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INTRODUCTION

Initially, bilateral investment treaties ("BITs") were intended as legal instruments to promote and protect investments from rich capital exporting states to the developing world. While BITs signed between developing countries (hereinafter South-South BITs) began to emerge from the mid-1960s onwards with the 1964 Kuwait-Iraq BIT, a typical BIT was until recently negotiated between a developed and a developing country (hereinafter North-South BITs). Accompanied by rising outward foreign direct investment ("FDI") stocks from developing countries over the last decade, however, this pattern has begun to change as many developing countries have increasingly entered into BITs among themselves.[1] South-South BITs today account for around 40% of the global network of BITs, and more than 100 developing countries have entered into BITs with another developing country.[2] Most have been signed within the same region, and many recent South-South BITs have been facilitated at minilateral conferences organized by the United Nations Conference on

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[1] *See* U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS at 5, U.N. Doc. UNCTAD/ITE/IIT/2005/3, U.N. Sales No. E.05.II.D.26 (2005).

[2] *Id.* Note that in contrast to UNCTAD's statistics, I do not distinguish between transition countries and developing countries.

Trade and Development (UNCTAD) or individual capital exporting countries, such as Germany, Switzerland, or France.[3]

Given the initial purpose of BITs, this development in the international investment regime is notable and raises a number of questions. For instance, does the popularity of South-South BITs imply that after decades of resistance, developing countries have finally converged completely to the norms of the developed world with respect to foreign investment treatment and protection standards? If true, that could give proponents of a multilateral investment treaty a strong political argument: if developing countries consistently incorporate the exact same clauses in South-South BITs as they do in North-South BIT, there is no apparent reason they should refuse to incorporate similar provisions in a multilateral framework. Alternatively, South-South BITs might espouse a different vision of international investment rules compared to their North-South counterparts. If so, what—if any—implications would that have for the global investment protection regime? Does it mean, for instance, that investment flows between developing countries are increasingly covered by systematically different BIT standards compared to investments made between developed and developing countries?

In order to examine these questions, this paper will investigate whether there are systematic differences in investment-rule making between South-South and North-South BITs. As noted by UNCTAD in its cursory review of South-South BITs, such an analysis has to be comprehensive and detailed enough to credibly identify whether or not South-South BITs in fact incorporate specific features.[4] Accordingly, this paper will utilize a newly constructed database with 303 BITs signed by 101 countries from 1994 to 2006 analyzed according to a set of quantitative indicators of investment provisions, which in turn allows large-sample statistical analyses. Space constraints naturally preclude a comprehensive examination of the similarities and differences between all substantial and procedural BIT provisions. The focus is therefore on two clauses, which have often been in dispute between developing countries and developed countries in multilateral discussions on investment rules in the past, namely (post-entry) national treatment provisions and provisions on repatriation of investment-related funds.

The analysis finds that South-South BITs *do* in fact vary systematically from North-South BITs with respect to these two provisions as South-South BITs are typically less comprehensive in scope. It appears that South-South BITs have been more likely to restrict, or exclude, national treatment from their substantive provisions, as well as include certain carve-outs to the transfer provisions to allow exceptional measures

[3] Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 271 (2008).

[4] UNCTAD, *supra* note 1, at 47.

taken under balance-of-payments difficulties for instance. The implications for the international investment protection regime are unclear, however, as South-South BITs have typically failed to ensure that their more narrow scope is not potentially "levelled out" by the treaties' most-favoured-nation ("MFN") provisions. This is somewhat perplexing, and based on interview feedback from BIT-negotiators, I conclude by speculating whether this de facto coherence in developing countries' BIT-networks might be unintended.

The paper is structured as follows. To provide the context of the analysis, the first section will outline the politics of the international investment regime in the post-colonial era. The second section will introduce the two provisions under review. The third section will outline the methodology applied in the analysis, as it departs substantially from the traditional legal literature investigating BITs. The fourth section will analyze whether there has been systematic variation in the content of South-South BITs with respect to the two provisions after conditioning on numerous covariates. The fifth section will review the extent to which the differences may be "levelled out" by the treaties' MFN provisions and further discuss the implications of the results. Lastly, a short conclusion will follow.

I. THE DISPUTED INTERNATIONAL INVESTMENT REGIME

First, some background. The reordering of global power relations after the First World War meant that Western states faced greater difficulties in the developing world when trying to enforce their views on the appropriate treatment of foreign investors.[5] In the absence of direct colonial rule, force and Gunboat diplomacy gradually became unfeasible in many parts of the world, and more benign means of enforcement had to be found.[6] One option was a legally binding multilateral agreement on investment. But repeated attempts by Western states within the League of Nations ultimately failed due to resistance from capital-importing states.[7] Similar attempts were made after the Second World War, when the United States proposed an International Trade Organization (ITO), which would enshrine the Western conceptions of international minimum standards for foreign investors.[8] While this view appealed to capital-exporting states, that was certainly not the case with a number of developing countries (primarily

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[5] *See* CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 8-12 (1985); ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT ch. 1 (2009).

[6] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 37–39 (2d ed. 2004).

[7] NEWCOMBE & PARADELL, *supra* note 5, at 15–16.

[8] CLAIR WILCOX, A CHARTER FOR WORLD TRADE 145–48 (1949).

Latin American countries and India), which in turn associated forced compensation and international arbitration of investment disputes with continued foreign domination and control over their resources.[9] A resulting compromise on this and other issues could not be reached and the less ambitious General Agreement on Tariffs and Trade (GATT) was put in charge of managing international trade in the post-war era.[10] Completely absent from the GATT, however, were issues pertaining to foreign investment, and the post-colonial conflict between developed and developing countries over which legal principles should determine the treatment and protection of foreign investors therefore remained unresolved.

As a response, capital-exporting states within the OECD initiated a new round of negotiations for an international investment treaty in 1962 after a series of failed non-governmental attempts during the 1940s and 1950s.[11] This proposal eventually failed as well as it became clear that developing countries would never agree to its terms. Many post-colonial states at the time had turned towards legal doctrines of sovereign control to legitimize their increasingly nationalist economic policies. Particularly, the so-called "Calvo Doctrine" became popular as it advocated against favoring foreign companies with independent standards and instead argued that multinationals only had a right to be treated as well—or as bad—as companies of the host state.[12] Apart from the substantive standards governing the affairs of foreign investors, this principle entailed settling investment disputes in local courts rather than through international arbitration. As a group, developing countries pursued these ideas in the General Assembly of the United Nations (UN) proposing a New International Economic Order ("NIEO"),[13] which allowed them "Permanent Sovereignty Over Natural Resources."[14] A cornerstone result of these efforts was the 1974 "Charter of Economic Rights and Duties of States," which stipulated that foreign investment disputes—over expropriation or otherwise—should be settled in the courts of host states and according to

[9] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 16–17 (2007).

[10] WILCOX, *supra* note 8, at 145–48; Riyaz Dattu, *A Journey From Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275, 286–88 (2000).

[11] *See The Proposed Convention to Protect Private Foreign Investment*, 9 J. PUB. L. 115 (1960); A. A. Fatouros, *An International Code to Protect Private Investment – Proposals and Perspectives*, 14 U. TORONTO L.J. 77, 89–90 (1961); *see also* NEWCOMBE & PARADELL, *supra* note 5, at 20–21.

[12] *See* Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26 (1907); *see also* SORNARAJAH, *supra* note 6, at 38.

[13] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974).

[14] Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, at 15, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962).

domestic law.[15] This of course contradicted Western aspirations of an international minimum standard and demonstrated the North-South dispute over the guiding principles of international investment law.[16]

But what capital-exporting states "lost" at the multilateral level, they gradually obtained through bilateral negotiations. Parallel to its multilateral efforts in the period after the Second World War, the United States thus expanded and upgraded its existing network of Friendship, Commerce and Navigation ("FCN") treaties, which apart from commercial and navigation matters dealt with the treatment of foreign investors.[17] While the treaties did not obtain as central a role for the treatment of foreign investment in developing countries as intended by United States policymakers,[18] they did provide an important inspiration for European states similarly eager to obtain favorable and legally binding standards for their investors abroad. Having lost almost all its investments after its defeat in the Second World War, West Germany thus entered into a BIT with Pakistan in 1959, which intended "to create favourable conditions for investments by nationals and companies of either state in the territory of the other State."[19] In contrast to FCN treaties, the BIT with Pakistan dealt solely with investment and was specifically customized to be negotiated between a developed and a developing country.[20] Soon, numerous other European countries followed Germany by entering into largely similar treaties with developing countries and, in particular, former colonies and protectorates.

BITs established an independent standard for the treatment and protection of foreign investors by obliging the contracting parties to provide compensation for expropriation, whether expropriatory measures were direct takings of assets or indirect takings "tantamount to expropriation." Typically, they further insured investors the repatriation of their profits and other capital, and they included further standards independent from domestic law, such as so-called "umbrella clauses" obliging the contracting

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[15] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), at 50, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974).

[16] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 15 (2008); *see also* Jason Web Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550 (2009).

[17] *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); Herman Walker Jr., *Treaties for the Encouragement of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956); *see, e.g.*, Treaty of Friendship, Commerce and Navigation, U.S.-S. Korea, Nov. 28, 1956, 8 U.S.T. 2217.

[18] Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 207–08 (1988).

[19] Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Preamble, Nov. 25, 1959, 457 U.N.T.S. 24.

[20] RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 10–11 (1995).

parties to observe their contractual obligations vis-à-vis foreign investors, as well as clauses providing for "fair and equitable treatment," "full protection and security," and damages from war or conflicts. Finally, many included non-discrimination standards, such as national and MFN treatment.

Gradually, BITs became popular legal instruments for the protection of Western investments in the developing world. Nevertheless, when developed countries pushed for including investment standards in GATT-negotiations during the Tokyo-round (1973-1979), developing countries refused yet again to agree to a binding set of multilateral investment rules. Similarly, negotiations within the UN for a non-binding code of conduct for transnational corporations (1977-1992) broke down because of differences between developing and developed countries over which substantive standards host states should follow in their treatment of transnational corporations.[21] And while the Uruguay Round (1986-1994) did lead to two agreements related to investment—the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS)—none of them dealt with investment protection (e.g., against expropriation) and non-discrimination was only provided for services investors.

But while multilateral negotiations on investment protection continued to disappoint Western countries, their network of BITs expanded, and with the end of the Cold War they became truly global in nature. Accompanied by further FDI-friendly reforms in the domestic investment codes of developing countries,[22] on average more than 100 BITs were signed each year during this decade. This was also the time when BITs began, as a general rule, to allow investors direct recourse to international arbitration to settle disputes against their host states without first having to exhaust local remedies.[23] This was in contrast to the WTO dispute settlement system, for instance, where only states can bring claims, as well as customary international law, where the usual procedure is that local remedies have to be exhausted. In 1995, developed countries therefore found the time ripe yet again to propose an international treaty for the liberalization and protection of investment. While negotiated by OECD-countries, the ambitious Multilateral Agreement on Investment (MAI) was meant to be open for signature by developing countries as well. Negotiations

[21] Draft United Nations Code of Conduct on Transnational Corporations, U.N. ESCOR, Spec. Sess., Supp. No. 7, Annex II, U.N. Doc. E/1983/17/Rev.1 (1983); NEWCOMBE & PARADELL, *supra* note 5, at 33.

[22] Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI flows: An Overview*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 1 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (see Table 3).

[23] *See* Jason Web Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 405 (2008).

deadlocked; however, as OECD members were unable to agree on many of the complex issues involved. Although they did not directly take part in the negotiations, many developing countries expressed their concerns with the proposed treaty (strongly backed by numerous civil society groups).[24] When the MAI ultimately failed, capital-exporting countries intensified efforts to include a more comprehensive investment dimension in the WTO.[25] Negotiations had hardly taken off in 2001, however, before it was clear that history was in the process of repeating itself. While developing countries had accepted legally binding standards on the treatment and protection of foreign investors on a bilateral basis, several were not willing to "multilaterize" a similar set of rules. It eventually became clear that the final outcome would fall far below what capital-exporting states had initially hoped for, and investments were eventually taken off the negotiating table.[26]

A constant theme in the development of the international legal regime for foreign investment has therefore been the North-South divide. Nationalist tendencies in the post-colonial era led developing countries to pursue a distinct vision of international investment principles different from that of Western countries. Even the spread of liberal economic reforms over the last three decades accompanied by the growing popularity of BITs did not make developing countries agree to a comprehensive multilateral investment agreement. This is despite the fact that a multilateral framework arguably would result in a more transparent and predictable investment regime than the current patchwork of bilateral obligations.

It is, however, important to recall that in contrast to multilateral negotiations, developing countries have for the most part been "regime takers" in BIT-negotiations with more powerful capital-exporting state.[27] The rapid expansion of the global BIT-network may therefore not have represented a complete consensus among developed and developing countries on which standards should govern the affairs of foreign investors, which could explain developing countries' different positions when they have negotiated on a bilateral basis and when they have negotiated as a group.

If so, the question becomes whether the recent rush towards South-South BITs might reflect a greater degree of consensus among developed

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[24] Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?*, 9 J. INT'L ECON. L. 325, 326 (2006); DAVID HENDERSON, THE MAI AFFAIR: A STORY AND ITS LESSONS (2000); Andrew Walter, *NGOs, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond*, 7 GLOBAL GOVERNANCE 51, 51 (2001).

[25] Sauvé, *supra* note 24, at 326.

[26] *Id.* at 326–27.

[27] Stefan D. Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 119 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

and developing countries. For while the bargaining power of countries like India and China on the one hand and small African countries on the other is of course not equal, many BITs between developing countries have nevertheless often been negotiated in a more symmetric bargaining context than North-South BITs. An overview of the content of South-South BITs may therefore provide useful insights into the preferences of developing countries in the international investment regime. As mentioned above, if they are completely similar to North-South BITs that could indicate that there has indeed been a convergence of views between developing and developed countries. On the other hand, if there are systematic differences between North-South and South-South BITs, it not only raises the question of whether a multilateral investment treaty is more feasible today than it was a decade ago, but also the practical issue of whether investment flows between developing countries are covered by different provisions compared to North-South flows.

In an attempt to answer these questions, I will compare two BIT-provisions across South-South and North-South BITs, both of which have been in dispute between developing countries and developed countries in multilateral discussions on investment rules in the past.

II. THE TWO PROVISIONS

The first of these is national treatment ("NT") for established investors. The purpose of an NT clause in investment treaties is to oblige host states not to discriminate, de jure or de facto, between foreign investors and similarly situated national investors.[28] In BITs, the clauses typically stipulate that foreign investors and their investments shall be "*accorded treatment no less favourable than that which the host state accords to its own investors*,"[29] and some, such as American BITs, specify that the clause applies only in "*like situations*,"[30] or "*like circumstances*."[31] Being a relative or contingent standard, NT will of course be of little use if domestic investors have limited rights. However, the purpose of NT provisions in BITs differs fundamentally from the NT concept which was part of the NEIO. Whereas the latter was intended to limit the rights foreign investors could rely upon through international law, BITs do not preclude that standards more favorable than those granted to national investors should be applied to foreign investors (on the contrary, see above).[32]

Not surprisingly, developed countries have been strong proponents of

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[28] DOLZER & SCHREUER, *supra* note 16; NEWCOMBE & PARADELL, *supra* note 5, ch. 4.

[29] *See, e.g.*, Danish 2008 model BIT, art. 3.1 (on file with author).

[30] *See, e.g.*, U.S. Dep't of State, U.S. Model Bilateral Investment Treaty, art. 2.1 (1994).

[31] *See, e.g.*, U.S. Dep't of State, U.S. Model Bilateral Investment Treaty, art. 3.1 (2004).

[32] DOLZER & SCHREUER, *supra* note 16, at 178; UNCTAD, NATIONAL TREATMENT at 37, U.N. Doc. UNCTAD/ITE/IIT/11 (Vol. IV), U.N. Sales No. E.99.II.D.16 (1999), *available at* http://www.unctad.org/en/docs/psiteiitd11v4.en.pdf.

including NT clauses in their BITs in order to "level the playing field" among their investors abroad and domestic companies of host states.[33] Developing countries, on the other hand, have traditionally sought to exclude, or substantially limit, the standard in order to favor their own nationals.[34] Often this agenda has been pursued based on infant-industry protection arguments, which (in theory) provide developing countries an economic justification for a certain level of discrimination against foreign competition.[35] In multilateral discussions, such arguments have been made for decades. During the discussions on the UN Draft Code on Transnational Corporations in the 1980s, for instance, developing countries thus proposed to limit the NT standard by allowing measures specified in legislation relating to developing countries' development objectives.[36] Similarly, although large-scale protectionist experiments have gone out of fashion in most of the developing world, several developing countries were cautious about granting foreign investors unlimited NT in the recent discussions on investment issues in the Doha Round. Such granting, they argued, would prevent subsidizing or providing other benefits to national investments, thereby potentially undermining national development strategies.[37]

Another BIT provision, where there has been a divergence of views between developing and developed countries, is the free transfer of investment-related funds out of the host state. While such clauses can and do differ from treaty to treaty, most BITs stipulate that a wide range of payments and other-investment related funds shall have a right to be transferred out of the host state without delay and, typically, in a freely convertible currency.[38] From foreign investors' point of view, these clauses are key in investment-treaties, as the ability to freely repatriate funds can be an important factor in their investment-decision process. Developing countries, on the other hand, often have an interest in not restraining their ability to adopt certain restrictive exchange rate or other measures, for instance, as means to prevent or confront economic and financial crises.

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[33] It is typically only North American BITs that include legally binding pre-entry NT provisions.

[34] Salacuse, *supra* note 17, at 668.

[35] *See generally* PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY ch. 10 (8th ed. 2008).

[36] U.N. CTR. ON TRANSNATIONAL CORP. [UNCTC], BILATERAL INVESTMENT TREATIES at 33, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 (1988), *available at* http://unctc.unctad.org/aspx/allDocsYear.aspx; *see* The Secretariat, U.N. Comm'n on Transnat'l Corp., *Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, paras. 55–61, *delivered to the General Assembly*, U.N. Doc E/C.10/1984/S/5 (May 29, 1984), *reprinted in* 23 I.L.M. 602.

[37] Working Group on the Relationship Between Trade and Investment, *Report to the General Council*, para. 93, WT/WGTI/6 (Dec. 9, 2002) (WTO Report), *available at* www.wto.org/english/docs_e/docs_e.htm.

[38] DOLZER & STEVENS, *supra* note 20, at 85–95.

Particularly, the numerous investment claims brought against Argentina in the wake of its 2001 financial crisis have sparked a debate on the risks of not subjecting such guarantees to certain exceptions.[39] But while this particular crisis might have brought attention to this issue, it has always been controversial. Jeswald Salacuse thus stated in 1990: "[T]he negotiation of BIT provisions on monetary transfer is often one of the most difficult negotiations to conclude. Capital-exporting countries seek broad, unrestricted guarantees on monetary transfers, while developing countries press for limited guarantees, subject to a variety of exceptions."[40]

As with the NT provision, this difference in preferences was also clear in the discussions on the UN Draft Code on Transnational Corporations, where rules on currency transfer was one of the key issues developed and developing countries could not agree upon.[41] Similarly, during the recent investment negotiations in the Doha Round, many developing countries argued that a host state should be able to prevent foreign investors from freely transferring revenues and capital out of its country if it were under economic difficulties.[42] While such an exception is included in some North-South BITs, it is far from the norm (see below).

For my purposes, the question is therefore whether South-South BITs are any different from North-South BITs with respect to provisions on NT and the transfer of funds. Have the skepticism of some developing countries towards wide-ranging NT provisions in multilateral discussions been reflected in BITs signed amongst themselves? Similarly, have South-South BITs been more likely to include certain safeguards against exceptional measures taken under balance-of-payments difficulties? As will be argued in the next section, the strategy to investigate these questions will benefit from the application of quantitative tools.

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[39] *See* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse Into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008–2009 (Karl P. Sauvant ed., 2009); Abba Kolo & Thomas Wälde, *Economic Crises, Capital Transfer Restrictions and Investor Protection Under Modern Investment Treaties*, 3 CAPITAL MARKETS L.J. 154, 154–55 (2008); Annamaria Viterbo, *Dispute Settlement over Exchange Measures Affecting Trade and Investments: The Overlapping Jurisdictions of the IMF, WTO, and the ICSID* (Soc'y of Int'l Econ. Law, Working Paper No. 34/08, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154673.

[40] Salacuse, *supra* note 17, at 669; *see* Kolo & Wälde, *supra* note 39.

[41] UNCTC, *supra* note 36, at 179.

[42] This suggestion was strongly opposed by the U.S. delegation for instance. *See* Working Group on the Relationship Between Trade and Investment, *Report on the Meeting Held on 16–18 September 2002, Note by the Secretariat*, para. 121, WT/WGTI/M/19 (Dec. 3, 2002) (WTO Report), *available at* www.wto.org/english/docs_e/docs_e.htm.

III. METHODOLOGY

A. Is It Necessary To Code BITs? Is It Possible?

The literature investigating the content of BITs can generally be divided into two categories.[43] Whereas one set of studies compares and contrasts several treaty obligations across a few treaties,[44] another takes an issue-based approach, which investigates one particular aspect of BITs with *ad hoc* references to a large stock of treaties as illustrations.[45] Both approaches have their obvious advantages and drawbacks. However, neither of them can credibly identify and/or correlate variation in the content of BITs across countries or time. This can only be done by comparing a large and representative sample of BITs, which in turn is only practically possible if based on a quantification of the treaties' content based on a set of transparent underlying criteria.

Necessity is one thing; feasibility is another. While the exercise of quantifying legal documents is not new within the social sciences,[46] many would undoubtedly consider it pointless to even try and capture the content of complex legal documents, such as BITs, with numeric values. A comprehensive evaluation of a treaty's terms and conditions is bound to be a qualitative exercise, which has to carefully consider the ordinary meaning of its terms in their context and in light of their object and purpose.[47] An in-depth analysis of a given BIT is therefore not well-suited for quantitative analysts trying to observe the world through binary codes of 1's and 0's. But while this skepticism is perhaps well-founded, most would probably nevertheless agree that it is possible to code certain aspects of BITs in a meaningful and informative manner. For instance, irrespective of discipline, most scholars group BITs into two distinct groups: one which grants investors a right of admission (typically North American BITs), and one that does not (typically European BITs). This is of course a simplified distinction as admission clauses can, and do, vary substantially. But

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[43] Paul Alexander Haslam, *A 'Flexibility for Development' Index: Can International Investment Agreements be Compared Quantitatively?*, 19 EUR. J. DEV. RES. 251, 252–53 (2007).

[44] *Id.*; *see, e.g.*, Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT'L ARB. 383 (2004).

[45] Haslam, *supra* note 43, at 253; ORG.FOR ECON. CO-OPERATION & DEV. [OECD], INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS ch.1 (2008).

[46] For example, publications based on the Comparative Constitutions Project are available at http://www.comparativeconstitutionsproject.org/publications.htm, and contributions on the interaction between investor protection and financial development can be found in publications such as Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997), and Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

[47] *Cf.* Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

however imperfect, it is nevertheless generally accepted as a legitimate "binary coding" of BITs that can identify general features of different treaties.[48] This paper simply takes a step further by grouping BITs according to an additional set of criteria useful to investigate my empirical question, namely whether systematic variation in BITs is co-determined by both parties being developing countries. Note, however, that what the paper does *not* intend to do is to try to compare the BITs according to an aggregate quantitative score based on some underlying concept such as the treaties' strength or flexibility for development. This has been tried elsewhere.[49] But while not necessarily an illegitimate exercise, it involves major and ultimately subjective assumptions on the role and importance of different provisions which would be more than problematic for most purposes, including this paper.

B. Sample

The sample used comprises 303 BITs signed by 100 countries from 1994 to 2006 available in English or French from UNCTAD's online BIT-database.[50] Out of these, 191 have been signed between 1994 and 1999, and the rest have been signed between 2000 and 2006 (many recent BITs have not yet been made available on UNCTAD's database). While the sampling process was random, it nevertheless resulted in a slight oversampling of countries with large BIT programs. This was addressed by a re-sampling to allow the majority of countries included in the dataset to have a sampling rate of between 20% and 30%. The language criteria meant a substantial undersampling of Italian treaties, but I am nevertheless rather confident that the sample is sufficiently representative of the total population of BITs.[51]

Distinguishing between developing and developed countries is always tricky, particularly in studies over time. For my purposes, I define a developed country as one, which the World Bank has classified as a "high-income" country for the majority of the period in focus. Apart from

[48] *See, e.g.*, DOLZER & SCHREUER, *supra* note 16, at 81.

[49] *See* Brian Hicks, Dissecting the Black-Box: Bilateral Investment Treaties and Global Investments (Mar. 27, 2008) (unpublished manuscript, presented at the 2008 Annual Meeting of the International Studies Association), *available at* http://www.allacademic.com/meta/p250708_index.html; Haslam, *supra* note 43.

[50] UNCTAD's online BIT-database can be found at http://www.unctadxi.org/templates/DocSearch____779.aspx.

[51] *See generally* UNCTAD, WORLD INVESTMENT REPORT 2007: TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT, U.N. Doc. UNCTAD/WIR/2007, U.N. Sales No. E.07.II.D.9 (2007), *available at* http://www.unctad.org/en/docs/wir2007overview_en.pdf (describing the spatial and temporal distribution of BITs); UNCTAD, *Bilateral Investment Treaties 1959-1999*, U.N. Doc. UNCTAD/ITE/IIA/2 (2000), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf (same).

Western countries, this includes countries such as South Korea and Kuwait. While these countries have signed numerous treaties with Western countries, their role in South-South BIT negotiations is arguably often that of capital exporters; and I thus expect their interests to be similar to Western capital exporters seeking as favorable terms for their investors abroad as possible.[52] Among the sampled treaties, a North-South BIT therefore has one of the following countries as its home state: the 15 "old" members of the European Union, members of the European Free Trade Association, Australia, New Zealand, United States, Canada, Japan, Korea, Hong Kong, Singapore, Israel, Kuwait, or United Arab Emirates. This classification leaves 124 South-South BITs, which corresponds to 41% of the total sample.

Rather than using a computer package, the coding was done by me as some of the detailed questions involved appear impossible or, at a minimum, risky to attempt to code using automated techniques. As BITs often include different obligations for the contracting parties, all indicators are coded based on the obligations of host states vis-à-vis home state investors. North-South BITs always have the developed country as the "home state," whereas the "home state" in South-South BITs is distributed randomly across the sample between large and small developing countries.

C. Covariates

Since I am interested in whether changing the BIT partner from a developed to a developing country, *ceteris paribus*, have changed the content of BITs, my explanatory variable of interest is a dummy variable indicating whether the BIT-dyad is between two developing countries. Of course, there are other reasons a host state might, or might not, wish to vest foreign investors with certain rights in its BITs, apart from whether the home state is a developing or developed country. I thus control for the level of development of the host state by including the natural log of its GDP per capita income as well as its level of incoming investment by including the natural log of its inward FDI stock. I moreover control for its political environment by including a dummy variable for whether it has a socialist legal tradition (typically former or current communist countries) and two variables indicating whether it had a left-wing and/or a nationalist government in the year it signed the BIT.[53] Furthermore, I include a dummy variable for whether the host state is from Latin America (the "home region" of the Calvo Doctrine) and similarly include dummy variables to capture systematic tendencies in the BIT-networks of the ten

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[52] *See* Salacuse, *supra* note 17, at 658–59.

[53] In sensitivity analysis, various indexes attempting to measure the investment climate of the host state were included as well. This reduced the observations by almost one third, and because the indexes were generally not significant in any of the estimations, they are excluded from the analysis below.

countries with the largest number of BITs signed at the end of the period.[54] As a measure of the economic integration between the BIT partners, I include a variable measuring their bilateral trade flows as a share of the host state's GDP. Finally, I include a dummy variable for whether the BIT was signed after 2000 to capture possible time-effects. A summary of the covariates (excluding the country and period dummies) and their bivariate correlations are given in Tables 1 and 2 below.

TABLE 1

Variable description								
	Independent variables	**N**	**Mean**	**St. dev.**	**Min**	**Max**	**Source**
Dyadic variables	South-South BIT	303	0.41	0.49	0	1	1
	Bilateral trade (% of host GDP)	291	1.05	2.87	0	34.74	1, 2
Host variables	Ln GDP per capita (US$)	292	7.31	1.03	4.76	9.16	1
	Ln inward FDI stock (mio. US$)	292	8.28	1.89	3.26	12.51	3
	Leftwing executive	303	0.25	0.44	0	1	4
	Nationalist executive	302	0.14	0.35	0	1	4
	Socialist legal tradition	303	0.32	0.47	0	1	5
	Latin American country	303	0.20	0.40	0	1	-

Sources: (1) World Bank, World Development Indicators; (2) International Monetary Fund, Direction of Trade Statistics; (3) UNCTAD, FDI statistics; (4) Thorsten Beck et al., *New Tools in Comparative Political Economy: The Database of Political Institutions*, 15 WORLD BANK ECON. REV. 165 (2001); and (5) Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008).

[54] Due to the undersampling of Italian BITs, Italy is not included as a dummy.

TABLE 2

Bivariate correlation matrix								
	I:	II:	III:	IV:	V:	VI:	VII:	VIII:
I: South-South BIT	1							
II: Bilateral trade (% of host GDP)	-0.11	1						
III: Ln GDP per capita	-0.05	-0.04	1					
IV: Ln inward FDI stock	0.18	-0.10	0.26	1				
V: Leftwing executive	-0.15	-0.04	0.28	-0.00	1			
VI: Nationalist executive	-0.07	0.01	0.12	-0.14	0.23	1		
VII: Socialist legal tradition	-0.07	0.02	-0.10	-0.40	0.04	0.09	1	
VIII: Latin American country	-0.20	0.05	0.36	0.18	0.28	-0.13	-0.29	1

D. Estimation Techniques

As both provisions are coded as binary variables (see below), the estimations use logistic regression techniques. But since the content of a specific BIT is not likely to be independent from the content of other BITs signed by the same host or home state, the assumption of unit independence necessary for normal logit models is not upheld in this case. Many countries have model BITs, for instance, which they use as their reference point during negotiations.[55] While the country-specific dummies control for some of this variation, this is not sufficient, and in two separate sets of regressions, I therefore adjust standard errors for correlations between individual home or host countries' BITs, respectively.

Initial data-analysis revealed an additional challenge, however, often found in applied logistic regression analyses, namely that of "separation." This is when one or more variables predict the outcome perfectly (complete separation) or almost perfectly (quasi-separation), which is problematic as it can make the maximum likelihood estimation impossible to calculate (i.e., regression coefficients become positive or negative infinity). Not surprisingly, these variables are the country-specific dummies capturing idiosyncratic effects of specific BIT-programs (the problem is thus a variation of the intra-country correlation issue described above). With respect to NT provisions, there is thus complete separation, as *all* Dutch and U.K. BITs in the sample, for instance, include NT clauses without major limitations (see definition below). With respect to transfer clauses there is quasi-separation. For instance, only two recent Chinese BITs in the sample do not include limitations in their transfer clauses and only one U.K. BIT does (see again definition below). Unfortunately, however, most econometric textbooks fail to provide a remedy for the separation problem.

[55] On the several purposes of model BITs, see Salacuse, *supra* note 17, at 662–63.

In my initial logit estimations I follow the advice of Davidson and MacKinnon[56] and leave out the "perfect classifiers," when there is complete separation. But since this solution risks underspecifying the model, I run a second set of regressions using maximum penalized likelihood estimation, in which the likelihood function is penalized in order to produce consistent parameter estimates in the presence of separation.[57] This estimation technique does not allow us to adjust the standard errors, however, and I am therefore left with three regressions on each dependent variable confronting different, but ultimately related, estimation challenges.[58] If the different specifications all lead to the same conclusions, this would naturally increase our trust in the robustness of the results (and vice-versa).

IV. ANALYSIS

A. National Treatment

The first question I address is whether developing countries' skeptic statements in multilateral discussions towards wide-ranging NT provisions have been reflected in BITs signed amongst themselves. I therefore compare the share of BITs which exclude or limit NT provisions across the two BIT-dyads. Limitations are here understood as clauses, where the NT standard is either not legally binding or subject to domestic laws (and thus substantially restricted). It suffices to say that this simple distinction will result in grouping BITs, where NT provisions would potentially be applied somewhat differently on a case-to-case basis. However, certain simplifications are necessary to identify general, but hopefully still meaningful, patterns across a large number of treaties. For my purposes, certain sector specific reservations therefore do not count as major limitations.[59] Moreover, I do not distinguish between BITs specifying that NT shall be provided in the "same" or "identical" circumstances[60] from BITs where this basis of comparison is not included. Neither do I

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[56] RUSSELL DAVIDSON & JAMES G. MACKINNON, ESTIMATION AND INFERENCE IN ECONOMETRICS 521 (1993).

[57] *See generally* Christopher Zorn, *A Solution to Separation in Binary Response Models*, 13 POL. ANALYSIS 157 (2005); David Firth, *Bias Reduction in Maximum Likelihood Estimates*, 80 BIOMETRIKA 27 (1993); *see also* Georg Heinze & Michael Schemper, *A Solution to the Problem of Separation in Logistic Regression*, 21 STAT. MED. 2409 (2002).

[58] An alternative specification strategy would have been hierarchical modeling. This is not suitable here, however, as country-specific effects clearly cannot be regarded as a random variable, as required in the random effect model; and a logistic regression model with fixed-effects is equally problematic due to the separation problem.

[59] While a formal distinction can be made between "reservations" and "exceptions," I use these terms interchangeably along with the term limitations. *See generally* NEWCOMBE & PARADELL, *supra* note 5, ch. 10.

[60] *See, e.g.*, Agreement for the Promotion and Protection of Investments, Belize-U.K., art.3, Apr. 30, 1982, 1294 U.N.T.S. 199.

distinguish between BITs using the term "no less favourable" treatment and those using terms such as "same treatment" or "as favourable" treatment. Finally, for my purposes, the general taxation exception to NT found in most BITs is not considered to substantially restrict the NT provisions nor are the exceptions to NT based on prudential measures in financial services[61] or intellectual property rights guaranteed under international intellectual property conventions.[62]

TABLE 3

National treatment (post-establishment)			
	Share		
	Total	North-South BITs	South-South BITs
I: No NT	0.20 (0.15 - 0.24)	0.08 (0.04 - 0.12)	0.36 (0.28 - 0.45)
II: Parties shall strive to provide NT or NT is subject to domestic laws	0.07 (0.04 - 0.09)	0.05 (0.01 - 0.08)	0.10 (0.04 - 0.15)
III: Specific exceptions	0.11 (0.07 - 0.14)	0.16 (0.10 - 0.21)	0.03 (0.00 - 0.06)
IV: No exceptions	0.63 (0.58 - 0.69)	0.72 (0.65 - 0.79)	0.51 (0.42 - 0.60)
V: No NT or major limitations to NT (I or II)	0.26 (0.21 - 0.31)	0.12 (0.07 - 0.17)	0.46 (0.37 - 0.55)
N:	303	179	124
Notes: 95 % confidence intervals in brackets. Percentages don't add up due to rounding.			

A breakdown of the sample is provided in Table 3. Purely aspirational NT clauses are few and distributed more or less equally across the two BIT-dyads. A greater share of North-South BITs has NT clauses with specific exceptions, but this is almost solely driven by U.S. and Canadian treaties which include exceptions to their NT provisions for the pre- and post-establishment phases. The major difference, however, is that more than one-third of South-South BITs does not include an NT provision at all compared to only 8% of North-South BITs. This means that only 12% of North-South BITs exclude or limit their NT provisions as defined above, whereas the share is 46% for South-South BITs. The confidence intervals for the two groups do not overlap, and the difference is therefore unlikely to

[61] *See, e.g.*, Agreement for the Reciprocal Promotion and Protection of Investments, Barb.-Can., art. 11, May 29, 1996, 2026 U.N.T.S. 341.

[62] *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Nicar., art. 2, July 1, 1995, S. TREATY DOC. NO. 106-33 (2000), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:td033.pdf.

be due to random variation. It thus seems that South-South BITs have indeed been less likely to incorporate wide-ranging NT clauses compared to North-South BITs. The question is, however, whether this pattern is actually due to the differences in BIT-partners, or instead reflects some other underlying factors. In other words, is the systematic difference between North-South and South-South BITs "real" or simply due to an omitted variable bias?

Table 4 below provides the results from the logistic regressions. Several country-dummies have been excluded from the "normal" maximum likelihood estimations due to all of their treaties including NT provisions without major limitations. China has been excluded as none of its BITs in the sample include NT provisions without major limitations. With respect to the three political variables, none of them are significant or substantial, which could perhaps reflect the fact that BIT-negotiations rarely have been particularly politicized affairs (see below). Across all three specifications the Latin American dummy implies that Latin American countries signing BITs have been less likely to exclude or limit NT clauses than developing countries from other regions. This does not correspond with our intuitive understanding of Latin America as less welcoming to foreign investors than other regions. The bilateral trade variable indicates that countries with closer economic ties have been less likely to exclude or limit NT provisions (this relationship is significant in two out of three estimations), and the time dummy shows that comprehensive NT provisions have been more common in recent BITs compared to BITs from the 1990s. Finally, developing countries with higher inward FDI stocks have tended to include less wide-ranging NT provisions.

Most importantly for our purposes, the difference between South-South and North-South BITs is substantial in all estimations, and significant in two out of three. After conditioning on the included co-variates, South-South BITs are still between two and three times more likely to limit or exclude NT provisions. Accordingly, I am quite confident that developing countries have been more likely to exclude or limit NT in their BITs when the other contracting party has been a developing country. As we shall see below, this is not the only systematic difference between South-South and North-South BITs.

TABLE 4

National treatment (post-establishment) *Logistic regressions*		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	2.34/** (2.01/4.31)	2.46** (5.64)
Ln GDP p.c.	0.79 (1.62/0.98)	0.80 (1.57)
Ln inward FDI stock	1.60***/*** (11.38/8.75)	1.57*** (15.75)
Leftwing executive	0.89 (0.05/0.08)	0.85 (0.14)
Nationalist executive	0.75 (0.31/0.38)	0.80 (0.26)
Socialist legal tradition	1.76 (0.91/1.04)	1.80 (1.74)
Latin American country	0.25*/* (2.91/3.91)	0.32* (3.38)
Bilateral trade	0.62*/** (3.77/4.65)	0.94 (1.61)
2000-2006	0.40**/** (5.29/5.08)	0.41** (6.30)
Germany	(dropped)	0.19 (1.30)
China	(dropped)	67.99*** (20.81)
Switzerland	0.39*/ (3.51/0.70)	0.53 (0.53)
UK	(dropped)	0.27 (1.10)
Egypt	0.63 (0.95/1.01)	0.70 (0.45)
France	(dropped)	0.22 (1.52)
Netherlands	(dropped)	0.25 (1.27)
BLEU	1.84 (1.13/0.71)	1.72 (0.57)
Korea	(dropped)	0.18 (2.10)
Romania	1.25 (0.02/0.02)	1.21 (0.03)
N	218	290

Notes: Dependent variable is coded as 1 if NT clause is absent, non-legally binding or subject to domestic laws. (I) Standard errors adjusted for correlation among home country BITs; (II) standard errors adjusted for correlation among host country BITs. Constants included but not reported. Chi2 values after Wald tests in brackets for (I) and (II), chi2 value after likelihood ratio test in brackets for (III).
* significant at 10%; ** significant at 5%; *** significant at 1%.

B. Transfer Clauses

I continue the analysis by comparing BITs on the second indicator, namely whether they include certain safeguards against exceptional measures taken under balance-of-payments difficulties.[63] Such safeguards come in several forms. One option is to subject the transfer clause to domestic laws, in which case the host state is free to limit the flow of capital out of its economy, for instance during economic crises, as long as it is done through law.[64] Another option is to allow exceptions to the free transfer of funds, but only during balance-of-payments difficulties and typically with a requirement that such restrictions should be necessary, non-discriminatory and on a temporary basis.[65] Finally, some treaties include other major limitations that permit restrictions on capital flight, such as certain Chilean BITs attempting to restrict short-term capital in- and outflows.[66] For my purposes, provisions safeguarding the powers of financial services regulators[67] or national laws concerning bankruptcy, trading or dealing in securities, criminal or administrative violations, or compliance with resolution of tribunals[68] are not considered to specifically safeguard measures taken during economic crises. Similarly, I do not find the so-called "lumpy transfers" exception, to be as restrictive as those mentioned above, and BITs including these are therefore grouped with BITs without direct safeguards.[69]

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[63] *See* Kolo & Wälde, *supra* note 39 (discussing whether international law makes it illegal for a contracting party to a BIT to restrict such transfers during balance of payments crises without such exceptions).

[64] *See, e.g.*, Agreement for the Promotion and Mutual Protection of Investments, Port.-Bulg., art. 5, May 27, 1993, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/portugal_bulgaria_eng.pdf.

[65] *See, e.g.*, Agreement for the Promotion and Protection of Investments, U.K.-Arg., art. 6, Dec. 11, 1990, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf.

[66] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Chile-Austria, protocol, Sept. 8, 1999, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/austria_chile.pdf.

[67] *See, e.g.*, Agreement for the Promotion and Protection of Investments, Can.-Peru, art. 14, Nov. 14, 2006, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf.

[68] *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Mozam., art. 5, Dec. 1, 1998, S. TREATY DOC. NO. 106-31 (2000), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/us_mozambique.pdf.

[69] *See* Kolo & Wälde, *supra* note 39, at 163 (the lumpy transfer exception permits "the parties to limit transfers of proceeds of liquidation to a certain percentage of an investment's value per year, so long as the investor is permitted to maintain the value of the investment domestically"). It is typically American BITs that include such exceptions. *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, art. 5, Mar. 11, 1986, S. TREATY DOC. NO. 99-24 (1986), *available at* http://www.state.gov/documents/organization/43559.pdf.

TABLE 5

Repatriation of investment-related funds			
	Share		
	Total	*North-South BITs*	*South-South BITs*
I: Transfers subject to domestic laws and/or other major restrictions	0.22 (0.17 - 0.27)	0.10 (0.05 - 0.14)	0.40 (0.31 - 0.48)
II: Free transfers guaranteed except under balance-of-payments difficulties	0.05 (0.03 - 0.08)	0.06 (0.02 - 0.09)	0.05 (0.01 - 0.09)
III: No balance-of-payments or other major restrictions to transfer clause	0.73 (0.68 - 0.78)	0.85 (0.80 - 0.90)	0.56 (0.47 - 0.65)
N:	303	179	124

Notes: 95 % confidence intervals in brackets. Percentages don't add up due to rounding.

Table 5 provides a breakdown of the sample according to these criteria. Whereas the share of BITs which includes balance-of-payments exceptions is low and almost the same in North-South and South-South BITs, a much higher share of South-South BITs includes major restrictions to the transfer clause and/or subject it to domestic laws. Forty percent of South-South BITs in the sample thus incorporate such restrictions compared to only ten percent of North-South BITs; and as with NT-provisions, the confidence intervals show that this difference is not only substantial in absolute terms, but also statistically significant.

In Table 6, the regressions again indicate that domestic political factors in developing countries appear to have had little impact on the content of their BITs. Moreover, as was also the case for NT-provisions, recent BITs have had fewer exceptions to their transfer provisions, and developing countries with higher inward FDI stocks have been more likely to include such exceptions.

TABLE 6

Transfer of investment-related funds *Logistic regressions*		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	3.67***/*** (8.49/13.11)	3.49*** (11.07)
Ln GDP p.c.	0.79 (2.38/1.01)	0.79 (1.81)
Ln inward FDI stock	1.45***/** (9.28/5.63)	1.42*** (12.31)
Leftwing executive	0.60 (1.92/0.91)	0.62 (1.58)
Nationalist executive	1.90 (1.77/1.87)	1.84 (1.75)
Socialist legal tradition	0.72 (0.40/0.45)	0.77 (0.41)
Latin American country	2.26 (2.48/1.12)	2.16 (2.69)
Bilateral trade	0.89 (2.23/1/77)	0.95 (1.02)
2000-2006	0.49*/* (3.14/3.78)	0.52** (4.19)
Germany	1.49 (1.24/0.34)	1.44 (0.19)
China	16.84***/*** (11.81/10.40)	10.03*** (11.57)
Switzerland	0.37***/ (8.76/0.82)	0.53 (0.52)
UK	0.85 (0.14/0.03)	1.07 (0.00)
Egypt	0.76 (0.37/0.48)	0.79 (0.20)
France	3.04***/ (7.36/1.83)	2.83 (2.10)
Netherlands	0.54 (1.98/0.59)	0.72 (0.12)
BLEU	0.93 (0.04/0.01)	1.05 (0.00)
Korea	1.12 (0.08/0.03)	1.24 (0.07)
Romania	0.45 (0.85/1.90)	0.68 (0.11)
N	290	290

Notes: Dependent variable is coded as 1 if transfer clause includes balance-of-payments restrictions or other major restrictions such as subjecting the clause to domestic laws. (I) Standard errors adjusted for correlation among home country BITs; (II) standard errors adjusted for correlation among host country BITs. Constants included but not reported. Chi2 values after Wald tests in brackets for (I) and (II), chi2 value after likelihood ratio test in brackets for (III).
* significant at 10%; ** significant at 5%; *** significant at 1%.

With respect to our variable of interest, South-South BITs have been between three and four times more likely to include restrictions to their transfer clauses. These estimates are significant across all estimations. As with the NT provisions, I therefore still find substantial and significant variation between South-South and North-South BITs in this regard even after conditioning on several important covariates.

However, my focus only on transfer clauses may not be entirely justified here, as developed countries might have included safeguards against restrictions imposed during balance-of-payments crises elsewhere in their BITs. Arguably, including safeguards during balance-of-payments crises in BITs can be accomplished by including a general exception based on national security concerns. In WTO jurisprudence at least, the exception based on "essential security interests" in Article XXI(b) of GATT has been constructed to include exchange control measures to protect economic interests.[70] In BITs, such exceptions can cover the whole treaty[71] or only parts of it, such as the NT and MFN provisions,[72] general non-discrimination provisions,[73] full protection and security provisions,[74] or performance requirements.[75] While all these provisions can be relevant when establishing whether measures taken to prevent or confront an economic crisis constitute a breach of a BIT *as a whole*,[76] a narrower

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[70] *See* Kolo & Wälde, *supra* note 39, at 160. Note that rulings on the applicability of BITs' emergency clause with respect to financial crises have been contradictory. Compare two claims against Argentina: CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, Award, paras. 359–378 (May 12, 2005), *reprinted in* 44 I.L.M. 1205 (2005); with LG&E Energy Corp. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/1, Decision on Liability, paras. 229–261 (Oct. 3, 2006), *reprinted in* 46 I.L.M. 40 (2007). Both disputes were based on Article XI in the Argentina–United States BIT. *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993). For further discussion, see August Reinisch, *Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v. Argentina *and* LG&E v. Argentina, 81 J. WORLD INVESTMENT & TRADE 191 (2007).

[71] *See, e.g.*, Agreement on the Promotion and Protection of Investments, Austl.-India, art. 15, Feb. 26, 1999, 2116 U.N.T.S.145.

[72] *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, Alb.-Spain, art. 4, June 5, 2003, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/spain_albania.pdf.

[73] *See, e.g.*, Agreement on the Reciprocal Promotion and Protection of Investments, Belgo-Luxemburg Economic Union-Guat., art. 3, Apr. 14, 2005, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/BLEU-Guatemala-eng.pdf.

[74] *See, e.g.*, Agreement for the Promotion and the Protection of Investments, Turk.-Morocco, art. 2, Apr. 8, 1997, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/turkey_morocco.pdf.

[75] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Croat.-Kuwait, art. 3, Mar. 8, 1997, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/croatia_kuwait.pdf.

[76] *See* Kolo & Wälde, *supra* note 39.

question is whether the security exception covers the transfer provision in particular. In practice, this is typically the case when the security exception covers the whole treaty. Below, I repeat the previous analysis, this time grouping BITs with direct restrictions in their transfer clauses with BITs, where restrictions on investment transfers based on national security interests could be allowed.

Table 7 below shows that North-South BITs are in fact more likely to include security exceptions, but the share of BITs with a security exception that covers the transfer provision is more or less similar between North-South BITs and South-South BITs (and the difference is not statistically significant). But the overall conclusion remains the same, for while around half of the sample's South-South BITs incorporate a security exception that covers the transfer provision and/or include restrictions to the transfer clause, only around a quarter of North-South BITs do so.

TABLE 7

Security exceptions			
	Share		
	Total	*North-South BITs*	*South-South BITs*
I: No security exceptions	0.79 (0.75 - 0.84)	0.74 (0.67 - 0.80)	0.86 (0.80 - 0.92)
II: Security exceptions for certain provisions, but not transfer provision	0.10 (0.06 - 0.13)	0.15 (0.09 - 0.20)	0.03 (0.00 - 0.06)
III: Security exception covers transfer provision (typically when it covers the whole treaty)	0.11 (0.07 - 0.14)	0.12 (0.07 - 0.17)	0.11 (0.05 - 0.16)
IV: Security exception for entire BIT and/or restrictions* to transfer clause	0.37 (0.31 - 0.42)	0.26 (0.19 - 0.32)	0.52 (0.44 - 0.61)
N:	303	179	124

Notes: 95 % confidence intervals in brackets. Percentages don't add up due to rounding.
* Include balance-of-payments restrictions as well as other major restrictions such as subjecting the clause to domestic laws.

It is therefore not surprising that while the estimates did become lower in the logistic regressions after also considering security exceptions, the differences between North-South and South-South BITs are still substantial across all three specifications and significant in two out of three (Table 8 below). I am therefore rather confident that South-South BITs have been more likely to allow restrictions to the transfer clauses, for instance as a means of insulating the contracting parties from capital flight in times of economic crises.

TABLE 8

Limitations on transfer clauses (incl. security exception) *Logistic regressions*		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	1.82/**	1.77*
	(2.83/4.30)	(3.03)
N	290	290
Notes: Dependent variable is coded as 1 if transfer clause includes balance-of-payments restrictions or other major restrictions such as subjecting the clause to domestic laws. It is also coded as 1 if the BIT includes a security exception covering the transfer provision. (I) Standard errors adjusted for correlation among home country BITs. (I) Standard errors adjusted for correlation among home country BITs; (II) standard errors adjusted for correlation among host country BITs. Constants and coefficents on other included regressors not reported. Chi2 values after Wald tests in brackets for (I) and (II), chi2 value after likelihood ratio test in brackets for (III).		
* Significant at 10%; ** significant at 5%; ***significant at 1%.		

V. IMPLICATIONS

After controlling for multiple potential covariates, the results show that South-South BITs have been more likely to include restrictions to their NT and transfer clauses.[77] Thus, with respect to these two provisions at least, it is not entirely correct when textbooks on international investment treaties state that a review of BITs signed among developing countries "does not reveal significant differences with agreements concluded with developed states,"[78] or that "treaties concluded between developing countries have in substance remained very similar to those concluded by capital-exporting countries."[79] Rather, a systematic (as opposed to *ad hoc)* review of the treaties does in fact reveal that in South-South agreements, developing countries have been more likely to agree to a different set of rules, which potentially allows them more flexibility to pursue developmental concerns than North-South BITs.

Where does this leave us? On the one hand, the conclusion may imply

[77] Moreover, in a separate set of regressions not reported here I controlled for whether these results still hold after taking into account the extent to which the BITs incorporate a legally binding consent to international investor-state arbitration. This did not change the results or conclusions.

[78] DOLZER & SCHREUER, *supra* note 16, at 21.

[79] DOLZER & STEVENS, *supra* note 20, at 9–10.

that while many past differences between developed and developing countries with respect to foreign investment protection have been overcome, one should perhaps not overstate the degree of consensus purely based on the fact that South-South BITs are proliferating. If so, then the popularity of South-South BITs cannot, in and of itself, be used as an argument that a multilateral treaty on investment is more feasible today than it was ten years ago.

Alternatively, the systematic differences should perhaps not be taken as an indicator of developing countries' collective interests in the international investment regime. Instead, it could simply be that demands in BIT-negotiations between developing countries have been more easily accommodated, not because they are necessarily thought to be prudent by both contracting parties, but simply because negotiators may not consider the BIT particularly relevant in practice. For instance, a senior developing country official involved in negotiating BITs mentioned in an interview that "things were much more flexible when negotiating with developing countries."[80] Another official recalled: "Our negotiations with developing countries were generally much quicker and much easier. When demands were made we didn't object, as most understood that these treaties were basically just signals, rather than hard and serious legal agreements."[81] By contrast, it would probably be rare for developed countries to accept major limitations to their model BITs and may therefore simply have walked away from negotiations if such demands were made. A third BIT-negotiator further explained: "We never actually had a position in our BIT-negotiations, whether with developed or developing countries. So we just signed off when drafts were presented to us, and that's why we have different obligations in different treaties."[82] Accordingly, further research could examine whether the specific characteristics of South-South BITs are in fact intended by developing countries to espouse a different vision of international investment rules or merely because developing country negotiators have not felt the need to insist on a particular set of provisions. The statements by negotiators above suggest the latter.

But apart from the symbolic and political implications, does the systematic difference among BITs imply that investors seeking protections under BITs should expect a different set of provisions when covered under South-South BITs compared to being covered by North-South BITs? Are investors more likely to be met with restrictions to NT and repatriation of

[80] Telephone interview with developing country BIT-negotiator (January 2009) (not for attribution, on file with author). Note that all interviews referred to here are not-for-attribution, as this was a condition of several interviewees to be quoted.

[81] Telephone interview with developing country BIT-negotiator (April 2009) (not for attribution, on file with author).

[82] Telephone interview with developing country BIT-negotiator (July 2009) (not for attribution, on file with author).

investment-related funds when covered by South-South BITs? The statistical review above seems to imply this to be the case. In practical terms, however, the content of BIT-provisions cannot be investigated in isolation.

The analysis has thus far been based on the treaty texts alone and has not taken into account MFN provisions. As a general rule, MFN provisions operate in BITs according to all matters falling within the scope of the treaty.[83] Whether the *ejusdem generis* principle implies that the clause only covers substantive provisions is unclear from existing case law.[84] Nor is it clear whether the clause only allows an investor to invoke provisions from other investment treaties that are "compatible in principle," and if so, how that applies in terms of limiting its application.[85] What is clear, however, is that cases decided so far have generally allowed a contracting party to "import" substantive provisions from other BITs entered into by the other contracting party. In *Bayindir v. Pakistan*,[86] for instance, the tribunal held that the MFN provision allowed the investor to invoke a fair and equitable treatment clause from another BIT.[87] Similarly, in *CME v. Czech Republic*,[88] the tribunal argued that the investor could rely on an expropriation provision from another BIT to determine the standard of compensation. Arguably, this implies that even if a South-South BIT does not include an NT provision, for instance, the MFN clause may oblige the parties to extend NT nevertheless as long as they have included NT in at least one other BIT.[89]

It is therefore notable that *all* BITs in the sample include an MFN provision, and none of them exempts NT or transfer clauses from the

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[83] Marie-France Houde & Fabrizio Pagani, OECD, *Most-favoured-nation Treatment in International Investment Law* (OECD Working Paper on International Investment, No. 2004/2, 2004), *available at* http://www.oecd.org/dataoecd/21/37/33773085.pdf; *see* DOLZER & SCHREUER, *supra* note 16, at 186.

[84] *See, e.g.*, Maffezini v. Spain (Arg. v. Spain), ICSID (W. Bank) Case No. ARB/97/7 (Jan. 25, 2000), 16 ICSID REV.-FOREIGN INV. L.J. 212 (2001), *available at* http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_000.pdf; Berschader v. Russian Federation, Arbitration Institute of the Stockholm Chamber of Commerce [SCC] Case No. 080/2004 (Apr. 21, 2006); *see generally* Locknie Hsu, *MFN and Dispute Settlement—When the Twain Meet*, 7 J. WORLD INVESTMENT & TRADE 25 (2006).

[85] DOLZER & SCHREUER, *supra* note 16, at 191.

[86] Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan (Turk. v. Pak.), ICSID (W. Bank) Case No. ARB/03/29 (Nov. 14, 2005).

[87] *Id.* para. 231; *see also* MTD Equity Sdn. Bhd. v. Chile (Malay. v. Chile), ICSID (W. Bank) Case No. ARB/01/7, Award, paras. 103–04 (May 25, 2004).

[88] CME Czech Rep. B.V. v. Czech Republic (Neth. v. Czech Rep.), U.N. Comm'n on Int'l Trade Law, Final Award (Mar. 14, 2003), *available at* http://ita.law.uvic.ca/documents/CME-2003-Final_002.pdf.

[89] UNCTAD, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULE-MAKING at 33, U.N. Doc. UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D.16 (2007).

clause's coverage. Since very few countries have consistently limited NT or transfer clauses in all their BITs, this means that as a general rule, differences in substantive rules between South-South and North-South BITs are "levelled out" by the treaties' MFN provisions. As a result, the more restricted standards in South-South BITs will rarely become relevant for investors in practice, who can continue to rely on BITs with more favorable provisions. This, of course, leaves us with a considerable puzzle: why have developing countries often allowed more flexibility to host states in BITs signed with each other but then failed to make sure that this "policy-space" is not cancelled out by the treaties' MFN clauses? If the more limited substantive provisions in South-South BITs have little, if any, relevance for the legal rights granted to foreign investors in practice, why limit them in the first place?

At a first glance, one possible explanation could be that the exceptions are intended as signals of a distinct South-South BIT agenda more in tune with the one developing countries have expressed in multilateral investment negotiations as a group. If so, the negotiating parties may not have been too concerned with whether the limitations actually have implications for foreign investors in practice. The contracting parties may have tried to *appear* as though they sign "development friendly" BITs, while at the same time appeasing investors that they are granted normal BIT-protections. However, such clever intentions are unlikely to have driven the pattern. It is important to note that the overwhelming majority of BITs have been signed largely under the radars of public opinion. Except for BITs with the United States, the vast majority of BIT negotiations seem to have caught (surprisingly) limited attention,[90] and it is therefore difficult to see how the aspects of South-South BITs investigated here could be intended as symbolic political statements.

So perhaps a more plausible explanation could be that developing countries have simply failed to realize the full implications of MFN-provisions. Indeed, there are indications that developing countries have often failed to understand the true nature and scope of BITs when signing up to them.[91] It suffices to say that this suggestion may appear paternalistic

[90] *See, e.g.*, Lauge Skovgaard Poulsen & Damon Vis-Dunbar, *Reflections on Pakistan's Investment—Treaty Program after 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan*, INVESTMENT TREATY NEWS, Mar. 16, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan.aspx; Luke Peterson, *Out of Order*, FDI MAGAZINE, Oct. 7, 2008, *available at* http://www.fdimagazine.com/news/fullstory.php/aid/2575/Out_of_order.html; *see, e.g.*, Dep't of Trade & Indus., Republic of South Africa, Government Position Paper on Bilateral Investment Treaty Policy Framework Review (June 2009), *available at* http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf.

[91] *Id.*; DOLZER & SCHREUER, *supra* note 16, at 8.

to some.[92] But when asked about why the MFN provision had not been adjusted to accommodate the different standards in the country's BIT-network, one former BIT-negotiator responded: "We didn't have a consistent approach because there wasn't an understanding that consistency was required . . . . No one seemed to realize the implications of the MFN provision."[93] Other BIT-negotiators have similarly mentioned in interviews that their predecessors did not know how MFN provisions worked as they often had no background or training in international law.[94] One recalled that the speed with which many South-South BITs were signed exacerbated this capacity problem: "For instance, in all these mini-conferences UNCTAD would actively promote BITs to be signed amongst the participants—often within as little as a few hours—and I couldn't see that any serious considerations were given by the countries whatsoever."[95] And while officials from developing countries might have a better understanding today of the effect of different BIT-provisions compared to ten years ago, it is probably still incomplete in many cases. One negotiator suggests:

> While workshops held by various international organizations might help somewhat in upgrading developing countries' negotiating capacity, they haven't solved the problem. There is still not a very good understanding of what is implied by the different provisions, so even if negotiators from the developing world take their job seriously, they are often not entirely aware of what they are doing.[96]

Accordingly, even if developing countries have aimed to restrict certain provisions in their South-South BITs, these statements suggest that they might not have had the proper legal expertise to make sure such restrictions are enforceable in practice. If this is in fact the case, that would naturally raise a more general question pertaining to the level of understanding within developing countries when entering into BITs and, as such, the level of rationality we as observers should assume about the BIT-making process. While I am currently undertaking such a research project, these explanations remain provisional for now and must therefore be subject to further investigation.

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[92] *See* Francisco Orrego Vicuña, *Regulatory Expropriations in International Law: Carlos Calvo, Honorary NAFTA Citizen*, 11 N.Y.U. ENVTL. L.J. 19, 31 (2002).

[93] Telephone interview with developing country BIT-negotiator (May 2009) (not for attribution, on file with author).

[94] Telephone interviews with developing country BIT-negotiator (February and August 2009) (not for attribution, on file with author).

[95] Telephone interview with developing country BIT-negotiator (August 2009) (not for attribution, on file with author).

[96] Telephone interview with developing country BIT-negotiator (January 2009) (not for attribution, on file with author).

VI. CONCLUSION

This article analyzed two substantive BIT-provisions across a large sample of treaties from the mid-1990s to 2006. It showed that treaties signed by two developing countries have varied systematically from more typical North-South BITs. In South-South BITs, NT provisions have tended to be more restricted (or completely absent), and transfer clauses more likely to allow restrictions to foreign investors' repatriation of funds. In contrast to the vast majority of other studies investigating the content of BITs, I used regression techniques to control for possible omitted variable biases and demonstrated that the systematic pattern persisted even after adjusting for a number of important covariates.

The last section of the article noted, however, that none of the South-South BITs made sure that such restrictions were not potentially "levelled out" by the treaties' MFN provisions, and concluded by speculating whether this de facto coherence in developing countries' BIT-networks might have been unintended. If true, this would be problematic. As stated by UNCTAD, "[i]f countries are unable to properly understand and assess the content of the agreements to which they have agreed because of their complexity, the risk arises that they will enter into agreements that they are unprepared to honour fully."[97]

Ultimately, however, the intent of developing countries when entering into South-South BITs is left open for further research. Arguably, this would require the application of qualitative methodologies, as the objectives of developing countries can only truly be inferred by investigating the ideas and thoughts of key actors involved in the politics and negotiations of investment treaty rule-making. Unfortunately, not much research has been conducted so far. To understand the sometimes paradoxical behaviour of developing countries in the international investment regime, future research should therefore triangulate quantitative studies investigating systematic patterns in rule-making (like this article) with qualitative studies investigating the actual intent of the contracting parties. This might also allow a further clarification of differences *among* developing countries, such as whether those with large outward FDI flows have systematically different strategies and intentions than developing countries with only few investments abroad. This and related questions would require not treating developing countries as a monolith with one fixed set of interests, as done in so many studies including, to some extent, this one.

[97] UNCTAD, INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD at 51, U.N. Doc. UNCTAD/ITE/IIT/2007/3, U.N. Sales No. E.08.II.D.1 (2008), *available at* http://www.unctad.org/en/docs/iteiit20073_en.pdf.