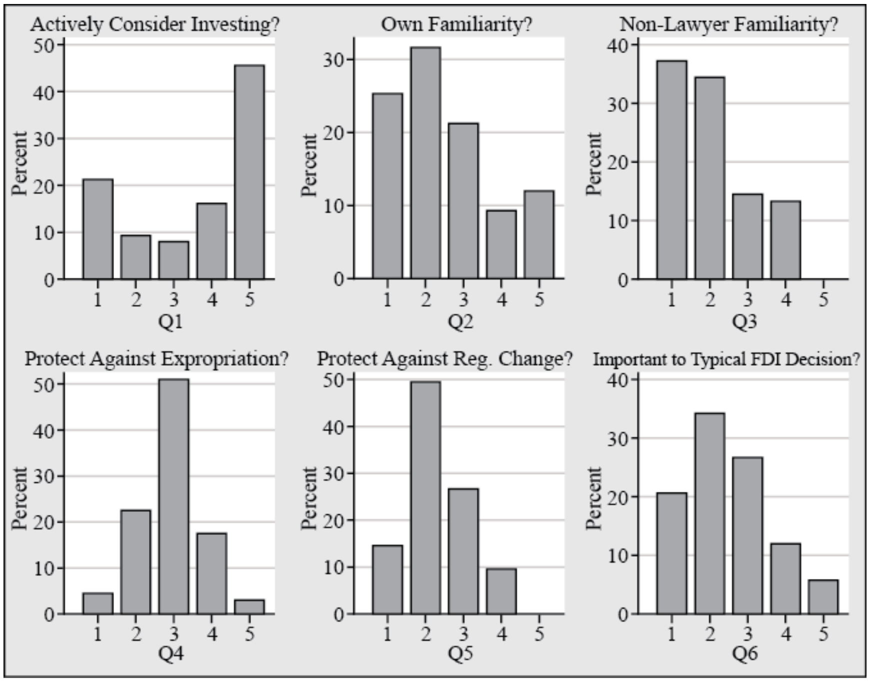
jurisprudence of arbitral tribunals, which have so far refused to read a broad regulatory takings doctrine into the treaties.[130] Finally, BITs do not appear to be a great consideration in the "typical" FDI decision, and only four respondents report that their companies have declined an investment opportunity specifically because of the absence of BIT protections.[131]

Figure 4 shows distributions of responses for all six scalar questions. It is notable, for instance, that only approximately 20% of GCs reported higher than medium (>3) familiarity with BITs, that no GC reported that non-lawyer senior executives were "very familiar" with BITs, and that only approximately 5% of GCs viewed BITs as "very important" to the typical FDI decision.

130. Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT'L L. REV. 303, 310 n.17 (2009).

131. The four "Yes" responses to Question 7 (indicating that the company had declined to invest because of the lack of a BIT) were distributed across the Fortune 500 list and across sectors. Two "Yes" responses were from companies ranked in the top twenty, one from a company ranked between sixty and seventy, and one from a company ranked between 170 and 180. One of the four companies is engaged in the primary (energy) sector, one is a large multinational conglomerate engaged in industrial manufacturing, consumer products, services, and energy; another is a global financial services company; and the fourth is a manufacturing conglomerate.

FIGURE 4: SURVEY RESPONSE HISTOGRAM



This evidence of a relative lack of appreciation of BITs by foreign investment decision makers is consistent with the anecdotal evidence already discussed above.[132] It is also broadly consistent with a number of earlier studies of corporate "political risk" analysis and management. Kobrin's work on this subject is perhaps the most well known. In an impressive 1982 study of corporate practice, he found that political risk analysis was often weakly institutionalized, with managers often possessing only a "diffuse, subjective, and impressionistic" perception of political risk.[133] As he noted in an earlier study:

> [M]ost managers' understanding of the concept of political risk, their assessment and evaluation of politics, and the manner in which they integrate political information into [their] decision making are all rather general, subjective, and superficial. [This finding illustrates an] interesting paradox. With very few exceptions, managers rate political instability (or political risk) as one of the major influences on the foreign investment decision. Yet, again with very few exceptions, the same surveys report the

132. *See supra* text accompanying notes 121–31.
133. KOBRIN, *supra* note 124, at 113.

> absence of any formal or even rigorous and systematic assessment of political environments and their potential impact upon the firm.[134]

Kobrin's findings accorded with various earlier studies from the 1960s, which generally found that "even large and active [multinational corporations] do not analyze political risk in a very sophisticated manner."[135] They also accord with studies contemporaneous to Kobrin's own, as well as more recent studies, which continue to suggest that multinational corporations often implement political risk assessment in ad hoc, weakly institutionalized kinds of ways. For example, in a 1982 survey that focused on the foreign investment decision-making process, Kelly and Philippatos found that multinationals tended to employ a rather casual attitude toward foreign investment decisions and risk analysis.[136] They concluded that their respondents "seldom compare and rank [prospective] investments as advocated in normative micro-investment theory." Moreover, they found that the "vast majority of companies do not employ the advocated methods to measure overseas risks," and that "most companies allow for risks by arbitrarily adjusting the required return or payback of a project." Further, they concluded that "it is obvious that field implementation of risk analysis most likely leads to suboptimal decisions on FDIs [sic] and market allocation of productive resources."[137] In a 1996 survey of highly internationalized

134. Stephen J. Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. INT'L BUS. STUD. 67, 68, 74 (1979). Kobrin's conclusions are reflected in a statistical study of the determinants of FDI that found that political risk played an insignificant role in locational decisions. David Wheeler & Ashoka Mody, *International Investment Location Decisions: The Case of U.S. Firms*, 33 J. INT'L ECON. 57, 70 (1992); *cf.* Williams, *supra* note 111, at 63 ("[E]xperience indicates that evaluation of political risk is treated by most managers more as an art than a science.").

135. Kobrin, *supra* note 134, at 75 (citing Antoine Van Agtmael, *How Business Has Dealt with Political Risk*, FIN. EXECUTIVE 26 Jan. 1976, at 26); *see also* Mark Fitzpatrick, *The Definition and Assessment of Political Risk in International Business: A Review of the Literature*, 8 ACAD. MGMT. REV. 249, 251–53 (1983) (reviewing studies showing that corporations approach political risk analysis haphazardly).

136. Marie E. Wicks Kelly & George C. Philippatos, *Comparative Analysis of the Foreign Investment Evaluation Practices by U.S.-Based Manufacturing Multinational Companies*, 13 J. INT'L BUS. STUD. 19, 24 (1982).

137. *Id*. at 23–24. By "normative micro-investment theory," Kelly and Philippatos mean studies such as a recent one by Ephraim Clark, which presents a complex formal mathematical model of the optimal method by which corporations might evaluate and monitor risk of expropriation but which, one suspects, no corporation actually uses or is capable of using. Ephraim Clark, *Pricing the Cost of Expropriation Risk*, 11 REV. INT'L ECON. 412, 413–17 (2003). These kinds of formal models of the investment decision-making process, especially as it relates to evaluation of political risk, are very difficult to square with the survey and interview data presented by Kobrin, Kelly and Philippatos, and others.

Dutch firms, de Mortanges and Allers report that the companies used unsophisticated, subjective approaches to political risk analysis.[138]

Given the apparently casual approach to political risk analysis of many multinational corporations, it would not be surprising if those same corporations failed to undertake sophisticated legal analyses of investment prospects that included, for example, identifying at the pre-investment stage any relevant investment treaties, understanding the formal content and associated jurisprudence of those treaties, and plugging that understanding into some sort of risk-adjusted cost-benefit analytic framework. Indeed, Lothian and Pistor have recently reported results from a "panel discussion with legal practitioners about the relevance of local institutions to foreign direct investors."[139] The authors find that "law plays a minor role in the decision to enter a market."[140] They conclude in part that the success of investment projects may often be adequately ensured through "informal institutions and a broader set of investment relations with different constituencies in the host country," rather than through formal legal instruments or arrangements.[141]

Lothian and Pistor's finding regarding the relative unimportance of domestic law is supported by Perry's study of foreign investors in Sri Lanka. Using surveys and interviews, Perry finds that many investors fail to undertake pre-investment analysis of the host country's domestic legal regime, and that "[m]ost interviewees who expressed an opinion on the matter suggested that investors do not investigate the [host state] legal system because they do not think it is important to the success of their investment."[142]

The results of my survey similarly imply that corporate decision makers do not analyze international law and political risk in a way that the commonly-used micro-investment theory says they should. While scholars might argue that investors *should* care deeply about BITs when

138. Charles Pahud de Mortanges & Vivian Allers, *Political Risk Assessment: Theory and the Experience of Dutch Firms*, 5 INT'L BUS. REV. 303, 317 (1996).

139. Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 101 (2003).

140. *Id.* at 109.

141. *Id*. at 120. A long line of law and society scholarship showing that formal law often plays a surprisingly slight and indirect role in business decisions and business relationships further supports their conclusion. For the classic statement of this position, see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1, 9–12 (1963). *See also* Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 96 (2003) ("The key finding here is that 'Contract Law,' as the doctrinalists study it, exerts remarkably little influence on a remarkably wide range of transactions.").

142. PERRY, *supra* note 83, at 86.

deciding whether and where to invest, the data presented above suggest that many investors and potential investors do not.

CONCLUSION

In this Article, I have presented three alternative tests of the thesis that BITs meaningfully impact FDI flows. Considered individually, the results of the tests can hardly be considered definitive. But considered jointly, and in conjunction with an earlier generation of inconclusive econometric studies of BITs and investment flows, we can begin to triangulate an understanding of BITs and FDI that would seem to caution a certain modesty of expectations. While BITs are routinely described as important tools for attracting FDI, and while certain empirical studies claim to have isolated huge causal impacts, my own examination suggests that, at best, BITs spur investment only irregularly, inconsistently, and with generally unassuming impact.

What explains the apparent failure of BITs to live up to expectations? My suggestions here are speculative at best, but they may be helpful for guiding future research.

It may be that BITs effectively address problems that are relatively narrow in scope or that are of little importance to most investors. Many analysts discuss the ability of BITs to protect against "expropriation," but the risk of expropriation may be slight for many investors. Kobrin found, for instance, that only about one-fourth of his CEO survey respondents ranked "expropriation" as one of the "four most important aspects of the political environment" of the host state.[143] Far more important were "political instability," "investment climate," "remittance restrictions," and "taxation," and BITs may be less effective at addressing these other concerns.[144]

In a more recent survey of Fortune 1000 companies, Hashmi and Guvenli found that "expropriation or nationalization" ranked twelfth among fourteen categories of "political risk" in terms of "significance" to respondent corporations.[145] If investors are not overly worried about the risk of expropriation, then they might not have much rational incentive to concern themselves with BITs.

Another alternative is that investors do not seem to care about BITs because BITs have not yet proven themselves to be of great utility in

---

143. KOBRIN, *supra* note 124, at 115 tbl.7-1; *cf.* Robert E. Ebel, *Politics Before Business: A Study in Risk Analysis by a Multinational Corporation*, 11 U. PA. J. INT'L BUS. L. 453, 454 (1989).

144. KOBRIN, *supra* note 124, at 115 tbl.7-1.

145. M. Anaam Hashmi & Turgut Guvenli, *Importance of Political Risk Assessment Function in U.S. Multinational Corporations*, 3 GLOBAL FIN. J. 137, 142 (1992).

preventing or providing adequate compensation for harmful host-state behavior.[146] As Susan Franck has shown, in investor–state arbitrations, investors rarely win anything close to the amount of damages claimed.[147] Given the high direct costs of arbitration to investors (through lawyer's fees, tribunal costs, etc.), and the high indirect costs associated with suing a state (that is, the damage to the investor's relationship with the state and the associated loss of future investment opportunities and the difficulties of enforcing any award, given lingering problems of sovereign immunity), enforcing treaty rights through international arbitration is surely an option of last resort.

Or perhaps investors already possess adequate means of providing themselves with the protections that BITs are said to provide, such as protections against expropriation. For example, I have argued elsewhere that investors have long had the ability to "credibly commit" host states to honor their contractual obligations through investment contracts that contain arbitration provisions. Such contracts essentially function as personalized, investment-specific "BITs."[148] Investors may also be able to minimize expropriation and other aspects of political risk by structuring their investments in non-law-based ways, such as by making the foreign subsidiary "dependent upon the parent for supplies, capital, technology, and markets" or by adopting an "international multiple-plant strategy to reduce the host government's ability to damage the firm by seizing a single plant."[149]

In a similar vein, we might expect that businesspeople deciding whether to pursue an investment project are typically occupied with a variety of non-legal considerations, or with simply "getting the deal done," and are likely to avoid or discount pre-investment legal or political risk analyses because such analyses take time, delaying the closing of the deal. These analyses are outside of the decision maker's scope of expertise, which is commercial rather than legal or political. Both legal and political risk analyses can also threaten the deal by raising (and thus over-emphasizing) long-term speculative concerns that, in all probability, will never actually materialize or will be unlikely to materialize before the decision maker is promoted and transferred.[150]

---

146. As Wälde has suggested, any risk-reducing role of BITs should materialize only "over time and [only] once the application [of the treaties] is sufficiently well tested." Thomas W. Wälde, *The* Serbian Loans *Case: A Precedent for Investment Treaty Protection of Foreign Debt?*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 383, 386 (Todd Weiler ed., 2005).

147. *See* Franck, *supra* note 26, at 49.

148. Yackee, *supra* note 36, at 1551–52.

149. Zimmerman, *supra* note 87, at 18–19.

150. As the authors of a leading casebook on international business transactions describe,

Even if decision makers actually consult lawyers, those lawyers, who are likely to be "transactional" rather than "litigation" attorneys, may share their clients' biases toward deal closure.[151] Or they may be consulted late in the decision-making process, with their advice mainly used — if it is used at all — to structure legally an investment decision that has, in substance, already been made.[152] At that stage, if BITs come to the attention of decision makers, they may impact the investment decision only in a rather superficial way — by encouraging the investor to route the investment through an affiliate in a country that has a BIT with the intended host state.[153]

Although it must be noted that anecdotes are merely another point of data from which to triangulate, rather than proof, I offer the

---

foreign investment decisions are often initiated by a multinational corporation's foreign-based management, who are usually assigned abroad for three to five years, with the understanding that successful performance abroad will lead to a promotion upon return to the home country. These managers:

> are judged on what they have accomplished, that is, how many new joint ventures they have established, how many new products were introduced, and how much sales revenues have increased during their assignments. [They] feel pressure to perform and produce within a short period of time during their overseas assignment, which is now often considered to be critical for long-term advancement within many corporations. Some business managers have been tempted to pursue very aggressive strategies, knowing that they will be rewarded when their assignment is over and that problems with their risky strategies may not arise until years later — long after they have departed the foreign branch and have been promoted. In this situation, conflicts can arise between ambitious business managers who seek business results . . . and the in-house lawyer whose job is to protect the company from unnecessary risks.

DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 7 (2d ed. 2010). More generally, work by law and society scholars such as Stewart Macaulay suggests that businesspeople plan their activities without much awareness or analysis of the laws and legal procedures that might apply in the event of an eventual dispute with a contracting party (or, by extension, with a host state). *See* Macaulay, *supra* note 84. The quote by Chow and Schoenbaum suggests that this lack of appreciation for law at the deal-making stage may not necessarily be irrational from the point of view of the deal maker.

151. *Cf.* Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996) (discussing the role that transactional lawyers play in facilitating business deals, and noting a number of ways in which lawyers have an incentive to make sure the deals succeed).

152. *Cf.* Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS. 243, 258 (2008) (noting how rational legal planning in the foreign investment decision-making process is impacted by the "cadence" of the surrounding negotiations, which is periodically "feverish" and "compressed and caffeinated"). Johns suggests that one of the lawyer's primary goals in international deal making is helping to "get[] the deal done" by making sure that all proper documentation is completed, *id.* at 257, and that transactional lawyers, unlike their litigation counterparts, "experience the deal as a collaborative, creative work, at one remove from the grubby brawls in which their litigation colleagues engage." *Id.* at 265. Important legal issues, such as choice-of-law clauses, may not be dealt with by lawyers until all of the commercial terms have been negotiated. *Id.* at 259 n.80.

153. On the "trans-shipment" of investment, see *supra* note 70.

observations of an informant I interviewed in the course of the survey of GCs discussed in Part V. The informant is the chair of the oil and gas section of a major international law firm and has extensive experience in facilitating and advising on all stages of major international and domestic oil and gas projects. The informant also lectures regularly at professional conferences on legal risk assessment in the international oil and gas sector and has authored practitioner-oriented papers on the topic, including papers that discuss BITs.

After explaining my project, I asked the informant his thoughts on the role that investment treaties play in oil and gas investment decisions. Given the history of expropriation in that sector,[154] one would think that oil and gas investors would be keenly interested in BITs.[155] The informant emphasized that for him personally, identifying the possibility of "treaty support" for a potential investment opportunity should be a "common sense" part of "due diligence."[156] He added, however, that many legal issues, including BITs, typically only come up "after the fact" (that is, after a dispute has arisen). It was only the infrequent "sophisticated" client who would engage in rigorous legal due diligence prior to the decision to invest, and if BITs came into the process, it was almost always part of a discussion of how to structure a given investment that was already going to be made. This kind of structuring consideration was much more common for tax purposes than to achieve BIT coverage, but he advocated (and had been involved in) structuring considerations for BIT-coverage purposes as well.

I specifically asked the respondent if he was aware of any investment deals that had not gone forward because of the absence of a BIT, and his answer was quick and unambiguous: He had "never seen anyone not do

154. For example, expropriation and nationalization in the petroleum sector in the 1950s, 1960s, and 1970s led to a number of celebrated international arbitral awards. *See generally* Yackee, *supra* note 36 (discussing arbitral awards). For a graphical portrait of expropriation trends in the petroleum, mining, and manufacturing sectors, see Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329, 334 (1984).

155. Alternatively, because oil and gas investors are often in a position to enter into investment contracts with host states, they may be better able than other investors to mitigate expropriation risk by agreement, and thus to perhaps have less objective need for treaty protections.

156. The informant's discussion of BITs as part of an idealized legal "due diligence" process suggests that even if investors do look for BITs, they do so very late in the investment process, as legal due diligence generally takes place only at the point at which an investor is focused on a particular investment opportunity that he is seriously considering undertaking. In other words, this kind of due diligence is unlikely to be part of an investor's initial comparative scanning of potential investment opportunities — if investors indeed undertake any sort of initial comparative analysis. (The studies by Kobrin and others suggest that corporations often fail to engage in significant comparative analysis of investment opportunities, electing instead to analyze potential investments on a stand-alone basis.)

a deal because there wasn't an investment treaty." Why were BITs not more relevant to investor decisions? In his view, it was the "nature of the business," which was "not driven by lawyers," but by "commercial" people whose job was to "get the deal done as soon as possible." Rigorous legal due diligence (even, he said, applying for OPIC or MIGA insurance) holds up the deal, and for that reason is often avoided.

The informant's comments may or may not reflect wider industry practice; they may or may not reflect practice in other sectors, such as manufacturing or services. They may reflect a totally and completely atypical set of professional experiences.[157] Indeed, in a sense they *must*, if it is really true that a country can nearly double its FDI inflows merely by entering investment treaties. I would suggest, however, that the respondent's observations fit well into the preceding pages of analysis and exposition. They confirm my conclusion that BITs generally have little causal role in promoting foreign investment.

What are this Article's larger implications? Theoretically, this Article's empirical results seem to confirm that law and society's observations about the limited and indirect role that formal law plays in the organization of commercial affairs domestically also apply internationally.[158] Foreign investors are presumably more in need of legal protection against adverse government action than are purely domestic investors who may enjoy greater access to and influence over the domestic political system and who are less able to be scapegoated in the judicial process as outsiders.[159] Yet, the business decisions of foreign investors do not seem to be particularly motivated by the availability of special international legal protections — at least not protections of the variety routinely included in BITs.

More practically, the results might suggest that developing countries that wish to attract investment, or to continue to attract investment, need

157. In the course of my research, I did not systematically interview either foreign investors or their lawyers. Such a project would provide a welcome extension of the research presented above. I did speak, however, to a small number of in-house counsel in multinational firms, including the GC of a prominent confectionary company, the assistant GC at an industrial manufacturing firm, and an assistant GC in the oil and gas division of a multinational conglomerate. In the course of discussions, none of these informants suggested that BITs were meaningfully relevant to their companies' foreign investment decisions. Lauge Poulson is currently engaged in an ambitious interview project of government officials in charge of negotiating BITs. *See* Poulson, *supra* note 115.

158. *See generally* Yackee, *supra* note 9 (providing a law and society critique of the argument that BITs should promote FDI).

159. For an example of such scapegoating, see the NAFTA Chapter 11 award in Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 442 (2005), in which the arbitral tribunal recounts a jury trial against a Canadian investor in which the United States party introduced inflammatory remarks about the investor's foreign status.

not sign on to the rigors and disciplines of BITs. Countries that refuse to sign BITs, or that allow their BITs to lapse, may be unlikely to see a meaningful reduction in investment flows. They may not, in other words, be destined to fall ever more behind in the so-called competition for capital.[160]

This conclusion admittedly has an unfortunate aspect to it. BITs are unlikely to be a quick-and-easy cure-all for whatever ails the developing country that is failing to receive all the foreign investment that it wants. BITs are not magic wands, the waving of which produces, with a poof and a cloud of smoke, a foreigner with pockets stuffed with cash. If developing countries wish to attract foreign investment, they need to do something more than sign and ratify BITs.

160. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811, 811 (2006) (arguing that developing states sign BITs primarily in order to "compete" for foreign direct investment).

APPENDIX

1. To your knowledge, how regularly does your company actively consider investing in foreign (non-U.S.) operations, businesses, joint ventures, or other projects?

Never or Rarely — Frequently

① ② ③ ④ ⑤

2. How familiar are lawyers in your office with the basic provisions of Bilateral Investment Treaties (BITs)?

Not at all Familiar — Very Familiar

① ② ③ ④ ⑤

3. How familiar are non-lawyer senior executives in your corporation with the basic provisions of BITs?

Not at all Familiar — Very Familiar

① ② ③ ④ ⑤

4. In your view, how effective are international treaties like BITs at protecting foreign investments from expropriation by a foreign government?

Not at all Effective — Very Effective

① ② ③ ④ ⑤

5. In your view, how effective are international treaties like BITs at protecting foreign investments from adverse regulatory change in the foreign country?

Not at all Effective — Very Effective

① ② ③ ④ ⑤

6. How important is the presence or absence of a BIT to your company's typical decision to invest in a foreign country?

Not at all Important → Very Important

① ② ③ ④ ⑤

7. To your knowledge, has your company ever declined to invest (or to consider investing) in a particular foreign project specifically because of the absence of a BIT?

No ○ Yes ○ Don't Know ○

APPENDIX: CORRELATIONS BETWEEN SURVEY RESPONSES[161]

	Fortune 500 Rank	Q1	Q2	Q3	Q4	Q5	Q6
Fortune 500 Rank	1.0000 200						
Q1	-0.1538 0.1940 73	1.0000 75					
Q2	-0.0403 0.7351 73	0.6272* 0.0000 75	1.0000 75				
Q3	-0.0517 0.6638 73	0.5570* 0.0000 75	0.6198* 0.0000 75	1.0000 75			
Q4	-0.0180 0.8916 60	0.3398* 0.0069 62	0.1941 0.1306 62	0.4554* 0.0002 62	1.0000 63		
Q5	-0.0051 0.9687 61	0.2162 0.0888 63	0.2326 0.0666 63	0.4426* 0.0003 63	0.5585* 0.0000 62	1.0000 63	
Q6	-0.1653 0.1883 65	0.5289* 0.0000 67	0.4159* 0.0005 67	0.6464* 0.0000 67	0.5281* 0.0000 61	0.3565* 0.0045 62	1.0000 67

161. The table shows correlation coefficients, level of statistical significance, and number of respondents for each survey question. The Fortune 500 rank of two respondents is unknown, as those respondents responded anonymously.

* * *