

PART I

FOUNDATIONS

1. The political economy of bilateral investment treaties

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Over the last 30 years, foreign direct investment (FDI)¹ has become the most important source of investment flows to the developing world, surpassing debt and portfolio investment, as well as official development assistance.² In 1990, FDI inflows represented approximately 4 percent of developing countries' gross fixed capital formation (GFCF) while FDI stock equaled 13.5 percent of developing economies' gross domestic product (GDP); from 2004 to 2013 FDI inflows averaged 11 percent of GFCF and FDI stock 26 percent of GDP in these countries.³ In 2013, FDI flows to developing and transition economies reached a record \$778 billion, accounting for just over half of all FDI flows.⁴ Increasingly, developing countries' governments and development economists see FDI as vital for sustained economic growth. Unlike development models based on international debt or portfolio investment, FDI is a relatively stable source of investment capital. Because FDI involves a management stake in an enterprise, such investment tends to be relatively immobile *ex post*. This feature of FDI makes it less vulnerable to sudden stops and reversals that have characterized other forms of international financial flows. Moreover, there is substantial evidence that FDI is associated with economic growth by contributing meaningfully to capital formation, technology transfer, and employment generation.⁵ While the extent to which FDI can

¹ FDI is defined as 'an investment involving a long-term relationship and reflecting a lasting interest and control' by an enterprise headquartered in a second jurisdiction. See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report – 2006* (United Nations 2006) 293.

² UNCTAD, *World Investment Report – 2017* (United Nations 2017) 12.

³ UNCTAD, *World Investment Report – 2014* (United Nations 2014) 90.

⁴ UNCTAD 2014 (n 3) xiii. Since 2015, the share of developing country FDI inflows has declined though overall flows have remained relatively constant. This is at least partially driven by increased large merger and acquisition deals in developed economies, which increase the overall value of world FDI inflows. See also UNCTAD 2017 (n 2) 42.

⁵ See especially Laura Alfaro, Areendam Chanda, Sebnem Kalemli-Ozcan, and Selin Sayek, 'FDI and Economic Growth: The Role of Local Financial Markets' (2004) 64(1) *Journal of International Economics* 89–112; Eduardo Borensztein, Jose De Gregorio and Jong-Wha Lee, 'How Does Foreign Direct Investment Affect Economic Growth?' (1998) 41(1) *Journal of International Economics* 115–35.

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contribute to positive productivity and wage spillovers is a subject of intense debate,⁶ an optimistic view of such investments emphasizes the potential for FDI to foster forward and backward linkages in host economies, which in turn can spur broad-based economic growth.

Given the potential positive effects of FDI on growth, governments are often keen to attract investment flows. There is an extensive literature on the economic determinants of FDI flows, which indicates that multinationals are attracted to economies that are richly endowed with natural resources, have large and growing domestic markets, and offer large pools of low cost laborers.⁷ FDI also follows geographic patterns; multinationals construct production networks that take advantage of geographical proximity to consumer markets and cheap transportation routes.⁸ And while economic and geographic factors explain a substantial portion of patterns of FDI flows, political factors also matter because variations in political institutions expose foreign firms to different degrees of political risk. Policymakers and political economists have focused their collective attention on assessing how political institutions and policies influence firms' locational decisions precisely because these institutional features are largely under governments' control while geographic and economic factors are not – at least in the short term.

This chapter provides a synthetic and critical review of political economy research related to bilateral investment treaties (BITs) and their effect on patterns of FDI flows. BITs arose in the aftermath of decolonization and are now the primary instrument of international diplomacy and law that regulates rules regarding the treatment of foreign investors in domestic jurisdictions. Fundamentally, these treaties represent attempts to overcome hold up problems that inhibit investment by committing host governments to a list of protections for foreign firms and providing an arbitration mechanism through which to adjudicate and remedy any investor-state disputes. As empirical research has largely called into question the size of the positive effects of BITs on investment, and has uncovered potentially large economic, political, and reputational costs of such treaties, many scholars have come to see BITs as deeply problematic legal tools that grant far-reaching rights to foreign investors at the expense of governments and local populations. At the same time, increasing availability of FDI data disaggregated by industry and balance sheet components, as well as new tools for surveying multinational investors, has the potential to ascertain more precisely the conditions under which BITs may be useful and even necessary instruments to attract development-oriented investment.

The remainder of this chapter is structured as follows. First, I ground analysis of political institutions and FDI in a framework that emphasizes the sources and consequences of expropriation risk (II). I use this theoretical approach to explain the

⁶ Much of this debate is over the importance of a host country's absorptive capacity. See Theodore Moran, Edward M Graham and Magnum Blomström, *Does Foreign Direct Investment Promote Development?* (Institute for International Economics 2005) and Alfaro et al. 2004 (n 5).

⁷ Bruce A Blonigen, 'A Review of the Empirical Literature on FDI Determinants' (2005) 33 Atlantic Economic Journal 383–403.

⁸ Bruce A Blonigen, Ronald B Davies, Glen R Waddell, and Helen Naughton, 'FDI in Space: Spatial Autoregressive Relationships in Foreign Direct Investment' (2007) 51 European Economic Review 1303–25.

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development and characteristics of the BIT regime. Next, I overview a broad but mostly inconclusive empirical literature that studies whether, how, and under what conditions BITs may influence investment flows (III). Scholars of BIT effects naturally began to consider the conditions that might influence governments' decisions to select into the BIT network; the fourth section overviews attempts to answer empirically the question of why governments agree to BITs and their terms at all (IV). A fifth section then considers the unintended consequences of BITs, particularly with respect to the increased use of investor-state arbitration, and whether these costs place undue constraints on host governments (VI). I then suggest three emerging areas of research that merit further attention (VII). Finally, the concluding section summarizes the main findings of this section briefly concludes (VII).

II. EXPROPRIATION RISK, THE FRACTURED INTERNATIONAL INVESTMENT REGIME, AND THE RISE OF BITS

Prior to World War I, most foreign investment followed colonial patterns; investment flowed from metropoles to colonial possessions. Latin America gained independence a century earlier, so investment to this continent occurred through a mixture of portfolio investing, direct investment from historical colonizers, and the regional hegemonic power – the United States.⁹ Foreign investor property rights were enforced through a combination of customary law that required swift and adequate compensation for any expropriation¹⁰ and gunboat diplomacy. However, the extent to which foreign investment enjoyed substantial legal protections declined dramatically, starting in the 1920s, as a variety of economic and political forces, including decolonization, gave rise to nationalist economic policies in much of the middle-income and developing world. Suddenly, foreign investment no longer seemed particularly protected. The increase in nationalizations and expropriations, primarily of foreign firms, throughout the developing world in the 1960s and 1970s sparked much of this concern. Attempts by the non-aligned movement throughout that same time period to enshrine the right to expropriate foreigners' assets in a New International Economic Order (NIEO) compounded these fears.

Thus, the social science literature on foreign investment has largely revolved around the following puzzle: under what conditions will firms be willing to invest in a foreign jurisdiction, considering the incentives and opportunities local governments have to seize foreign assets? Political economists operating in the new institutional economics tradition have largely framed the political problem of FDI as fundamentally due to obsolescing bargaining, which arises when actors face time-inconsistent preferences

⁹ Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press 1985).

¹⁰ The Hull Rule demands the 'prompt, adequate, and effective' compensation of firms in the event of an expropriation and is named for US Secretary of State Cordell Hull, who articulated such demands in response to Mexico's nationalization of US oil companies in the 1930s.

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and contracts are incomplete.¹¹ The logic of this bargaining problem is as follows. First, multinational enterprises (MNEs) have a bargaining advantage vis-à-vis the state before they invest and when governments are trying to attract investment. However, after firms sink immobile investments into a host market, MNEs can no longer credibly threaten exit. Host governments therefore have incentives to subsequently renege on their promises of property rights protections to foreign investors and instead renegotiate investment terms and agreements in their favor.¹² Second, foreign investment is made in an incomplete contracting environment.¹³ Domestic firms usually have clear rights in their home jurisdiction that provide them with legal pathways to protect the sanctity of their contracts and the right to seek damages for breach of these contracts in a domestic court system.¹⁴ In contrast, foreign investors often face a greater chance of discrimination in local courts and fewer remedies in the case of mistreatment. Moreover, nationalizing MNE assets may be politically expeditious when combined with government rhetoric of reclaiming national patrimony. Latin America's long history of natural resource expropriations, especially under leftist leaders, is particularly illustrative.¹⁵ Opposition to foreign-financed privatizations is especially likely to generate societal

¹¹ New Institutional Economics (NIE) as an ontological frame can be summarized as 'institutions matter'. By institutions, I mean 'the rules of the game', which is a definition most closely associated with Douglass North. Scholars operating in the NIE tradition emphasize the role of institutions in constraining political power and consequently incentivizing pro-growth behavior. In recent years, some have argued the obsolescing bargaining framework has outlived its usefulness in the study of the MNE and government relationship. Ravi Ramamutri, 'The Obsolescing "Bargaining Model"? MNC-Host Developing Country Relations Revisited' (2001) 32(1) *Journal of International Business Studies* 23–39 argues the international governance framework around FDI has limited the extent to which governments retain policy flexibility. Lorraine Eden, Stefanie Lenway, and Douglas Schuler, 'From the Obsolescing Bargain to the Political Bargaining Model' in Robert Gosse (ed.), *International Relations in the 21st Century* (Cambridge University Press 2005) argue the centrality of FDI to most countries' development strategies and the discursive nature of project financing and expansion reduce time-inconsistency in actor preferences while simultaneously ensuring firms and governments are likely to have shared rather than competing preferences. These are important critiques that are more fully addressed in the final section of this chapter.

¹² Raymond Vernon, *Sovereignty at Bay* (Basic Books 1971); Stephen Kobrin, 'Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries' (1987) 57(3) *International Organization* 609–38.

¹³ Oliver E Williamson, *The Economic Institutions of Capitalism* (The Free Press 1985).

¹⁴ In some countries with particularly weak domestic institutions, even indigenous firms have very few formal protections. However, in these situations, domestic firms can generate informal sources of property rights protections through political connections and elite networks that are often more difficult for foreign firms to cultivate. A Hirschmanian framing would argue foreign firms may have exit options, but domestic firms have voice and loyalty options as well, and the ability to exert influence through these channels is particularly valuable in jurisdictions characterized by weak formal institutions. See Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1972).

¹⁵ See e.g., Robert Grosse, *Multinationals in Latin America* (Routledge 1989).

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pressures to 'kick the foreigners out'.¹⁶ As such, MNEs are wary when investing internationally that host governments will expropriate firm assets without appropriate compensation, or will engage in discriminatory actions that make profitable operations difficult.

A large literature explores the ways in which domestic institutions can mitigate some of the most problematic political risks facing potential foreign investors. While older studies argued multinationals prefer to invest in autocratic regimes that may favor foreign investors over local capital,¹⁷ more recent empirical analysis provides evidence that investors tend to prefer democracies.¹⁸ Democracies lower both investors' perception of and actual expropriation risk.¹⁹ Limited government, in particular, seems especially important for lowering such risks. Executive constraints reduce the ability of leaders to engage in predatory taking such as outright seizure, discriminatory regulations and very high tax rates.²⁰ Domestic systems with a great deal of checks and balances across multiple branches of government reduce policy uncertainty because under such conditions it is challenging to quickly change macroeconomic policy.²¹ Fiscal federalism can induce local governments to lower taxes in order to compete with other subnational units for scarce investment.²² Democracies also tend to have stronger respect for property rights and adherence to the rule of law, which contributes to a predictable legal environment and also provides remedies for foreign firms when faced with contract disagreements with local firms as well as disputes with the government.²³

¹⁶ See Nina Bandelj, 'Economic Objects as Cultural Objects: Discourse on Foreign Investment in Post-Socialist Europe' (2008) 6 *Socio-Economic Review* 671–702 for the post-soviet context.

¹⁷ Peter Evans and Gary Gereffi, 'Foreign Investment and Dependent Development' in S A Hewlett and R S Weinert (eds), *Brazil and Mexico: Patterns in Late Development* (Institute for the Study of Human Issues 1982); Guillermo O'Donnell, *Bureaucratic Authoritarianism: Argentina, 1966-1973*, in *Comparative Perspective* (University of California Press 1988); John R Oneal, 'The Affinity of Foreign Investors for Authoritarian Regimes' (1994) 47(3) *Political Research Quarterly* 565–88.

¹⁸ Witold J Henisz, 'The Institutional Environment for Infrastructure Investment' (2002) 11(2) *Industrial and Corporate Change* 355–89; Quan Li and Adam Resnick, 'Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries' (2003) 57(1) *International Organization* 175–211; Nathan M Jensen, *Nation-States and the Multinational Corporation* (Princeton University Press 2006).

¹⁹ Nathan M Jensen, Glen Biglaiser, Quan Li, Edmund Malesky, and Pablo M Pinto, *Politics and Foreign Direct Investment* (University of Michigan Press 2012).

²⁰ Nathan M Jensen, 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment' (2003) 57(3) *International Organization* 587–616.

²¹ See Henisz 2002 (n 18). However, it is important to add that policy predictability does not necessarily mean that policies toward investment are necessarily favorable. Policies may be predictably unfavorable toward FDI, and political constraints may make it more difficult for governments to adequately respond to negative macroeconomic shocks. See Yu Zheng, 'Credibility and Flexibility: Political Institutions, Governance, and Foreign Direct Investment' (2011) 37(3) *International Interactions* 293–319.

²² Jensen 2006 (n 18).

²³ Li and Resnick 2003 (n 18).

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Of course, the process of creating stable, business-friendly domestic institutions is lengthy and politically fractious. Particularly in the post-World War II environment, many governments (mostly advanced industrial democracies) have attempted to use international organizations and treaties to legalize international economic governance. Capital exporting states in which many large MNEs have historically been domiciled were especially keen to develop an international investment regime as solidly multilateral and institutionalized as the General Agreement on Tariffs and Trade (GATT), and, later, the World Trade Organization (WTO).²⁴ When US-led attempts to construct an international organization for investment failed, many European countries turned to BITs to alleviate potential investors' concerns over political risk. BITs emerged in the aftermath of decolonization, when many newly independent governments nationalized foreign firms.²⁵ The resulting animosity between post-colonial governments and multinationals made binding treaties important for restoring faith in investor-state relations. Western European countries were early adopters of BITs, with the first BIT signed between Germany and Pakistan in 1959. The US was a late adopter of such treaties because it continued to hold out for a multilateral solution to investment governance; it signed its first BIT with Panama in 1982.²⁶ BIT formation accelerated rapidly in the 1990s, fueled by the dissolution of the Soviet Union and a rash of treaties signed by cash-strapped newly independent capitalist states and western European states with interests in facilitating investment in the region, especially to finance privatization. The failed Multilateral Agreement on Investment (MAI) negotiations in the mid-1990s also spurred additional BIT activity, as it became increasingly clear that a multilateral solution to cross border investment governance was politically infeasible.

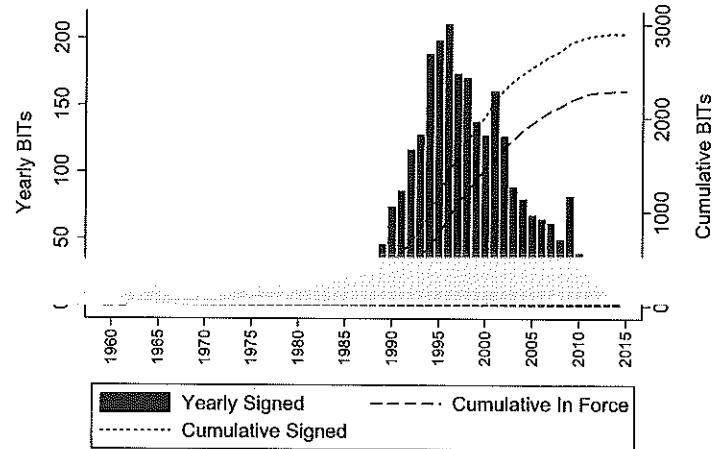
For these reasons, the BIT network grew exponentially through the 1990s and early 2000s, as Figure 1.1 illustrates. By June 2017, 181 countries had signed at least one BIT and over 2,368 BITs had been ratified worldwide.²⁷ Most of these treaties are characterized by asymmetrical power – BIT dyads tend to include a wealthy, capital exporting state and a poorer host country. In recent years, more BITs have been signed between developing countries. Some of this trend is driven by a preference wealthy states have for negotiating BITs with several developing countries at a time and then encouraging them to sign identical BITs with each other. However, developing

²⁴ Valentina Vadi, *Analogy in International Investment Law and Arbitration* (Cambridge University Press 2016) 47–8.

²⁵ For an extended discussion of the diffusion of BITs globally see Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2006) 60(4) *International Organization* 811–46; Srividya Jandhyala, Witold J Henisz, and Edward D Mansfield 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55(6) *Journal of Conflict Resolution* 1047–73.

²⁶ However, the US negotiated 22 Friendship, Commerce, and Navigation (FCN) treaties in the postwar era. These instruments were designed to provide US MNEs with the same protections abroad that foreign investors were entitled to by the US Constitution. FCN treaties were seen primarily, however, as stop gaps as the US attempted to embed multilateral rules on investment in the proposed International Trade Organization. See Kenneth J Vandervelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017).

²⁷ See <http://investmentpolicyhub.unctad.org/IIA> accessed 5 June 2017.



Source: ICSID Database of Bilateral Investment Treaties.

Figure 1.1 Bilateral investment treaties 1959–2014

countries have recently become substantial sources of FDI themselves, especially to other developing countries. Importantly, no BIT dyad includes two advanced developed economies.²⁸

BITs are agreements between states, but they provide specific legal protection to firms. The first BITs closely mimic the 1959 Draft International Convention on Investments Abroad and the OECD 1967 Draft Convention.²⁹ Typical terms include national treatment, a promise not to invoke performance requirements,³⁰ the right to repatriate earnings, and the right to fair compensation in the event of expropriation. In addition to these four core legal provisions, since the 1980s BITs increasingly included specific language about arbitration in the event of investment disputes between investing firms and host states arising from violations of these four key protective

²⁸ Perhaps in part because such countries are more likely to conclude preferential trade agreements with each other that include an investment chapter. For example, the US and Canada do not have a BIT between them, but NAFTA includes an investment chapter that includes investor-state dispute settlement provisions. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), which was signed in October of 2016, also contains an investment chapter. However, the EU has recently signaled it will no longer consider investment chapters in the preferential trade agreements it negotiates. See Von der Buchard, Hans, 'Juncker proposes fast-tracking EU trade deals,' Politico, 31 August 2017 <http://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/> accessed 17 October 2017.

²⁹ Jason Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2008) 33(2) Brooklyn Journal of International Law 405, 415.

³⁰ Performance requirements specify a percentage of local sources a firm must use in production.

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principles. This evolution is reflective of a general trend toward increased legalization of interstate behavior.³¹

Scholars examining political risk have given BITs considerable attention because they are clearly international legal tools designed to make potential host economies more conducive to FDI. Other treaties sometimes include investment clauses, most notably preferential trade agreements in recent years, but BITs are the only commonly used treaties with the primary purpose of protecting investment. Investor-state dispute settlement (ISDS) is widely considered the most unique and controversial characteristic of these treaties. While preferential trade agreements and the WTO also have arbitration provisions for trade disputes, the right to file claims under these treaties falls exclusively to governments. Allowing firm-initiated arbitration makes the decision to file a complaint less of a strategic political decision because firms do not have to convince their home state to advocate for them, but rather can instigate disputes on their own behalf. Many scholars view this provision as key to mitigating firm concerns over political risk. At the same time, providing foreign firms with the ability to use friendly arbitral boards to gain recompense for government activities – including public-interest regulation – that negatively affect firm profits has become increasingly controversial as ISDS has grown. Indeed, investors have taken advantage of their ability to file complaints directly. Figure 1.2 shows the rapid growth of ISDS claims in recent years; investor-initiated complaints to the International Centre for Settlement of Investment Disputes (ICSID), the body through which most BITs route investor-state disputes, numbered 597 by the end of 2016, 60 percent of which invoked BITs as the primary basis for ICSID jurisdiction.³² This represents an increase of more than a factor of 15 since 2000, when the total number of investor-state disputes ever filed was 38.³³

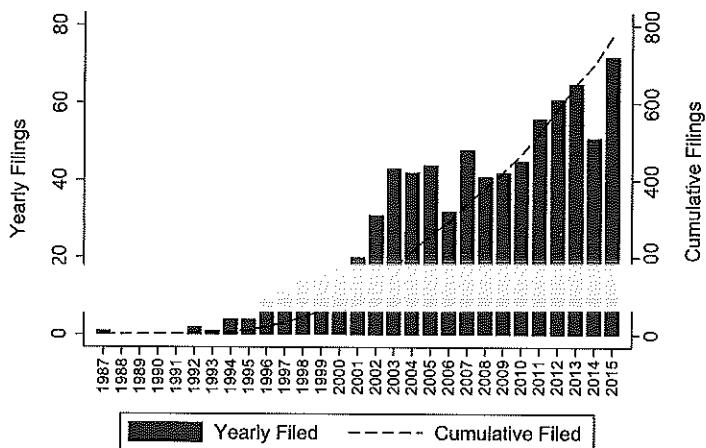
III. DO BITS ATTRACT FDI?

As BITs proliferated through the 1990s and early 2000s, scholars began to study whether and how such treaties influence investment flows. Determining the effect of BITs on inward investment has become increasingly relevant to policymakers as concerns about the sovereignty costs these treaties impose have mounted. As a whole, the empirical evidence is decidedly mixed. Some scholars find BITs attract a substantial amount of investment, while some find no evidence that BITs are useful tools for generating FDI inflows. Some find BITs function as substitutes for domestic rule of law in countries that have weak property rights protections, while others find BITs can only attract investment in jurisdictions that achieve some minimum threshold of domestic legal institutional quality. And, some have begun to carefully assess how BITs

³¹ For more on this general trend, see the special issue of *International Organization* (2000, 54:3) on Legalization. As of this writing, it seems very likely that the 2000s represented a peak of legalization. In the aftermath of the Global Recession of 2008, and the rise of protectionist sentiment in Europe and the US, it seems the global economic governance system is the process of substantial retrenchment and unwinding of international economic agreements.

³² The ICSID Caseload – Statistics. Issue 2017-1.

³³ Jandhyala et al. 2011 (n 25).



Source: Rachel L Wellhausen, 'Recent Trends in Investor-State Dispute Settlement' (2016) 7(1) Journal of International Dispute Settlement 117.

Figure 1.2 Known ISDS filings 1987–2016

might have differential effects across industries, different balance sheet components of FDI, and MNE mode of entry. A generous reading of the empirical record suggests BITs have only highly conditional effects on MNE's locational decisions.

1. Costly Signals vs. Credible Commitments

Political economy scholarship on BIT effectiveness is firmly embedded in a broader international relations (IR) research agenda devoted to assessing the conditions under which international institutions can become sufficiently binding as to constrain governments' actions. The evolution of this research agenda is rooted in the epistemological approach to studying international institutions first championed by Robert Keohane, who suggested IR scholars would be wise to move beyond circular debates over whether institutions influence behavior to instead consider the characteristics of institutions, actors, and the issue environment that make institutional arrangements more or less likely to influence behavior.³⁴ As such, most political science research on BIT effectiveness is grounded in ongoing debates about the role of institutions and governance structures in IR. The BIT universe is a particularly fertile ground on which to explore these questions because, unlike the trade regime, the diffuse nature of investment treaties generates substantial variation in states' participation in such agreements.

Because the political economy literature on BIT effect builds on broader debates within IR on the role of institutions in influencing government and non-state actor

³⁴ See Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984).

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behavior, early research emphasized the importance of establishing the precise mechanisms through which BITs might reassure foreign firms that governments' promises of investor protections would be honored in the future. Mechanisms matter for research design because signing a BIT may reassure foreign investors globally if such treaties operate as costly signals. Alternatively, these treaties may only increase investment among co-signers if these legal obligations function as instruments to establish credible commitments to investor-friendly policies.

Some scholars argue BITs operate as costly signals of governments' seriousness about protecting the assets of foreign firms. Ratifying BITs can be costly because doing so requires generating a supporting domestic coalition, despite the fact that such treaties often have the effect of providing foreign investors with more legal protections than domestic firms.³⁵ Thus, ratifying even one treaty may signal to the global investment community the strength of the pro-FDI coalition within a polity. To the extent that governments believe they will be punished if they fail to abide by the conditions of the treaty, BITs may also generate substantial sovereignty costs. Such treaties limit host governments' ability to differentially regulate FDI and domestic firms in the service of broader social and economic development policy priorities.³⁶ Relatively, having an active BIT program may send cognitive signals to MNEs that a particular host market is a legitimate potential location for investment.³⁷

If BITs operate as costly signals, host countries with an active BIT program should attract more FDI generally, regardless of whether they have a treaty with a particular country partner. Several studies find evidence to this effect. Neumayer and Spess find in a sample of 119 developing countries from 1970 to 2001 that signing more BITs increases undirected FDI inflows.³⁸ They estimate a one standard deviation increase in the number of signed BITs a developing country ~~has~~ increases FDI inflows between 43.7 and 93.2 percent.³⁹ Kerner also finds evidence of a positive effect of extra-dyadic BITs on dyadic FDI flows in a sample of 127 developing host countries and 22 developed home countries from 1982 to 2001.⁴⁰ Bastiaens finds BITs have a positive effect on monadic FDI inflows in a sample of 87 authoritarian countries from 1990 to 2008.⁴¹ However, several other studies find BITs do not have statistically significant

³⁵ Elkins et al. 2006 (n 25); Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) *World Development* 33 1567–85; Andrew Kerner, 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties' (2009) 53(1) *International Studies Quarterly* 73, 79–82.

³⁶ Luc Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* (International Institute for Sustainable Development 2004).

³⁷ Len J Trevino, Douglas E Thomas, and John Cullen, 'The Three Pillars of Institutional Theory and FDI in Latin America: An Institutionalization Process' (2008) 17(1) *International Business Review* 118–33.

³⁸ Neumayer and Spess 2005 (n 35).

³⁹ Ibid, at 1582.

⁴⁰ Kerner 2009 (n 35).

⁴¹ Ida Bastiaens, 'The Politics of Foreign Direct Investment in Authoritarian Regimes' (2016) 42(1) *International Interactions* 140–71.

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unconditional effect on non-directed investment inflows, which are discussed in greater detail in the following section.⁴²

Another prominent argument is that BITs may influence investor behavior by credibly committing governments to providing investors covered under a treaty with specific and enforceable rights. This logic stems from the literature on the bargaining theories of war, which emphasizes the importance of hands-tying mechanisms to prevent reneging due to time-inconsistent preferences.⁴³ Scholars argue BITs credibly commit host states to abiding by treaty provisions due to the reputational and financial costs that violation of a BIT would impose.

BITs also serve as credible commitments to investors by deterring governments from cheating.⁴⁴ Losing in investor-state arbitration can be financially costly; the average award is US\$508 million, though 50 percent of awards are less than US\$16 million.⁴⁵ Additionally, merely having an arbitration claim initiated against a host government may wipe out all of the increased FDI afforded by a BIT as the host country develops a reputation for truculence.⁴⁶

If BITs operate as credible commitments, they should only affect FDI bilaterally. That is, only firms specifically covered by a BIT should be willing to invest in an otherwise risky location. Moreover, such positive benefits should only accrue when BITs are in force (rather than those signed but not ratified) and when treaties have strong protections. Again, the evidence is mixed. Busse et al. employ a standard gravity model of bilateral FDI flows for 28 source countries and 83 developing host countries between 1978 and 2004 and find BITs increase FDI.⁴⁷ Using the same dataset, Berger et al. find BITs increase FDI inflows regardless of the details of the treaty.⁴⁸ Kerner finds, once accounting for selection effects, BITs substantially increase dyadic FDI flows in a sample of 127 developing host countries and 22 developed home countries

⁴² Jennifer L Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2011) 6(1) *Review of International Organizations* 1–32; Sarah Bauerle Danzman, 'Contracting with Whom? The Differential Effects of Investment Treaties on FDI' (2016) 42(3) *International Interactions* 452–78; Lisebeth Colen, Damiaan Persyn, and Andrea Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) *World Development* 193–206; Chia-yi Lee and Noel P Johnston, 'Improving Reputation BIT by BIT: Bilateral Investment Treaties and Foreign Accountability' (2016) 42(3) *International Interactions* 429–51.

⁴³ James D Fearon, 'Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs' (1997) 41(1) *Journal of Conflict Resolution* 68–90.

⁴⁴ Omar E Garcia-Bolívar and Jon Schmidt, 'The Rise of International Investment Arbitration in Latin America' (2006) 12(12) *Latin American Law and Business Report* 4–5, 24–5.

⁴⁵ Rachel L Wellhausen, 'Recent Trends in Investor-State Dispute Settlement' (2016) 7(1) *Journal of International Dispute Settlement* 117, at 133.

⁴⁶ Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65(3) *International Organization* 401–32.

⁴⁷ Matthias Busse, Jen Koniger, and Peter Nunnenkamp 'FDI Promotion through Bilateral Investment Treaties: More than a BIT?' (2010) 146(1) *Review of World Economics* 147–77.

⁴⁸ Axel Berger, Matthias Busse, Peter Nunnenkamp, and Martin Roy, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2013) 10(2) *International Economics and Economic Policy* 247–75.

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from 1982 to 2001.⁴⁹ Examining bilateral FDI flows between the US and 31 countries from 1991 to 2000, Salacuse and Sullivan find US BITs are statistically significantly associated with increase investment from the United States as well as increased FDI overall.⁵⁰ Egger and Pfaffermayr find in a sample of 19 home OECD and 54 host countries from 1982 to 1997 that OECD BITs increase dyadic FDI from those home countries.⁵¹ Others find that BITs increase dyadic FDI flows, but only after these treaties are in force, which further supports a credible commitment mechanism.⁵²

On the other hand, several studies find null effects on dyadic FDI flows. Perhaps the first empirical analysis on BIT effect, Hallward-Driemeier finds no influence of these treaties on FDI flows in a small sample of host countries.⁵³ In a series of papers, Yackee routinely finds little support for the notion that BITs – and particularly BITs with strong commitments to ISDS – increase dyadic FDI flows.⁵⁴ He attributes this finding largely to the fact that many foreign investors simply are not aware of BITs and treaty coverage rarely becomes a major factor in locational decisions of multinational firms. Tobin and Rose-Ackerman also find no evidence that BITs increase FDI inflows bilaterally.⁵⁵

2. Conditional Effects

As the previous section suggests, despite nearly 15 years of effort, the empirical research on the effect of BITs on FDI flows has not converged on a consensus view on whether such treaties meaningfully contribute to investment. This large variation in findings likely stems, in part, from variations in data coverage and modeling approaches. However, scholars have also increasingly recognized that variations in

⁴⁹ Kerner 2009 (n 35).

⁵⁰ Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46(1) Harvard International Law Journal 67–130.

⁵¹ Peter Egger and Michael Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (2004) 32 *Journal of Comparative Economics* 788–804.

⁵² Yoram Haftel, 'Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries' (2010) 17(2) *Review of International Political Economy* 348–77; Tim Buthe and Helen V Milner, 'Foreign Direct Investment and Institutional Diversity in Trade Agreements: Credibility, Commitment, and Economic Flows in the Developing World, 1971–2007' (2014) 66(1) *World Politics* 88–122; Ka Zeng and Yue Lu, 'Variation in Bilateral Investment Treaty Provisions and Foreign Direct Investment Flows to China, 1997–2011' (2016) 42(5) *International Interactions* 820–48.

⁵³ Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit and They Could Bite' (2003) *World Bank Research Working Paper No. 3121*.

⁵⁴ Yackee 2008 (n 29); Jason Webb Yackee 'Bilateral Investment Treaties, Credible Commitments, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2009) 42 *Law and Society Review* 805–32; Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment – Some Hints from Alternative Evidence' (2011) 51(2) *Virginia Journal of International Law* 397–442.

⁵⁵ Jennifer Tobin and Susan Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties' (2005) *Yale Law and Economics Research Paper No. 293*.

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domestic, treaty design, diplomatic, and firm-level factors may condition BIT effect on FDI flows to a substantial degree.

First, BITs may operate as a greater constraint on some countries while only weakly binding others. On the one hand, if BITs function, at least in part, as a commitment to investor-friendly policies, then the credibility of this commitment depends both on the extent to which investors believe governments will honor their treaty commitments and on the extent to which treaty terms offer strong or weak protections. This logic suggests BITs should be complements for local domestic laws and that only countries with a minimum threshold of rule of law and constraints on the executive branch are effective.

In otherwise risky institutional environments, we should expect BITs to be most effective in countries that have poor domestic laws with respect to property rights and political constraints.

Perhaps not surprisingly, the evidence on whether BITs are complements or substitutes for local domestic laws is inconclusive. Using non-dyadic FDI inflow data from 1982 to 2003 for 97 low and middle-income countries with populations above 1 million, Tobin and Rose-Ackerman find BITs are only positively and statistically significantly associated with subsequent FDI inflows in countries with relatively strong domestic institutions.⁵⁶ Allee and Peinhardt examine the effect of BITs and subsequent investor-state arbitration on investment flows in non-OECD countries from 1984 to 2007.⁵⁷ They find any gains in FDI flows countries receive after ratifying a BIT are more than erased if a firm initiates an arbitration claim against that country; this also suggests that BITs can only positively affect FDI inflows when local institutions sufficiently constrain governments from exercising their regulatory authority in ways that firms deem harmful to their interests. Looking specifically at authoritarian regimes, Bastiaens similarly finds BITs only generate FDI inflows when governments are sufficiently constrained ‘from below’, which she measures through the degree to which regimes allow public deliberation in the policy-making process.⁵⁸ While Hallward-Driemeier finds little evidence that BITs increase bilateral FDI inflows in a small sample of host countries, she does find some evidence that BITs are more likely to generate flows when host country domestic institutions are relatively strong.⁵⁹ She interprets this as further support for the view that BITs are unnecessary instruments since they are insufficient substitutes for local domestic laws.

Others find evidence that BITs’ influence on FDI inflows increases when domestic institutions are weak. Neumayer and Spess find BITs have a stronger positive effect on aggregate FDI inflows when there are fewer constraints on the executive branch in a sample of 119 developing countries from 1970 to 2001.⁶⁰ Using dyadic data and a gravity model framework, Busse et al. find similar effects.⁶¹ Rosendorff and Shinn constrain their analysis to authoritarian regimes and find BITs can import stronger

⁵⁶ Tobin and Rose-Ackerman 2011 (n 42).

⁵⁷ Allee and Peinhardt 2011 (n 46).

⁵⁸ Bastiaens 2016 (n 41).

⁵⁹ Hallward-Driemeier 2003 (n 53).

⁶⁰ Neumayer and Spess 2005 (n 35).

⁶¹ Busse et al. 2010 (n 47).

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governance institutions that will attract FDI.⁶² Ginsberg examines the domestic legal environment of BIT signatories and finds that, historically, countries with better legal systems tend to sign more BITs, but in the 1990s, many signatories of BITs had very weak legal systems.⁶³ This suggests that research that considers the conditional effects of the domestic institutional environment on FDI must be particularly attune to selection effects. Perhaps most disconcertingly, Ginsberg also finds evidence that BITs tend to weaken legal systems over time, although some of his findings may be driven by the idiosyncrasies of central and eastern European countries and transition economies.⁶⁴

Second, scholars have also increasingly recognized the wide variation, particularly over time, in treaty design. Extending again the logic of credible commitments, BITs with stronger provisions may be more likely to generate investment flows. For the most part, political economists have focused on treaty obligations related to ISDS. This emphasis reflects the literature's theoretical affinity toward new institutional economics and the obsolescing bargaining problem discussed in greater detail above. Yackee's work is perhaps most closely associated with this theoretical and measurement issue. His dataset on the strength of BIT commitments was the first cross-national measure of heterogeneity among investment treaties. He has generally found little evidence that BITs influence FDI flows, even when differentiating between BITs with strong arbitration provisions – which he views as most likely to generate flows – and BITs without such protections.⁶⁵ Recently, UNCTAD released new data on the universe of BITs that provides systematic coding on the strength of treaty protections across a range of provisions. This has begun to lead to an expansion of scholars' conceptualization of 'weak' and 'strong' BITs to consider components of BIT provisions beyond investor-state arbitration. For example, Zeng and Lu examine variations in Chinese BITs with respect to absolute treatment, relative treatment, and ISDS.⁶⁶ They find treaties with strong provisions in all of these areas tend to increase dyadic inward Chinese FDI from 1997 to 2011, which suggests that investors care about more components of BITs than just ISDS.⁶⁷ Despite a growing consensus in the literature that accounting for heterogeneity of treaty terms is essential to evaluating BIT effect, Berger et al. find in a sample of 28 source countries and 83 developing countries from 1978 to 2004 that strength of treaty provisions did not condition bilateral FDI flows.⁶⁸ They argue this is because investors are simply not very discriminating about the content of BITs.

⁶² Peter Rosendorff and Kongjoo Shin, 'Regime Type and International Commercial Agreements' (2015) 11 *International Journal of Economic Theory* 107–19.

⁶³ Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 107–23.

⁶⁴ Ibid.

⁶⁵ Yackee 2008 (n 29); Yackee 2009 (n 54); Yackee 2011 (n 54); Jason Webb Yackee, 'Do BITs "Work"? Empirical Evidence from France' (2016) 7(1) *Journal of International Dispute Settlement* 55–71.

⁶⁶ Zeng and Lu 2016 (n 52).

⁶⁷ Ibid.

⁶⁸ Berger et al. 2013 (n 48).

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Third, the effect of BITs on investment flows may be conditioned on the prior relationship of the co-signatories to a particular BIT. Desbordes and Vicard argue BITs are most useful in promotion of FDI from home to host countries that have a history of tensions; the BIT provides a signal of the host countries' commitment to pro-market policies as well as important legal protections if bilateral relations deteriorate.⁶⁹ In a sample of 30 OECD and 32 non-OECD countries from 1991 to 2000, they find BITs are most likely to increase bilateral FDI flows between countries with intermediate levels of tensions.⁷⁰ Lee and Johnston argue the relationship between BITs and FDI has become increasingly tenuous as more countries sign BITs.⁷¹

Fourth, investment treaties like BITs might hold a stronger influence on some forms of FDI over others. Using firm balance sheet data on US MNE's holdings in 99 developing countries from 1997 to 2007, Kerner and Lawrence demonstrate US BITs increase fixed asset investments in treaty partners, but not other forms of more mobile investment like cash holdings.⁷² They argue this indicates that BITs are useful in reassuring investors that their immobile assets are safe, but do not increase more liquid investments. Others emphasize how systematic differences in the asset specificity and the ease with which governments can take from firms generates industry-level heterogeneity in response to BITs. Using a dataset of 114 developing countries from 1985 to 2011, Bauerle Danzman shows BITs increase private sector investment in infrastructure investment, but not FDI overall.⁷³ In a more limited sample of 13 central and eastern European and former Soviet countries from 1994 to 2009, Colen et al. find BITs increase investment in industries such as utilities and real estate that are characterized by high sunk costs, but have no effect on manufacturing or services.⁷⁴ Jandhyala and Weiner find evidence at the transaction-level in 45 countries that investment agreement coverage increases the valuation of petroleum assets.⁷⁵

Given the divergent empirical evidence on the relationship between BITs and FDI flows, can we make any general claims about the relationship between BITs and foreign investment flows? The totality of evidence suggests BITs probably do have

⁶⁹ Rodolphe Desbordes and Vincent Vicard, 'Foreign Direct Investment and Bilateral Investment Treaties: An International Political Perspective' (2009) 37 *Journal of Comparative Economics* 372–86.

⁷⁰ Ibid.

⁷¹ Lee and Johnston 2016 (n 42).

⁷² Andrew Kerner and Jane Lawrence, 'What's the Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation' (2014) 44(1) *British Journal of Political Science* 107–21.

⁷³ Bauerle Danzman 2016 (n 42).

⁷⁴ Colen et al. 2016 (n 42).

⁷⁵ Srividya Jandhyala and Robert J Weiner, 'Institutions Sans Frontieres: International Agreements and Foreign Investment' (2014) 45(6) *Journal of International Business Studies* 649–69.

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some influence on investment decisions, but this effect is conditioned on several factors including the host country domestic legal environment, treaty design, signatories' political and economic relationships, and investment type. While the statistical significance of the relationship between BITs and investment inflows is not very robust to different model specifications, case coverage, or measurement techniques, enough studies using a variety of estimation strategies have found a relationship that it would be unwise to entirely discount any relationship. At the same time, the fragility of this statistical relationship cautions observers against taking an overly optimistic view of the ability of BITs to induce large amounts of investment under many different contexts. To the extent that investment agreements facilitate FDI flows, they do so in highly conditional and contextually specific ways. And, diverging findings throughout the literature also suggest we still have high levels of uncertainty over the precise relationship between investment treaties and FDI locational decisions.

IV. WHY DO GOVERNMENTS CONSENT TO BITS?

The discussion above highlights the fragility of the empirical case that BITs systematically increase investment flows. Particularly in recent research, it has become increasingly clear that the ability of BITs to generate FDI inflows is contingent on a variety of host country, dyadic, and firm-level factors. Given the limited effectiveness of these treaties, and recent research that suggests governments take on substantial sovereignty costs when signing such treaties, under what conditions would governments sign and ratify such agreements to begin with? Prominent explanations emphasize systems-level motivations such as competition for capital and asymmetrical bargaining power, domestic political concerns for both home and host countries, and cognitive failures on the part of the agents who negotiate these treaties.

Systems-level explanations of BIT ratification emphasize the ways in which strategic behavior constrains rational host country governments to sub-optimal outcomes. Guzman conceptualizes the rise of the BIT network as a reflection of a collective action problem on the part of host countries.⁷⁶ While all developing countries would be better off rejecting the strictures of BITs, the provisions of which often extend far beyond those of customary laws that were soundly rebuffed in the 1960s, the need to attract foreign investment leads states to agree to rather strict treaty obligations when negotiating bilaterally with wealthy countries. And, the pressures to attract such investments make it exceedingly difficult for developing countries to stand firm and demand a multilateral agreement that would provide them with more collective bargaining strength. Extending this framework, Elkins et al. find evidence in analysis of all developed-developing country dyads from 1960 to 2000 that the diffusion of BITs among developing countries is driven by competitive pressures; countries are more likely to sign BITs if countries with similar export profiles, who compete in the same export markets, and with similar levels of educational and infrastructure resources do.⁷⁷

⁷⁶ Andrew T Guzman, 'Why Developing Countries Sign Treaties that Hurt Them: Explaining the Popularity of BITs' (1998) 38 Virginia Journal of International Law 643–88.

⁷⁷ Elkins et al. 2006 (n 25).

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Analyzing provisions of 1,473 treaties signed by 170 countries through 2006, Allee and Peinhardt find economically powerful home countries are better able to impose ICSID clauses than when BITs are formed between two more economically matched partners.⁷⁸ Simmons finds developing countries are far more likely to agree to more constraining BITs when they face economic hardship, and are also more likely to face associated ISDS claims when experiencing macroeconomic fragility.⁷⁹ Betz and Kerner demonstrate developing countries sign and ratify more BITs when US interest rates are high and they have large external debts.⁸⁰

Other scholars examine the role of governments in BITs.

randomly selected treaties promulgated between 1960 and 2000, Blake finds governments with longer time horizons are more likely to craft BITs that provide them with more policy autonomy as they prepare for bad economic times.⁸¹ Governments with shorter time horizons are more concerned with getting FDI in the current period and therefore sign more constraining BITs. Haftel and Thompson examine the ratification fate of 2,595 treaties from 1957 to 2007 and find evidence that ratification of BITs depends on the extent to which legislative branches provide substantial checks on executive power.⁸² They find high levels of domestic political constraints makes ratification less likely, but that transparency, high state capacity, and UN voting affinity with the treaty partner increase the chance of ratification. Campello and Leamy look specifically at the Brazilian case, which is unique because Brazil has signed 19 BITs, but has failed to ratify any of them. They find ratification requires bureaucratic buy-in because legislatures typically house small, concentrated oppositions to such treaties that are hard to overcome without substantial commitment and deal making by executive branch officials.⁸³ When BITs are not highly salient to such officials, they are less likely to be successfully shepherded through ratification. Finally, other authors consider the rationale behind home countries' investments in constructing their BIT network in the way they do. Most scholars assume that home countries are motivated to construct BITs as part of a broader strategy of legalizing global economic exchange.⁸⁴ However, Chilton argues that – at least in the case of the US BIT program – investment treaty

⁷⁸ Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) *World Politics* 47–87.

⁷⁹ Beth A Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66(1) *World Politics* 12–46.

⁸⁰ Timm Betz and Andrew Kerner, 'The Influence of Interest: Real US Interest Rates and Bilateral Investment Treaties' (2016) 11 *The Review of International Organizations* 419–48.

⁸¹ Daniel J Blake, 'Thinking Ahead: Government Time Horizons and the Legalization of International Investment Agreements' (2013) 67(4) *International Organization* 797–827.

⁸² Yoram Z Haftel and Alexander Thompson 'Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties' (2013) 67(2) *International Organization* 355–87.

⁸³ Daniela Campello and Leamy Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' (2015) 22(5) *Review of International Political Economy* 1055–86.

⁸⁴ See e.g., Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51(2) *Harvard International Law Journal* 427–73.

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partners are chosen not for their desirable investment locations but rather reflect strategic decisions to shore up vulnerable diplomatic relationships with allies.⁸⁵

A few scholars have also highlighted the ways in which agent-level choices may influence governments' decisions to enter into investment treaties. Case study and interview evidence suggest government officials wanted to believe BITs would provide them an easy way to generate FDI inflows, sought out confirmatory anecdotes to justify BIT programs, and ignored evidence to the contrary.⁸⁶ Moreover, many officials just simply were unaware of the risks associated with ratifying BITs when most BITs were brought into force. Recall that ISDS was not a major component of these treaties until the middle to late 1980s and that arbitration claims did not accrue in any meaningful sense until the late 1990s. Therefore, officials often signed and ratified BITs without full information about the likelihood and costs of arbitration. Using a combination of qualitative interviews with relevant government officials as well as econometric evidence for 138 developing countries from 1990 to 2009, Poulsen and Aisbett find evidence that governments only slow down and re-evaluate their participation in investment treaties when they have a claim filed against them in an arbitral body.⁸⁷ They argue government officials are only boundedly rational regarding the evaluation of BIT risk because these officials seem to ignore BIT-derived claims against other countries, and only register concern when their own government faces ISDS proceedings.⁸⁸ In other work, Poulsen and Aisbett also find diplomats often pursue investment treaties for the purposes of private gains such as increased travel to desirable locations, larger operating budgets, and higher status within the bureaucracy.⁸⁹

From this increasingly expansive literature on the motivations behind investment treaty formation, a few key insights emerge. First, asymmetric power between treaty partners has rendered developing countries 'price takers' in the BIT market. Developing countries have less ability to negotiate terms in their favor, and are most likely to agree to the most stringent treaty conditions when facing macroeconomic hardship. Host countries would most likely receive more favorable terms if they could negotiate a multilateral solution to investment governance, but collective action dynamics – and civil society protests against perceptions of MNE overreach – render that scenario unlikely.

Second, patterns of BIT ratification are influenced both by host country political institutions that give the executive branch more or less power and by wealthy countries' competing diplomatic priorities. While most empirical studies of BIT effect acknowledge the existence of selection effects and use various instrumental variable techniques to guard against the possibility that previous FDI flows influence BIT formation, future

⁸⁵ Adam S Chilton, 'The Political Motivations of the United States' Bilateral Investment Treaty Program' (2016) 23(4) *Review of International Political Economy* 614–42.

⁸⁶ Lauge N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58(1) *International Studies Quarterly* 1–14.

⁸⁷ Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65(2) *World Politics* 273–313.

⁸⁸ Ibid.

⁸⁹ Lauge N Skovgaard Poulsen and Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' (2016) 7(1) *Journal of International Dispute Settlement* 72–91.

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studies must consider more carefully ways in which host and home country characteristics may moderate BIT effects in theoretically relevant ways. For example, extant empirical analysis remains inconclusive as to whether BITs are complements or substitutes for business-friendly domestic institutions. If BIT ratification requires a certain amount of executive autonomy, we might see host countries with large BIT programs that have low enough levels of political constraints such that the executive can push through its treaty agenda. However, once a BIT is in force, its ability to reassure investors may require that political constraints be substantial enough to deter the executive from engaging in discriminatory takings. Therefore the relationship

existing literature allows through its approach to empirical modeling. Similarly, if some BITs are signed for economic diplomacy reasons while others are negotiated for other strategic purposes, then only some BITs should be considered likely to generate FDI inflows and therefore BITs negotiated for different purposes should be analyzed separately for their ability to attract investment.

Third, developing countries' beliefs about the usefulness of investment treaties and their willingness to accept BIT terms have changed substantially over time. This means explanations of the politics and implications of BITs must be sensitive to the temporal cycles that characterize the BIT regime over the last 50 years. Jandhyala et al. show BITs follow a three-wave pattern in which early treaties were signed as mechanisms to solve time-consistency problems, second-wave treaties were negotiated in a less discriminating manner as developing countries sought legitimacy as desirable investment locations, and, as the costs associated with ISDS began to accrue, the third wave of BIT formation became more hesitant and discerning of the costs and benefits of each potential treaty.⁹⁰ These insights suggest the effect of BITs on investment should change over time as the rationale behind signing such agreements also changes.

V. DO BITS OVERLY CONSTRAIN HOST COUNTRY POLICY AUTONOMY?

Recently, an emerging research agenda has developed around questions of the potential negative policy consequences of a country's BIT program. Interest in identifying and quantifying the constraints of BITs has grown precisely because there is only weak evidence that such treaties attract investment and citizen groups have voiced strident concerns about the fairness of BITs' arbitration mechanisms as the ISDS case load grows.⁹¹ Much of this literature focuses on patterns and outcomes of arbitration, and generally finds ISDS generates very large reputational and economic costs for host countries. Using a sample of non-OECD countries from 1984 to 2007, Allee and Peinhardt estimate that losing an investment dispute in the last two years reduces subsequent FDI inflows by close to \$800 million.⁹² Moreover, just having a claim filed

⁹⁰ Jandhyala et al. 2011 (n 25).

⁹¹ See UNCTAD 2017 (n 2), for an extended review and critique of older BITs that provide broader protections to MNEs.

⁹² Allee and Peinhardt 2011 (n 46).

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against a state in the previous two years reduces FDI by about \$85 million. Freeman examines how domestic institutional capacity influences the willingness of firms to file disputes and governments to engage in expropriating behavior as well as how institutional capacity can constrain firms and governments alike. In a sample of up to 164 countries from 1987 to 2007, he finds countries with weak institutional capacity are far more likely to have claims filed against them than states with strong domestic institutions.⁹³ Hafner-Burton et al. examine the determinants of award secrecy in all ICSID filings from 1972 to 2011 and find that respondent states are likely to keep arbitration findings secret if they have previously suffered losses, that highly regulated industries such as utilities and infrastructure are more likely to have awards kept secret, that higher levels of local corruption and greater degrees of litigiousness on the part of filing firms lead to more secret decisions, and that ICSID-led transparency reform efforts do not seem to meaningfully reduce secrecy.⁹⁴ They argue continued secrecy creates legitimacy problems that contribute to increasingly widespread opposition to 'secret international courts'.

Others consider the ways in which BITs might overly constrain governments' 'right to regulate' in ways that can lead to a race-to-the-bottom dynamic. Manger argues investment agreements usually provide too little room for effective state regulation of service industries with large economies of scale such as finance, telecom and energy.⁹⁵ Arel-Bundock looks at the overlapping network of BITs and double taxation treaties (DTTs) and demonstrates that these treaty networks allow MNEs to forum shop not only for ideal ISDS conditions but also for lower corporate taxes.⁹⁶ Several other scholars currently have yet-unpublished working papers that attempt to uncover whether the threat of arbitration through BITs has led to a chilling effect on environmental and health regulations.⁹⁷ Perhaps another unintended and detrimental effect of BITs is that proliferating such treaties may make it easier for authoritarian leaders to hold onto power by reducing pressures to reform property rights institutions and therefore facilitating co-optation of large firms into patrimonial networks.⁹⁸

In sum, there is a growing consensus in the literature that BITs impose costly constraints on signatory governments generally and poorer countries specifically. Countries with weak institutional capacity can be easily overwhelmed by the better

⁹³ Nathan W Freeman, 'Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations, 1987–2007' (2013) 39(1) *International Interactions* 54–78.

⁹⁴ Emilie M Hafner-Burton, Zachary C Steinert-Threlkeld and David G Victor, 'Predictability versus Flexibility: Secrecy in International Arbitration' (2016) 68(3) *World Politics* 413–53.

⁹⁵ Mark Manger, 'International Investment Agreements and Services Markets: Locking in Market Failure?' (2008) 36(11) *World Development* 2456–69.

⁹⁶ Vincent Arel-Bundock, 'The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy' (2017) 71(2) *International Organization* 349–71.

⁹⁷ See e.g., Jennifer Tobin and Jena Shoaf, 'A Bit of Regulatory Chill? Assessing the Effect of Bilateral Investment Treaties on the Enactment of Environmental Regulations' (unpublished manuscript); Eckhard Janeba, 'Regulatory Chill and the Effect of Investor State Dispute Settlement' (2016) CESIFO Working Paper No. 6188.

⁹⁸ Soumyajit Mazumder, 'Can I Stay a BIT Longer? The Effect of Bilateral Investment Treaties on Political Survival' (2016) 11(4) *The Review of International Organizations* 477–521.

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resourced and more sophisticated legal teams of large MNEs, and the arbitration system suffers from transparency problems that have made ISDS increasingly controversial and salient. Because the empirical record provides much weaker evidence of BITs' purported benefits – that is, there is only weak and highly conditional evidence that these treaties meaningfully contribute to investment inflows – political economists have generally become increasingly concerned that the potential benefits of maintaining BIT obligations are not worth the associated sovereignty trade-offs.

As outlined above, the political economy literature on BITs has rigorously debated the effectiveness of investment treaties on investment flows, the strategic dynamics that influence patterns of treaty formation and treaty design, and the consequences of these treaties on host governments' macroeconomic and political environments. Clearly, this collective research program has continued to probe deeper into more complex questions about the contingent nature of BITs and FDI as it has matured. At the same time, scholars working in this field would be wise to pause to reflect on where the most fruitful lines of inquiry remain after 15 years of sustained analysis. To continue to move the literature forward, researchers should: exploit new data and research methods at the firm level to extend analysis of BIT effect beyond aggregate flow data, more explicitly connect our better understandings of the multi-causal processes through which BITs are formed to empirical inquiry into the conditions under which particular types of treaties are more or less likely to affect firms' investment decisions, and generate more nuanced understanding of the ways in which investors and states manage conflict. As social scientists delve more deeply into analyzing these questions, they should also interact more with legal scholars, firm personnel, and policymakers in order to develop questions and theories that are better grounded in the experiences of the agents whose behavior they seek to explain. This means engaging in multi-method research designs that combine large statistical analysis with qualitative methods of research such as elite interviews.

1. Bringing the Firm Back in

To begin, research on the relationship between BITs and FDI flows should move beyond reduced-form empirical models – that is, statistical models that look at aggregated capital flows – to instead ascertain the extent to which individual firms' locational decisions are influenced by the presence or absence of investment treaties. There are several reasons why this development is necessary.

First, the BIT regime is far from static. Both BITs and FDI flows increased substantially throughout the 1990s. In 1980, less than 5 percent of OECD-sourced FDI was covered by a BIT. By 2000, 50 percent of OECD outward FDI was subject to a BIT.⁹⁹ At first glance, these statistics may seem to provide substantial evidence that a host country is more likely to receive FDI when it signs and ratifies BITs. However, in

⁹⁹ Hallward-Driemeier 2003 (n 53), at 12.

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1980, there were 157 BITs in force and this number ballooned to 1606 by 2000.¹⁰⁰ As the network of BITs becomes increasingly dense, more FDI will be covered by these treaties whether the treaty influences firms' locational decisions or not. Indeed, Tobin and Busch find the marginal effects of BITs on FDI flows declines over time as the treaty network approaches saturation.¹⁰¹ Thus, scholars studying the effect of BITs must carefully identify the precise mechanisms through which BITs might influence FDI flows and then disentangle the effect of these treaties from a general trend toward increased FDI flows simultaneous to BIT proliferation. Creating research designs that accurately consider the temporal location of treaty effects is particularly challenging since there are reasons to believe both that rational expectations may lead to pre-ratification effects as firms anticipate their investment will be covered by a BIT not yet in force¹⁰² and, on the other hand, that investment flows may take several years to adjust higher as investors develop projects in the wake of new treaties. This task is made ever more complicated by the shifting composition of BIT partners over time and the growing role of south-south FDI in recent years.

Second, despite the rapid rise in ISDS filings in the past 15 years, there remains limited evidence that decision-makers in firms have much knowledge about BITs or that the presence or absence of such treaties plays a pivotal role in locational decisions. While Bastiaens found in a sample of 107 US multinational firm managers that BITs are at least somewhat valuable as signals of pro-business policies, Yackee found through econometric analysis and survey data that political risk insurers as well as the legal departments of large multinationals rarely consider the presence of BITs when making insurance pricing or locational decisions.¹⁰³ Fundamentally, if BITs function to reassure investors, then their effects should accrue through changing the decision calculus at the investment deal level, and there is currently little systematic empirical evidence to support or refute this microfoundational assumption that underpins the entirety of the literature on BIT effect.

Finally, research on firm preferences and behavior related to investment treaties must also consider not just investor *awareness* of BITs but also the relative *salience* of such treaties. In a unidimensional policy space, firms may report they would prefer to do business in jurisdictions in which their investments would be protected by a BIT. However, the political and economic policy environment is exceedingly complex. In the real world, firm managers must weigh the relative value of a constellation of governmental policies, geographic conditions, and alternative choices when making

¹⁰⁰ UNCTAD's International Investment Agreements Tool, <http://investmentpolicyhub.unctad.org/IIA> accessed 23 May 2017.

¹⁰¹ Jennifer L Tobin and Marc L Busch, 'A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Agreements' (2010) 62(1) World Politics 1–42.

¹⁰² See Leonardo Baccini and Johannes Urpelainen, 'Understanding the Timing of International Treaty Effects on Domestic Policies' (2014) 58 International Studies Quarterly 29–43, for a discussion of pre-ratification effects with respect to trade treaties. See Peter Egger and Valeria Merlo, 'The Impact of Bilateral Investment Treaties on FDI Dynamics' (2007) 30(10) The World Economy 1536–49, for a dynamic model of the relationship between BITs and FDI. They find the full effect of BITs on FDI inflows takes several years, with most changes occurring within the first year and one half after ratification.

¹⁰³ Bastiaens 2016 (n 41); Yackee 2009 (n 54).

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operational decisions. For example, BITs and political risk insurance are often functionally substitutes. The US's Overseas Private Investment Corporation (OPIC) does not provide coverage for BIT-related arbitral award default (AAD), and it typically does not provide coverage for both AAD and expropriation on the same project.¹⁰⁴ One promising path forward is the use of innovative survey experiments such as conjoint analyses that force firms to rank their preferences between multidimensional policy packages rather than simply ask managers whether a BIT is a positive, neutral, or negative incentive for investment. This approach also allows researchers to determine what firm-level characteristics are most influential.

For example, Kim et al. use conjoint analysis to assess the components of trade policy that are most important to firms operating in Costa Rica.¹⁰⁵ They find that investment protections are the most salient trade policy to firms engaged in global production networks, but that trade-related dispute settlement mechanisms are more important for exporters that are not deeply integrated into global value chains. Moreover, they find that levels of firm engagement in patterns of economic exchange are far more informative in predicting variations in policy preference than are industry-level characteristics. Similarly, researchers of the investment policy environment can use conjoint analysis designs to determine the importance of various components of BIT treaty provisions in relation to other aspects of the investing environment, including licensing regulations, tax policy, and access to political risk insurance.

Considering other ways firms manage their political and contract risks is especially important as rapid developments in the structure of the global economy create complex supply chains that involve both domestic and international firms. As Eden et al. argue, the increasingly iterative nature of MNE project development and expansion as well as foreign firms' increasing use of domestic suppliers may create new pathways through which firms can secure their property rights – ways that are not as toxic to future firm-government interactions and popular political discourse as is ISDS.¹⁰⁶ Under what conditions will firms prefer to manage these sorts of risks through political risk insurance, advocacy through local business associations, home country pressure, or lobbying coalitions with local business networks?

2. Connecting BIT Formation to BIT Effect

Second, scholarship on BITs should do more to explicitly connect a growing body of theory and evidence over why and how countries select into particular BIT partnership and how different rationales of treaty formation influence treaty effect on investment flows. While most quantitative analysis on the relationship between BITs and FDI

¹⁰⁴ Personal correspondence with OPIC official, 30 May 2017.

¹⁰⁵ In Song Kim, Helen V Milner, Thomas Bernauer, Gabriele Spilker, Iain Osgood and Dustin Tingley, 'Firms' Preferences over Multidimensional Trade Policies: Global Production Chains, Investment Protection and Dispute Settlement Mechanisms' (Forthcoming) *International Studies Quarterly*.

¹⁰⁶ Eden et al. 2005 (n 11) 251–72.

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flows do employ statistical tools designed to correct for selection effects, they mostly do so atheoretically through instrumental variable regression or through the Arellano-Bond generalized method of moments (GMM) estimator, which uses a mixture of differenced and lagged dependent variables to correct for endogeneity. While such approaches are improvements over less sophisticated modeling techniques that do not consider that the population of countries (or country dyads) with BITs may be statistically significantly different across a variety of other characteristics that may influence investment flows, they do not consider the possibility that BITs themselves vary in terms of their purpose as conceived by partner states. As discussed in greater depth above, scholars have found evidence that US BITs are often negotiated as part of a broader diplomatic strategy rather than for commercial purposes, and that diplomats may pursue BITs for personal prestige and relevance within the bureaucracy. This suggests that BITs themselves may vary in the extent to which they generate FDI flows, not just due to variations in the strength of treaty provisions, but also because of the differing rationales behind pursuing these treaties.

Moreover, the future of the BIT regime is in question at the moment. Concerns over the costs of ISDS, an increasing realization that first generation BITs often had overly broad and vague definitions and provisions that effectively constrained host state policy authority more than anticipated, and the fact that many BITs are reaching the end of their initial binding period, after which parties can unilaterally withdraw, have combined to generate great pressure to reform international governance over investment. Nineteen treaties were terminated between January 2016 and April 2017, with most being terminated through unilateral withdrawal.¹⁰⁷ Indonesia and India, both large developing economies, were particularly active in their termination behavior. European-led calls for the development of a multilateral investment court to replace ISDS also represent a potential major change to the composition and terms of the BIT network, and many developing countries have expressed strong interest in moving toward such a system.¹⁰⁸ Moreover, the European Union (EU) continues to wrestle with the fate of intra-EU BITs, particularly between central and eastern European Countries and Western Europe, as the EU has assumed competency over outward foreign investment policies and treaties.¹⁰⁹

UNCTAD has increasingly led the charge for comprehensive BIT reform, referencing the fact that 77 percent of treaty-based ISDS claims have invoked BITs that were ratified in the 1990s when treaty language routinely provided little, vague, or no reference to the right to regulate, defined investors broadly to also include portfolio and

¹⁰⁷ UNCTAD 2017 (n 2), at 112.

¹⁰⁸ At the 14th convention of UNCTAD in June 2016, a high-level panel on international investment agreement reform underscored this point. Almost all country delegates (usually financial or commerce ministers) specifically referenced the development of a multilateral investment court and increased protections for states' right to regulate as top priorities. Only the US and Japanese officials offered counter views. Author observation, Nairobi, Kenya, 17–22 July 2016.

¹⁰⁹ Following the 6 March 2018 European Court of Justice's judgement on *Slovakische Republik v Achmea BV*, the European Commission has issued guidance that members must terminate intra-EU BITs. Commission Communication to Member States on Protection of Intra-EU Investment, 2018 O.J. C 54.

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sovereign debt investors, provided no clarity on a definition of indirect expropriation, and failed to clarify that most-favored-nation treatment did not extend to other BITs' ISDS provisions.¹¹⁰ The potential for a flurry of new negotiations to replace old BITs with a next generation of less expansive treaties provides a wealth of opportunity for scholars to study both the factors that influence success and failure in re-negotiating investment treaties as well as the effects of these treaty changes, if any, on investment flows.

3 ISDS in a Shifting Global Environment

As the investment governance system continues to evolve, ISDS seems most poised to undergo substantial and perhaps critical changes. Especially because political economy scholars have seized on ISDS as a particularly important component of the BIT network – both from a conflict resolution perspective as well as from a distributive politics perspective – the research community will undoubtedly turn its attention to how variations in different provisions in investment agreements affect claim filing and resolution. As countries negotiate increasingly specific and circumscribed definitions of investors, national treatment, and most-favored-nation status, and as they more explicitly preserve the right to regulate, will ISDS claims fall? As standing tribunals operate parallel to arbitration, will we see a difference in filings and resolutions between legal fora? And, what will these changes mean for public perception of the investment governance regime? Interrogating these questions will allow political economists to speak to broader questions about the interest groups that comprise pro-investment and protectionist coalitions, the ways in which MNEs embed into domestic political lobbying efforts, and how changes to legal protections influence investment flows.

Additionally, research in this area should also build more nuanced theories of political and contract risk management that may differ across industry and firm-level characteristics. The existing literature tends to assume that firms are largely homogeneous in their willingness and ability to use ISDS. In reality, firms often see arbitration as a last resort because it is lengthy, costly, and damaging to the investor-state relationship. In fact, the negative effects of ISDS claims on subsequent investment inflows that scholars have previously found may have little to do with a negative reputational effect and instead reflect the reality that firms tend to disinvest as they file claims and that disinvestment can have lasting effects on inflows since as much as 40 percent of FDI inflows to developing countries accrue through follow on investment from firms already in place.¹¹¹

Just as researchers should do more to consider the salience of BITs to investors, future analysis must develop a richer theory to explain the conditions under which firms will choose to pursue ISDS rather than a different strategy for protecting their property rights. Such theory development will advance knowledge on the formal rules

¹¹⁰ UNCTAD 2017 (n 2), at 122.

¹¹¹ Xavier Forneris and Priyanka Kher, 'Investment Protection and Retention: Enabling FDI to take Root in Domestic Economies' (2017) (presentation) 6. See also Sarianna M Lundan, 'Reinvested Earnings as a Component of FDI: An Analytical Review of the Determinants of Reinvestment' (2006) 15(3) *Transnational Corporations* 35–66.

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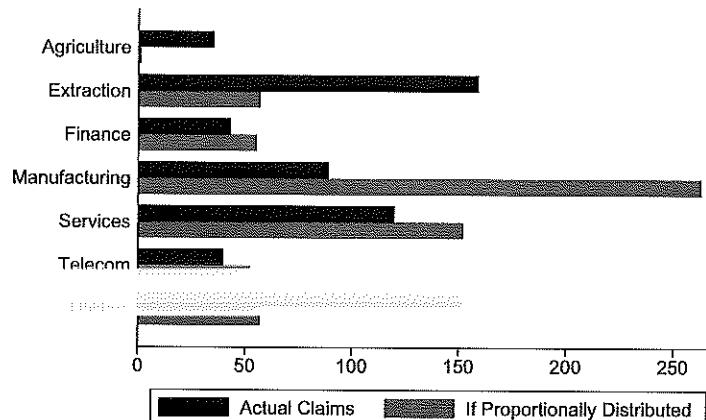
and informal practices firms can use to manage political risk, and the conditions under which governments view their interests as closely aligned with MNEs. The answers to these questions are likely to vary significantly across industry and firm characteristics.

For example, the distribution of ISDS claims across industries is far from evenly distributed when scaling claims by the percentage of FDI stock each industry represents. Figure 1.3 illustrates this clearly. Using data on all ISDS from 1990 to 2015 as well as data on cumulative greenfield and acquisition FDI globally over the same time frame, I calculate the expected number of ISDS claims if each industry was equally likely to generate an ISDS claim.¹¹² I then compare this expected distribution to the actual distribution of claims across industries. I find that manufacturing is grossly under-represented in claims, relative to manufacturing's share of FDI stock. In contrast, agriculture, extraction, and utilities are substantially over-represented. These findings are in line with previous research of mine and others that find BITs are more likely to increase investment flows in industries especially characterized by intensive contracts between the state and firms. However, if ISDS is particularly disruptive to the investor-firm relationship, and if a sustained and well-functioning relationship is necessary for the continued success of an investment, then the relatively high numbers of ISDS claims in these industries represent great inefficiencies and lost potential for mutually beneficial investment projects. Are there discernible variations in the extent to which firms in these industries can successfully resolve disagreements before they escalate into disputes? If so, what makes it more likely that investors and states can manage conflict in less costly ways?

Finally, there has been little sustained effort at considering how firm-level characteristics might influence the likelihood that investors resort to ISDS to resolve disputes. Two exceptions are Wellhausen's work on how co-national investors collectively apply pressure on governments to protect each other's property rights and John and Wellhausen's formal and empirical work that finds that US MNEs take fewer legal actions against states that host more US supply chain activity.¹¹³ However, more research is needed in this area to determine how different approaches to global integration of value chains – such as vertical integration or subcontracting – affects both governments' treatment of MNEs as well as MNEs' strategies for protecting their property rights. If MNEs are less reliant on ISDS in countries where they have close commercial connections to local firms, what formal and informal mechanisms of property protections are substituting for ISDS? What are the implications of MNE reliance on local networks for the distribution of rents generated through these

¹¹² The ISDS claims data come from Wellhausen 2016 (n 45), table 1; FDI stock data come from UNCTAD 2017 Annex Tables 13 and 20. I add all net flow data to create FDI stock figures for each industry over the time period. Greenfield investment figures at the industry level are only available from 2003 onward. Accordingly, I create two measures: one that combines greenfield investment and mergers and acquisitions from 2003 onward only, and one that combines all available data. The results are substantively similar and I report 'expected claims' based on the average of these two figures.

¹¹³ Rachel L Wellhausen, 'Investor-State Disputes: When Can Governments Break Contracts?' (2015) 59(2) *Journal of Conflict Resolution* 239–61; Leslie Johns and Rachel L Wellhausen, 'Under One Roof: Supply Chains and the Protection of Foreign Investment' (2016) 110(1) *American Political Science Review* 31–51.

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Source: Rachel L Wellhausen, 'Recent Trends in Investor-State Dispute Settlement' (2016) 7(1) *Journal of International Dispute Settlement* 117; UNCTAD 2017 World Investment Report Annexes.

Figure 1.3 Investor-state dispute settlement claims (by Industry, 1990–2015)

commercial activities? And, how does the alliance of MNE and local firm interests influence the broader political and policy environment?

VII. CONCLUSION

Over the past 15 years, scholars have asked increasingly nuanced questions regarding the political and economic causes and consequences of BITs. While researchers continue to debate the relative costs and benefits of these treaties for development outcomes, a thorough review of, and reflection on, the literature provides several important insights. First, to the extent that BITs help developing countries attract FDI, they do so in highly conditional and nuanced ways. In particular, domestic political institutions, characteristics specific to particular BITs and treaty partners, and variations at the industry and firm level all influence the extent to which BITs can meaningfully influence investment flows. Second, patterns of treaty formation suggest that the selection into a BIT and what the terms of that BIT look like depends on structural, dyadic, and host country characteristics. Poorer states are typically 'price takers' in treaty negotiations, and therefore are unable to successfully obtain concessions from FDI-exporting states. Which country pairs begin the BIT negotiation process is in part determined by the strategic diplomatic priorities of wealthy FDI-sending states, but which BITs are ultimately ratified depend on the political institutional environment of developing host states. Third, as MNEs have increasingly turned to ISDS, the cost-benefit calculus of BITs for developing countries has shifted and the system itself faces a mounting legitimacy crisis. Emerging research that suggests BITs systematically prevent host states from enacting public-interest regulation provides additional empirical support for those who argue the current BIT system is unfair and should be substantially reformed.

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As the BIT regime stands at a crossroads, scholars interested in the politics and economics of such treaties have the opportunity to exploit changes to the system to systematically study the political processes and economic effects of treaty renegotiation and termination. At the same time, scholars interested in BIT effects should move beyond aggregate flow data to the firm level. Engaging more directly with firms and their locational decisions can help scholars ascertain whether and when firm managers even consider BIT coverage when making locational decisions and can help the field develop more grounded theories and understandings about the multiple ways in which firms manage the risks associated with investing in foreign jurisdictions.

In sum, it may be tempting, given the inconclusive nature of much of the literature on BIT effect on investment, to conclude that political economists have reached the limit of fruitful analysis of the politics and economics that undergird the BIT regime. However, in reality the number of research questions and the ability to rigorously test these questions using both large and qualitative research methods is only expanding.

