The Politics of South-South Bilateral Investment Treaties

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Introduction[1]

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

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[2] UNCTAD, 'South-South Cooperation in International Investment Agreements' *Series on Issues in International Investment Policies for Development* (2005).

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

Given the initial purpose of BITs, this development in the international investment regime is notable and raises a number of questions. Does the popularity of South-South BITs imply that after decades of resistance, developing countries have finally converged completely to the norms of the developed world with respect to foreign investment treatment and protection standards?[4] If true, that could give proponents of a multilateral investment treaty a strong political argument: for if developing countries consistently incorporate 'traditional' North-South BIT-standards even in South-South BITs, there is no apparent reason why they should refuse to incorporate similar standards in a multilateral framework. Alternatively, however, South-South BITs might espouse a different vision of international investment rules compared to their North-South counterparts. If so, what – if any – implications would that have for the global investment protection regime? Does it mean, for instance, that investment flows between developing countries are increasingly covered by systematically different BIT-standards compared to investments made between developed and developing countries?

In order to examine these questions, we need to investigate whether there are systematic differences in investment rule-making between South-South and North-South BITs. As noted by UNCTAD in its cursory review of South-South BITs, such an analysis has to be

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[3] UNCTAD, *Progress report: Work undertaken within UNCTAD's work programme on international investment agreements between the 10th Conference of UNCTAD, Bangkok, February 2000 and July 2002* (New York: United Nations, 2002); Olof Karsegard, Pedro Bravo, and Hubert Blom, *UNCTAD work programme on capacity building in developing countries on issues in international investment agreements: Final in-depth evaluation report* (New York: United Nations, 2006).

[4] From the 1929 Draft Convention on the Treatment of Foreigners to the recent Doha-round of WTO-negotiations, many developing countries have time and again objected to Western proposals for multilateral investment rules based on legally binding minimum standards. See e.g. Dattu, 'A Journey From Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' 24 *Fordham International Law Journal* (2000) 275, G. Van Harten *Investment Treaty Arbitration and Public Law* (2007), ch. 2; C. Wilcox *A Charter for World Trade* (1949), 145-8; Abs and Shawcross, 'The Proposed Convention to Protect Private Foreign Investment' 9 *Journal of Public Law* (1960) 115; Fatouros, 'An International Code to Protect Private Investment – Proposals and Perspectives' 14 *University of Toronto Law Journal* (1961) 77; D. Henderson *The MAI Affair: A Story and its Lessons* (2000); Sauvé, 'Multilateral Rules on International Investment: Is Forward Movement Possible?' 9 *Journal of International Economic Law* (2006) 325.

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comprehensive and detailed enough in order to credibly identify whether or not South-South BITs in fact incorporate specific features.[5] This chapter will outline and discuss the results of such an analysis based on an investigation of 303 BITs signed by 100 countries from 1994 to 2006 analysed according to a set of quantitative indicators of investment provisions, which in turn allow large-n statistical analyses. The sampling and methodology is briefly outlined in the annex along with the definition of what constitutes a South-South BIT.[6]

Space constraints naturally preclude investigating all substantive and procedural BIT-provisions. Focus is therefore on two standards, which have been in dispute between developing countries and developed countries in multilateral discussions on investment rules in the past, namely (post-entry) national treatment provisions and provisions on repatriation of investment-related funds. The analysis finds that South-South BITs *do* in fact vary systematically from North-South BITs with respect to these two provisions as South-South BITs are typically less comprehensive in scope. South-South BITs have been more likely to restrict, or exclude, national treatment from their substantive provisions, as well as include certain carve-outs to the transfer provisions to allow exceptional measures taken under balance-of-payments difficulties for instance. The implications for the international investment protection regime are unclear, however, as South-South BITs have typically failed to ensure that their more narrow scope is not potentially "levelled out" by the treaties' most-favoured-nation ("MFN") provisions. This is somewhat perplexing, and based on interview feedback from BIT-negotiators, I conclude by speculating whether this de facto coherence in developing countries' BIT-networks might be unintended.

The chapter is structured as follows. The first section briefly discusses the methodology applied in the analysis, as it departs substantially from the traditional legal literature investigating BITs. The second section introduces the national treatment standard and reviews whether South-South BITs have been more likely to restrict or completely exclude the standard compared to North-South BITs. The third section introduces BITs' transfer

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[5] UNCTAD, *supra* note 2, at 47.
[6] Further details can be found in the full paper; see *supra* note 1.

clauses and reviews whether South-South BITs have been more likely to allow restrictions to foreign investors' repatriation of funds. The fourth section reviews whether the differences are 'leveled out' by the treaties' MFN provisions and discusses the implications of the results. The final section concludes.

1. Methodology

The literature investigating the content of BITs can generally be divided into two categories.[7] Whereas one set of studies compares and contrasts several treaty obligations across a few treaties,[8] another takes the issue-based approach, which investigates one particular aspect of BITs with *ad hoc* references to a large stock of treaties as illustrations.[9] Both these approaches have their obvious advantages and drawbacks. None of them, however, can credibly identify and/or correlate variation in the content of BITs across countries or time. This can only be done by comparing a large and representative sample of BITs, which in turn is only practically possible if based on a quantification of the treaties' content relying on a set of transparent underlying criteria.

One thing is necessity, however, another is feasibility. For while the exercise of quantifying legal documents is not new within the social sciences,[10] many would undoubtedly consider it pointless to even try and capture the content of complex legal documents, such as BITs, with numeric values. A comprehensive evaluation of a treaty's terms and conditions is bound to be a qualitative exercise, which has to carefully consider the ordinary meaning of its terms in their context and in light of their object and purpose.[11] An in-depth analysis of a given BIT is therefore not well-suited for quantitative analysts trying

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[7] Haslam, 'A Flexibility for Development Index: Can International Investment Agreements be Compared Quantitatively?' 19 *European Journal of Development Research* (2007) 251.

[8] See e.g. Kantor, 'The New Draft Model US BIT: Noteworthy Developments' 21 *Journal of International Arbitration* (2004) 383.

[9] See e.g. UNCTAD's *Series on Issues on Issues in International Investment Agreements*, available at: www.unctad.org/Templates/Page.asp?intItemID=2322&lang=1.

[10] See e.g. the publications based on the 'Comparative Constitutions Project' (available at: www.comparativeconstitutionsproject.org/publications.htm); and the contributions on the interaction between investor protection and financial development by Porta *et al.*, such as 'Legal determinants of external finance' 52 *Journal of Finance* (1997) 1131; and 'Law and Finance' 106 *Journal of Political Economy* (1998) 1113.

[11] Cf. Article 31 of the 1969 Vienna Convention on the Law of Treaties.

to observe the world through binary codes of 1's and 0's. But while this scepticism is perhaps well-founded, most would probably nevertheless agree that it is possible to code certain aspects of BITs in a meaningful and informative manner. For instance, irrespective of discipline, most scholars group BITs into two distinct groups: one which grant investors a right of admission (typically Northern American BITs), and one that doesn't (typically European BITs). This is of course a simplified distinction as admission clauses can, and do, vary substantially. But however imperfect, it is nevertheless generally accepted as a legitimate 'binary coding' of BITs that can identify general features of different treaties.[12] The following analysis simply takes this exercise one step further by grouping BITs according to additional set of criteria useful to investigate my empirical question, namely whether systematic variation in BITs is co-determined by both parties being developing countries. Note, however, that the analysis does *not* intend to compare the BITs according to an aggregate quantitative score based on some underlying concept such as the treaties' strength or flexibility for development. This has been tried elsewhere.[13] But while not necessarily an illegitimate exercise, this would involve major and ultimately subjective assumptions on the role of different provisions which would be more than problematic for most purposes, including this analysis.

2. National Treatment

The first standard included in the analysis is that of national treatment (NT). The purpose of an NT clause in investment treaties is to oblige host states not to discriminate, de jure or de facto, between foreign investors and similarly situated national investors.[14] In BITs, the clauses typically stipulate that foreign investors and their investments shall be "*accorded treatment no less favourable than that which the host state accords to its own investors*,"[15] and some, such as American BITs, specify that the clause applies only in "*like*

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[12] See e.g. R. Dolzer and C. Schreuer *Principles of International Investment Law* (2008), at 81.

[13] See Hicks, '*Dissecting the Black-Box: Bilateral Investment Treaties and Global Investments*' presented at the Annual Meeting of the International Studies Association, San Francisco, March 27, 2008; and Haslam, *supra* note 7.

[14] Dolzer and Schreuer, *supra* note 12; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties Standards of Treatment,* ch. 4 (2009).

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

situations,"[16] or "*like circumstances*."[17] Being a relative or contingent standard, NT will of course be of little use if domestic investors have limited rights. However, the purpose of NT provisions in BITs differs fundamentally from the NT concept which was part of the New International Economic Order of the 1970s. Whereas the latter was intended to limit the rights foreign investors could rely upon through international law, BITs do not preclude that standards more favorable than those granted to national investors should be applied to foreign investors.[18]

Not surprisingly, developed countries have been strong proponents of including NT in their BITs in order to 'level the playing field' among their investors abroad and host states' domestic companies.[19] Developing countries, on the other hand, have at times sought to exclude, or substantially limit, the standard in order to favour their own nationals.[20] On occasion this agenda has been pursued based on infant-industry protection arguments, which (in theory) provide developing countries an economic justification for a certain level of discrimination against foreign competition.[21] In multilateral discussions, such arguments have been made by developing countries for decades. During the discussions on the UN Draft Code on Transnational Corporations in the 1980s, for instance, developing countries thus proposed to limit the NT standard by allowing measures specified in legislation relating to developing countries' development objectives.[22] Similarly, even though large-scale protectionist experiments have gone out of fashion in most of the developing world, several developing countries were cautious about granting foreign investors unlimited NT in the recent discussions on investment issues in the Doha-round,

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

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

[18] Dolzer and Schreuer, *supra* note 12, at 178; UNCTAD, *National Treatment* (New York: United Nations, 1999), at 37.

[19] It is typically only in North American BITs we find legally binding pre-entry NT provisions; see T. Pollan *Legal Framework for the Admission of FDI* (2006), at 70-82.

[20] Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' 24 *International Lawyer* (1990) 655, at 668.

[21] P. Krugman and M. Obstfeld *International Economics: Theory and Policy, 8t^th^ ed*. (2008), ch. 10.

[22] United Nations Center on Transnational Corporations (UNCTC) *Bilateral Investment Treaties* (1988), at 33; see further UNCTC, 'Report on Outstanding Issues in the Draft Code on Transnational Corporations' par. 55-61*,* U.N. Doc E/C.10/1984/S/5 (1984), reprinted in 23 *ILM* 602.

as that would prevent them from subsidizing or providing other benefits to national investments, thereby potentially undermining national development strategies.[23]

The question is therefore whether there are systematic differences between North-South and South-South BITs with respect to NT-standards. Is some developing countries' scepticism towards wide-ranging NT provisions in multilateral discussions reflected in BITs signed amongst themselves? In order to investigate this, I compare the share of BITs which exclude or limit NT provisions across the two BIT-dyads. Limitations are here understood as clauses, where the NT standard is either not legally binding or subject to domestic laws (and thus substantially restricted). It suffices to say that this simple distinction will result in grouping BITs, where NT provisions would potentially be applied somewhat differently on case-by-case basis. However, certain simplifications are necessary if we want to identify general, but hopefully still meaningful, patterns across a large number of treaties. For my purposes, certain sector specific reservations therefore do not count as major limitations.[24] Also, I do not distinguish between BITs specifying that NT shall be provided in the 'same' or 'identical' circumstances[25] and BITs where this basis of comparison is not included. Neither do I distinguish between BITs using the term 'no less favourable' treatment and those using terms such as 'same treatment' or 'as favourable' treatment. Finally, for my purposes the general taxation exception to NT found in most BITs is not considered to substantially restrict the NT provisions, nor is the exception to NT based on prudential measures in financial services[26] or intellectual property rights guaranteed under international intellectual property conventions.[27] A breakdown of the sample is provided in table 1.

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[23] WTO *Report of the Working Group on the Relationship between Trade and Investment to the General Council,* WT/WGTI/6 (2002), par. 93 (available at: www.wto.org/english/docs_e/docs_e.htm).

[24] While a formal distinction can be made between "reservations" and "exceptions," I use these terms interchangeably along with the term limitations. *See generally* Newcombe and Paradell, *supra* note 14, ch. 10.

[25] E.g. 1982 Belize-United Kingdom BIT, article 3.

[26] E.g. 1996 Barbados-Canada BIT, article 11.

[27] E.g. 1995 Nicaragua-US BIT, article 2.

Table 1

National treatment (post-establishment)			
	Share		
	Total	North-South BITs	South-South BITs
I: No NT	0.20 (0.15 - 0.24)	0.08 (0.04 - 0.12)	0.36 (0.28 - 0.45)
II: Parties shall strive to provide NT or NT is subject to domestic laws	0.07 (0.04 - 0.09)	0.05 (0.01 - 0.08)	0.10 (0.04 - 0.15)
III: Specific exceptions	0.11 (0.07 - 0.14)	0.16 (0.10 - 0.21)	0.03 (0.00 - 0.06)
IV: No exceptions	0.63 (0.58 - 0.69)	0.72 (0.65 - 0.79)	0.51 (0.42 - 0.60)
V: No NT or major limitations to NT (I or II)	0.26 (0.21 - 0.31)	0.12 (0.07 - 0.17)	0.46 (0.37 - 0.55)
N:	303	179	124
Notes: 95 % confidence intervals in brackets.			

Purely aspirational NT clauses are few and distributed more or less equally across the two BIT-dyads. A greater share of North-South BITs has NT clauses with specific exceptions, but this is almost solely driven by U.S. and Canadian treaties which include exceptions to their NT provisions for the pre- and post-establishment phases. The major difference, however, is that more than one-third of South-South BITs does not include an NT provision at all compared to only 8 percent of North-South BITs. This means that only 12 percent of North-South BITs exclude or limit their NT provisions as defined above, whereas the share is 46 percent for South-South BITs. The confidence intervals for the two groups don't overlap, and the difference is therefore unlikely to be due to random variation in the sample. It thus seems that South-South BITs have indeed been much less likely to incorporate wide-ranging NT clauses compared to North-South BITs. This conclusion is interesting and relevant in and by itself. By basing the analysis on a large and representative sample of treaties, the table above gives a much clearer picture of rule-making patterns in the international investment regime than the traditional cursory and non-systematic reviews.

An additional question, however, is whether the pattern is due to the differences in BIT-partners, or it instead reflects some other underlying factors. For apart from whether the home state is a developing or developed country, there are of course many other reasons why a host state might, or might not, wish to grant foreign investors NT in its BITs. I therefore test whether the systematic difference between North-South and South-South BITs is due to some omitted variable bias. The results of this analysis are outlined in table 2 (see annex for further information on the co-variates and regression techniques). The difference between South-South and North-South BITs is substantial in all estimations, and significant in two out of three. After conditioning on the included co-variates, South-South BITs are still between two and three times more likely to limit or exclude NT provisions. Accordingly, I am quite confident that developing countries have been more likely to exclude or limit NT in their BITs when the other contracting party has been a developing country. As we shall see below, this is not the only systematic difference between South-South and North-South BITs.

Table 2

National treatment (post-establishment) ***Logistic regressions***		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	2.34/** (2.01/4.31)	2.46** (5.64)
N	218	290
Notes: Dependent variable is coded as 1 if NT clause is absent, non-legally binding or subject to domestic laws. (I) Standard errors adjusted for correlation among home country BITs; (II) standard errors adjusted for correlation among host country BITs. Constants and coefficents on other included regressors not reported. Chi2 values after Wald tests in brackets for (I) and (II), chi2 value after likelihood ratio test in brackets for (III). * significant at 10%; ** significant at 5%; *** significant at 1%.		

3. Transfer Clauses

Another BIT-provision that has been associated with a divergence of views between developing and developed countries is the free transfer of investment-related funds out of the host state. While such clauses can and do differ from treaty to treaty, most BITs stipulate that a wide range of payments and other-investment related funds shall have a right to be transferred out of the host state without delay and, typically, in a freely convertible currency.[28] From foreign investors' point of view these clauses are key in investment-treaties, as the ability to freely repatriate funds can be an important factor in their investment-decision process. Developing countries, on the other hand, often have an interest in not restraining their ability to adopt certain restrictive exchange rate or other measures, for instance as means to prevent or confront economic and financial crises. Particularly, the numerous investment claims brought against Argentina in the wake of its 2001 financial crisis have sparked a debate on the risks in not subjecting such guarantees to certain exceptions.[29] But while this particular crisis might have brought attention to this issue, it has always been controversial. Jeswald Salacuse thus stated in 1990 that: *'(..) the negotiation of BIT provisions on monetary transfer is often one of the most difficult negotiations to conclude. Capital-exporting countries seek broad, unrestricted guarantees on monetary transfers, while developing countries press for limited guarantees, subject to a variety of exceptions'.*[30]

As with the NT standard, this difference in preferences was also clear in the discussions on the UN Draft Code on Transnational Corporations, where rules on currency transfer was one of the key issues developed and developing countries could not agree upon.[31] Similarly, during the recent investment negotiations in the Doha Round, many developing countries argued that a host state should be able to prevent foreign investors from freely transferring revenues and capital out of the its country if under economic difficulties.[32] While such an exception is included in some North-South BITs, it is far from the norm (see below).

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[28] R. Dolzer and M. Stevens *Bilateral Investment Treaties* (1995), at 85-96.
[29] See; Viterbo, '*Dispute Settlement over Exchange Measures Affecting Trade and Investments: The Overlapping Jurisdictions of the IMF, the WTO, and the ICSID'* presented at the Society for International Economic Law's Inaugural Conference, Geneva, July 2008.
[30] Salacuse, *supra* note 20, at 669. See also; Kole and Wälde, 'Economic Crises, capital transfer restrictions, and investor protection under modern investment treaties' 3 *Capital Markets Law Journal* (2008) 154.
[31] UNCTC (1984), *supra* note 22, at 179.
[32] This suggestion was strongly opposed by for instance the US delegation; see WTO's Working Group on the Relationship between Trade and Investment *Report on the Meeting held on 16 – 18 September 2002 – Note by the Secretariat,* WT/WGTI/M/19 (2002).

I therefore compare the two groups of BITs again, this time to see whether South-South BITs have been more likely to include certain safeguards against exceptional measures taken under balance-of-payments difficulties.[33] Such safeguards come in several forms. One option is to subject the transfer clause to domestic laws, in which case the host state is free to limit the flow of capital out of its economy during economic crises as long as it is done through law.[34] Another option is to allow exceptions to the free transfer of funds, but only during balance-of-payments difficulties and typically with a requirement that such restrictions should be necessary, non-discriminatory and on a temporary basis.[35] Finally, some treaties include other major restrictions, such as certain Chilean BITs attempting to restrict short-term capital in- and outflows.[36] For my purposes, provisions safeguarding the powers of financial services regulators[37], or national laws concerning bankruptcy, trading or dealing in securities, criminal or administrative violations, or compliance with resolution of tribunals[38] are not considered to specifically safeguard measures taken during economic crises. Similarly, I do not find the so-called 'lumpy transfers' exception to be as restrictive as those mentioned above, and BITs including these are therefore grouped with BITs without direct safeguards.[39]

[33] For a discussion as to whether international law makes it illegal for a contracting party to a BIT to restrict such transfers during balance of payments crises without such exceptions; see Kole and Wälde, *supra* note 30.
[34] E.g. 1993 Portugal–Bulgaria BIT, article 5.
[35] E.g. 1990 Argentina – UK BIT, article 6.
[36] E.g. 1999 Chile-Austria BIT, protocol.
[37] E.g. 2006 Peru-Canada BIT, article 14.
[38] E.g. 1998 Mozambique-US BIT, article 5.
[39] Kole and Wälde define the lumpy transfer exception as permitting: '*the parties to limit transfers of proceeds of liquidation to a certain percentage of an investment's value per year, so long as the investor is permitted to maintain the value of the investment domestically*' (*supra* note 30, at 163). It is typically American BITs, which include such exceptions (e.g. 1986 US-Egypt BIT, article 5). To test whether BITs with these exceptions were biasing the estimations, I ran all the regressions also without US BITs. This did not substantially change the results.

Table 3

Repatriation of investment-related funds			
	Share		
	Total	*North-South BITs*	*South-South BITs*
I: Transfers subject to domestic laws and/or other major restrictions	0.22 (0.17 - 0.27)	0.10 (0.05 - 0.14)	0.40 (0.31 - 0.48)
II: Free transfers guaranteed except under balance-of-payments difficulties	0.05 (0.03 - 0.08)	0.06 (0.02 - 0.09)	0.05 (0.01 - 0.09)
III: No balance-of-payments or other major restrictions to transfer clause	0.73 (0.68 - 0.78)	0.85 (0.80 - 0.90)	0.56 (0.47 - 0.65)
N:	303	179	124
Notes: 95 % confidence intervals in brackets.			

Table 3 provides a breakdown of the sample according to these criteria. Whereas the share of BITs which include balance-of-payments exceptions is low, and practically the same in North-South and South-South BITs, a much higher share of South-South BITs include other major restrictions to the transfer clause and/or subject it to domestic laws. We can thus be 95 percent confident that between 31 and 48 percent of all South-South BITs incorporate such restrictions, whereas only five to fourteen percent of North-South BITs do. As with NT-provisions, this difference is therefore not only substantial in absolute terms, but also statistically significant, and the regressions analyses in table 4 confirm that it persists after conditioning on several important covariates. South-South BITs are here between 3 and 4 times more likely to include restrictions to their transfer clauses with estimates significant across all model specifications.

Table 4

Transfer of investment-related funds *Logistic regressions*		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	3.67***/*** (8.49/13.11)	3.49*** (11.07)
N	290	290

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

It could be, however, that my narrow focus on only transfer clauses is not entirely justified here, as developed countries might have included safeguards against restrictions imposed during balance-of-payments crises elsewhere in their BITs. Arguably, this can be done by including a general exception based on national security concerns. In WTO jurisprudence, at least, the exception based on 'essential security interests' in article XXI(b) of GATT has been constructed to include exchange control measures to protect economic interests.[40] In BITs such exceptions can cover the whole treaty[41] or only parts of it such as their NT and MFN standards,[42] general non-discrimination provisions,[43] full protection and security provisions,[44] or with respect to performance requirements.[45] While all these provisions can be relevant when establishing whether measures taken to prevent or confront an economic crisis constitute a breach of a BIT *as a whole,*[46] a narrower question is whether the security exception covers the transfer provision in particular. I therefore repeat the

[40] Kole and Wälde, *supra* note 30, at 160.
[41] E.g. 1999 India-Australia BIT, article 15.
[42] E.g. 2003 Albania-Spain BIT, article 4.
[43] E.g. 2005 Guatemala–BLEU BIT, article 3.
[44] E.g. 1997 Turkey–Morocco BIT, article 2.
[45] E.g. 1997 Kuwait–Croatia BIT, article 3.
[46] Kole and Wälde, *supra* note 30.

analysis above but this time group BITs with direct restrictions in their transfer clauses with BITs, which include exceptions to national security interests could be allowed.

Table 5

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

Notes: 95 % confidence intervals in brackets.
* Include balance-of-payments restrictions as well as other major restrictions such as subjecting the clause to domestic laws.

Table 5 shows that North-South BITs have in fact been more likely to include security exceptions, but the share of BITs with a security exception that covers the transfer provision is more or less similar between the two types of BIT-dyads (and the difference is not statistically significant). The overall conclusion therefore remains the same. For while a little more than half the sample's South-South BITs incorporate a security exception that covers the transfer provision and/or include restrictions to the transfer clause, only around a quarter of North-South BITs do so. Accordingly, it is not surprising, that while the estimates did become lower in the logistic regressions after also considering security exceptions, the differences are still substantial across all three specifications and significant in two out of three (table 6). I therefore remain confident that South-South BITs have been more likely to allow exceptions to the free transfer of funds, for instance as a means of insulating the contracting parties from capital flight in times of economic crises.

Table 6

Limitations on transfer clauses (incl. security exception) *Logistic regressions*		
	Maximum likelihood (I)/(II) Odds ratio	Maximum penalized likelihood (III) Odds ratio
South-South BIT	1.82/** (2.83/4.30)	1.77* (3.03)
N	290	290

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

4. Implications

Thus far I've shown that NT provisions have been more likely to be restricted or excluded altogether in South-South BITs and transfer clauses have similarly been more likely to be restricted. While this pattern is interesting in and of itself, the differences also hold after controlling for multiple possible covariates.[47] With respect to these two provisions, at least, it is therefore not entirely correct when textbooks on international investment treaties state that a review of BITs signed among developing countries '*does not reveal significant differences with agreements concluded with developed states'*[48], or the '*(…) treaties concluded between developing countries have in substance remained very similar*

[47] Moreover, in a separate set of regressions not reported here I controlled for whether these results still hold after taking into account the extent to which the BITs incorporate a legally binding consent to international investor-state arbitration. This did not change the results or conclusions. For a useful analysis on systematic patterns in rule-making concerning dispute settlement clauses, with a methodological approach closely related to the analysis presented here, *see*; Jason Webb Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, 33 *Brooklyn Journal of International Law* 405 (2007-2008).

[48] Dolzer and Schreuer, *supra* note 12, at. 21.

to those concluded by capital exporting countries'.[49] Rather, a systematic (as opposed to *ad hoc)* review of the treaties do in fact reveal that developing countries have been more likely to agree to a different set of rules in South-South agreements, which potentially allows them flexibility to pursue developmental concerns to a greater extent than North-South BITs.

Where does this leave us? On the one hand, the conclusion may imply that while many past differences with respect to foreign investment protection between developed and developing countries have been overcome, one should perhaps not overstate the degree of consensus purely based on the fact that South-South BITs are proliferating. If so, then the popularity of South-South BITs cannot, in and of itself, be used as an argument that a multilateral treaty on investment is more feasible today than it was ten years ago. Alternatively, the systematic differences should perhaps not be taken as an indicator of developing countries' collective interests in the international investment regime. Instead, it could simply be that demands in BIT-negotiations between developing countries have been more easily accommodated, not because they are necessarily thought to be prudent by both the contracting parties but simply because negotiators may not consider the BIT particularly relevant in practise. For instance, a senior developing country official involved in negotiating BITs mentioned in an interview that: "*(…) things were much more flexible when negotiating with developing countries.*''[50] And another BIT-negotiator recalls that: '*Our negotiations with developing countries were generally much quicker and much easier. When demands were made we didn't object, as most understood that these treaties were basically just signals, rather than hard and serious legal agreements*'.[51] By contrast, it would probably be rare for developed countries to accept major limitations to their model BITs and may therefore simply have walked away from negotiations if such demands were made. A third BIT-negotiator further explained: "*We never actually had a position in our BIT-negotiations, whether with developed or developing countries. So we just signed off when drafts were presented to us, and that's why we have different obligations in different*

[49] Dolzer and Stevens, *supra* note 28, at 9-10.
[50] Not-for-attribution interview, January 2009.
[51] Not-for-attribution interview, April 2009.

treaties (…)".[52] Accordingly, further investigation could examine whether the specific characteristics of South-South BITs have in fact been intended by developing countries to espouse a different vision of international investment rules, or they merely are because developing country negotiators have not felt the need to insist on a particular set of provisions when demands were made. The quotes above would suggest the later.

But apart from symbolic and political implications, does the systematic difference found imply that investors seeking protections under BITs should expect a different set of standards, when covered under South-South BITs compared to if they were covered by a North-South BIT? Are investors more likely to be met with restrictions to NT and repatriation of investment-related funds when covered by South-South BITs? The statistical review above seems to imply this to be the case. In practical terms, however, the content of BIT-provisions cannot be investigated in isolation.

The analysis has thus far been based on the treaty texts alone and therefore not taken into account MFN provisions. As a general rule, MFN-provisions operate in BITs according to all matters falling within the scope of the treaty.[53] Whether the *ejusdem generis* principle implies that the clause only covers substantive provisions is unclear from existing case-law.[54] Neither is it clear whether the clause only allows an investor to invoke provisions from other investment treaties which are 'compatible in principle', and if so what that means in terms of limiting its application.[55] What is clear, however, is that cases decided so far have generally allowed a contracting party to 'import' substantive provisions from other BITs entered into by the other contracting party. In *Bayindir v. Pakistan,* for instance, the tribunal held that the MFN provision allowed the investor to

[52] Not-for-attribution interview, July 2009.

[53] OECD, 'Most-favored-nation treatment in international investment law' *OECD working paper* (2004); Dolzer and Schreuer, *supra* note 12, at 186.

[54] See e.g. *Emilio Augustin Maffezini v. Spain,* ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2005; and *Vladimir & Moise Berschader v. Russian Federation, SCC Case No V(080/2004)*. See generally Hsu, 'MFN and Dispute Settlement: When the Twain Meet' 7 *Journal of World Investment & Trade* (2006) 25.

[55] Dolzer and Schreuer, *supra* note 12, at 191.

invoke a fair and equitable treatment clause from another BIT.[56] Similarly, in *CME v. Czech Republic* the tribunal argued that the investor could rely on an expropriation provision from another BIT to determine the standard of compensation.[57] Arguably, this implies that even if a South-South BIT does not include an NT provision, for instance, the MFN clause may oblige the parties to extend NT nevertheless, as long as they have included NT in at least one other BIT.[58]

It is therefore notable that *all* BITs in the sample include a MFN provision and none of them exempt NT or transfer clauses from the clause's coverage. Since very few countries have consistently limited NT or transfer clauses in all their BITs, this means that, as a general rule, differences in substantive rules between South-South and North-South BITs are 'levelled out' by the treaties' MFN provisions. As a result, the more restricted standards in South-South BITs will rarely become relevant for investors in practise, who can often continue to rely on BITs with more favourable provisions. This, of course, leaves us with a considerable puzzle: why have developing countries often allowed more flexibility to host states in BITs signed with each other but then failed to make sure that this 'policy-space' is not cancelled out by the treaties' MFN clauses? If the more limited substantive provisions in South-South BITs have little, if any, relevance for the legal rights granted to foreign investors in practise, why limit them in the first place?

At a first glance, one possible explanation could be that the exceptions have been intended as signals of a distinct South-South BIT agenda more in tune with the one, developing countries have expressed in multilateral investment negotiations as a group. If so, the negotiating parties may not have been too concerned with whether the limitations actually have implications for foreign investors in practise. The contracting parties may thus have tried to *appear* as though they sign 'development friendly' BITs, while at the same time appeasing investors that they are granted 'normal' BIT-protections. However,

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[56] *Bayindir v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, par. 231-2. See also; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, par. 103-4.

[57] *CME v. Czech Republic*, UNCITRAL case, Final Award, 14 March 2003, 9 *ICSID Reports* 264 (2003).

[58] UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making* (New York: United Nations, 2007), at 33.

such clever intentions are unlikely to have driven the pattern. It is important to note that the overwhelming majority of BITs have been signed largely 'under the radars' of public opinion. Except for BITs with the United States, the vast majority of BIT negotiations seem to have caught (surprisingly) limited attention,[59] and it is therefore difficult to see how the aspects of South-South BITs investigated here could be intended as symbolic political statements.

So perhaps a more plausible explanation could be that many developing countries may have simply failed to realize the full implications of MFN-provisions. Indeed, there are indications that developing countries have often failed to understand the true nature and scope of BITs, when signing up to them.[60] It suffices to say that this suggestion may appear paternalistic to some [61] or perhaps even disingenuous,[62] and naturally several developing countries have undoubtedly been very well informed when entering into BITs. But others probably have not. When asked about why the MFN provision hadn't been adjusted to accommodate the different standards in the country's BIT-network, one former BIT-negotiator for instance mentioned that: '*We didn't have a consistent approach because there wasn't an understanding that consistency was required. (…) No-one seemed to realise the implications of the MFN provision*'.[63] BIT-negotiators from other countries have similarly mentioned that their predecessors didn't know how MFN provisions - or other key provisions for that matter – worked as they often had no background or training in international law,[64] and one recalled that the speed with which many South-South BITs were signed exacerbated this capacity problem: '*In all these mini-conferences, UNCTAD would actively promote BITs to be signed amongst the participants - often within as little as a few hours - and I couldn't see that any serious considerations were given by the*

[59] *See, e.g.*, Lauge Skovgaard Poulsen and Damon Vis-Dunbar, 'Reflections on Pakistan's Investment—Treaty Program after 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan,' *Investment Treaty News*, Mar. 16, 2009; Department of Trade and Industry, Republic of South Africa, *Government Position Paper on Bilateral Investment Treaty Policy Framework Review* (June 2009), *available at* http://www.pmg.org.za/files/docs/090626trade-bilateralpolicy.pdf.

[60] Dolzer and Schreuer, *supra* note 12, at 8; Poulsen and Vis-Dunbar, *supra* note 59; South Africa Department of Trade and Industry, *supra* note 59.

[61] Francisco Orrego Vicuna, 'Regulatory Expropriations in International Law: Carlos Calvo, Honorary NAFTA Citizen,' 11 *New York University Environmental Law Journal* 19, 31 (2002).

[62] Not-for-attribution interview with former Eastern European BIT-negotiator, April 2010.

[63] Not-for-attribution interview, May 2009.

[64] Not-for-attribution interviews, February 2009, August 2009, and April 2010.

countries what-so-ever'.[65] And while officials from developing countries might have a better understanding today of the effect of different BIT-provisions compared to 10 years ago, it is probably still very incomplete in many cases. One negotiator puts it like this: '*While workshops held by various international organisations might help somewhat in upgrading developing countries' negotiating capacity, they haven't solved the problem. There is still not a very good understanding of what is implied by the different provisions, so even if negotiators from the developing world take their job seriously, they are often not entirely aware of what they are doing.*'[66] Accordingly, even if developing countries aim to restrict certain provisions in their South-South BITs, these statements suggest that they might not have the proper legal expertise to make sure such restrictions actually matter in practise. If this is in fact the case that would naturally raise a more general question pertaining to the level of understanding within developing countries when entering into BITs and, as such, the level of rationality we as observers should assume about the BIT-making process. While I am currently undertaking such a research project, these explanations remain provisional and somewhat speculative for now and must therefore be subject to further investigation.

Conclusion

This chapter analyzed two substantive BIT-provisions across a large sample of treaties from the mid-1990s to 2006. It showed that treaties signed by two developing countries vary systematically from more normal North-South BITs. In South-South BITs, NT provisions have tended to be more restricted (or completely absent), and transfer clauses more likely to allow restrictions to foreign investors' repatriation of funds. Given the methodology of the analysis, much more precise inferences were made about the share of treaties including certain clauses than traditional non-systematic reviews of investment rule-making. Also in contrast to the vast majority of other studies investigating the *content* of BITs, I used regression techniques to control for possible omitted variable biases and showed that the systematic pattern persisted even after adjusting for a number of important covariates.

[65] Not-for-attribution interview, August 2009.
[66] Not-for-attribution interview, January 2009.

The last section of the chapter noted, however, that none of the South-South BITs made sure that such restrictions were not potentially 'levelled out' by the treaties' MFN provisions, and the chapter concluded by speculating whether this *de-facto* coherence in developing countries' BIT-networks might by unintended. If true, this would be problematic. As stated by UNCTAD: '*If countries are unable to properly understand and assess the content of the agreements to which they have agreed because of their complexity, the risk arises that they will enter into agreements that they are unprepared to honour fully*'.[67] Ultimately, however, the intent of developing countries when entering into South-South BITs is left open for further research to investigate. In the absence of detailed survey data, this would arguably require the application of qualitative methodologies such as interviews or detailed case-studies, as the objectives of developing countries can only truly be inferred by investigating the ideas and strategies of key actors involved in the politics and negotiations of investment treaty-rule making. So it is unfortunate that few – if any – studies assessing why, and how, developing countries have signed BITs include systematic inputs from officials involved in the process themselves. To understand the behaviour of developing countries in the international investment regime, future research should therefore triangulate quantitative studies investigating systematic patterns in rule-making (like this chapter) with qualitative studies investigating the actual intent of the contracting parties. This might also allow a further clarification of differences *among* developing countries, such as whether those with large outward FDI flows have systematically different strategies and intentions than developing countries with only few investments abroad. This and related questions would require not treating developing countries as a monolith with one fixed set of interests, as done in so many studies including, to some extent, this one.

[67] UNCTAD, 'International Investment Rule-Making: Stocktaking, Challenges and the Way Forward' *UNCTAD Series on International Investment Policies for Development* (2008), at 51.

Annex

Sample and coding

The sample used comprises 303 BITs signed by 100 countries from 1994 to 2006 available in English or French from UNCTAD's online BIT-database.[68] Out of these, 191 have been signed between 1994 and 1999, and the rest have been signed between 2000 and 2006 (many recent BITs have not yet been made available on UNCTAD's database). While the sampling process was random, it nevertheless resulted in a slight oversampling of countries with large BIT programs. This was addressed by a re-sampling to allow the majority of countries included in the dataset to have a sampling rate of between 20 and 30 percent. The language criteria meant a substantial undersampling of Italian treaties, but I am nevertheless rather confident that the sample is sufficiently representative of the total population of BITs.[69]

How to distinguish between developing and developed countries is always tricky, particularly in studies over time. For my purposes, I define a developed country as one, which the World Bank has classified as a "high-income" country for the majority of the period in focus. Apart from Western countries, this includes countries such as South Korea and Kuwait. While these countries have signed numerous treaties with Western countries, their role in South-South BIT negotiations is arguably often that of capital exporters; and I thus expect their interests to be similar to Western capital exporters seeking as favorable terms for their investors abroad as possible.[70] Among the sampled treaties, a North-South BIT therefore has one of the following countries as its home state: the 15 "old" members of the European Union, members of the European Free Trade Association, Australia, New Zealand, United States, Canada, Japan, Korea, Hong Kong, Singapore, Israel, Kuwait, or United Arab Emirates. This classification leaves 124 South-

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

[69] *See generally* UNCTAD, *World Investment Report: Transnational Corporations, Extractive Industries and Development* (New York: United Nations, 2007) (describing the spatial and temporal distribution of BITs); UNCTAD, *Bilateral Investment Treaties 1959-1999* (New York: United Nations, 2000).

[70] *See* Salacuse, *supra* note 20, at 658–59.

South BITs, which corresponds to 41 percent of the total sample. As BITs often include different obligations for the contracting parties, all indicators are coded based on the obligations of host states vis-à-vis home state investors. North-South BITs always have the developed country as the "home state," whereas the "home state" in South-South BITs is distributed randomly across the sample between large and small developing countries.

Explanatory variables

My explanatory variable of interest is a dummy variable indicating whether the BIT-dyad is between two developing countries or not. The host state's level of development is controlled for by including the natural log of its GDP per capita income, and its level of incoming investment by the natural log of its inward FDI stock. I control for its political environment by including a dummy variable for whether it has a socialist legal tradition (typically former or current Communist countries) and two variables indicating whether it had a leftwing and/or a nationalist government in the year it signed the BIT.[71] I moreover include a dummy variable for whether the host state is from Latin America (the 'home region' of the Calvo doctrine) and similarly include dummy variables to capture systematic tendencies in the BIT-networks of the 10 countries with the largest number of BITs signed at the end of the period.[72] As a measure of the economic integration between the BIT partners I include a variable measuring their bilateral trade flows as a share of the host state's GDP, and finally I include a dummy for whether the BIT has been signed after 2000 to capture possible time-effects. A summary of the covariates (excluding the country and period dummies) is given in the table below.

[71] In sensitivity analysis, various indexes attempting to measure the investment climate of the host state were included as well. This reduced the observations by almost one third, and because the indexes were generally not significant in any of the estimations.
[72] Due to the undersampling of Italian BITs, Italy is not included as a dummy.

Table 7

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

Sources: (1) World Bank, World Development Indicators; (2) International Monetary Fund, Direction of Trade Statistics; (3) UNCTAD, FDI statistics; (4) T. Beck, G. Clarke, A. Groff, P. Keefer, and P. Walsh "New tools in comparative political economy: The database of political institutions," 15 *World Bank Economic Review* 165 (2001); (5) R. La Porta, F. Lopez-De-Silanes, and A. Shleifer "The economic consequences of legal origins," 46 *Journal of Economic Litterature* 285 (2008).

Logistic regression techniques

As both provisions are coded as binary variables, the estimations use logistic regression techniques. But since the content of a specific BIT is likely to be dependent on the content of other BITs signed by the same host or home state, the assumption of unit independence necessary for normal logit models is not upheld in this case. While some country-specific dummies are included as controls, this is not sufficient, and in two separate sets of regressions I therefore adjust standard errors for correlations between individual home or host countries' BITs, respectively. To confront issues of 'separation' when the country-specific controls predicted the outcome perfectly (or almost perfectly), these controls are left out in my initial logit estimations.[73] But as this risks underspecifying the model, a second set of regressions are run with the likelihood function penalized in order to produce consistent parameter estimates in the presence of separation.[74] This estimation technique does not allow adjusting the standard errors, however, and I am therefore left with three regressions on each dependent variable confronting different,

[73] Following the advice of: R. Davidson and J.G. MacKinnon *Estimation and Inference in Econometrics* (1993), at 521. See further explanation in full version of the paper; see *supra* note 1.
[74] Details of this technique are described in: Zorn, 'A Solution to Separation in Binary Response Models' 13 *Political Analysis* (2005) 157; Firth, 'Bias Reduction in Maximum Likelihood Estimates" 80 *Biometrika* (1993) 27.

but ultimately related, estimation challenges.[75] If the different specifications all lead to the same conclusions, this would naturally increase our trust in the robustness of the results (and vice-versa).

[75] An alternative specification strategy would have been hierarchical modeling. This is clearly not suitable here, however, as we can not regard country-specific effects as a random variable, as required in the random effect model, and a fixed effect estimation is impossible due to the separation problem.