

2014

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COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 700
(2D SERIES)



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THE LAW SCHOOL
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July 2014

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Reconsidering the Motivations of the United States' Bilateral Investment Treaty Program

Adam S. Chilton¹

Over the last thirty years, the United States has entered into nearly fifty Bilateral Investment Treaties (BITs).² A foundational question that has not yet been adequately explained, however, is *why* the U.S. has signed these agreements. Despite the fact that this question has not been empirically studied, a dominant narrative in the academic literature has emerged to answer it. The logic of that narrative is simple: the United States negotiated investment treaties to protect American capital invested abroad.³ This view of the United States' BITs program should not only be unsurprising because of the content of the treaties, but also unsurprising because the same explanation has consistently been offered by scholars to explain why developed countries in general are motivated to sign investment agreements.⁴

It is my contention, however, that this investment-centric theory for why the United States would have been motivated to sign BITs does not fit the evidence. Although a complete discussion of the topic is beyond the scope of this short paper, one strong piece of evidence that cautions against an investment-centric account of the American BITs program is the Senate consideration of BITs.⁵ As Table 1 shows, the BITs that have been submitted to the Senate have taken an average of 1,259 days to pass. Although it is just one data point, this is at least some evidence that there was little pressure on the Senate to put the new investment protections codified by the BITs into effect. Moreover, when BITs were eventually considered, they all passed on voice votes without any recorded opposition. If BITs actually made it easier for American corporations to invest capital

¹ Assistant Professor of Law, University of Chicago Law School. Email: adamchilton@uchicago.edu. This short paper was prepared for presentation at the 2014 American Society of International Law (ASIL) Annual Meeting, and will be published in the 108th edition of the *ASIL Proceedings*. These remarks draw on my larger project, currently titled *The Politics of the United States' Bilateral Investment Program*.

² See "United States Bilateral Investment Treaties," available at <<http://www.state.gov/e/eb/afd/bit/117402.htm>> (last visited May 15, 2014). For a discussion of the establishment of the U.S. BITs Program, see Kenneth J. Vandavelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 624-27 (1993); Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373, 373 (1985).

³ See, e.g., Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 201-2 (1988) ("The purpose of [BITs negotiated by the United States] is to protect investments of each party's nationals and companies in the territory of the other."); Gann, *supra* note 1, at 374 ("The BIT program resulted from the U.S. government's determination that a more favorable framework for U.S. investment in developing countries should be created. This new framework has a twofold purpose: to encourage as well as to protect such investment."); Jeffery Lang, Keynote Address, 31 CORNELL INT'L L.J. 455, 457 (1998) (arguing that the United States' goals in negotiating BITs are: (1) protecting U.S. investment abroad; (2) encouraging adoption of market-orientated domestic policies; (3) promoting development of international law that meets these objectives). It is worth noting that the argument that the United States signed BITs to promote the development of legal regimes that protect property rights has also been made.

⁴ Jennifer L. Tobin & Marc L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POL. 1, 2 (2010) ("Wealthy states want BITs as an institutional check against uncompensated expropriation."); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Investment in Developing Countries*, 24 INT'L LAW. 655, 661 (1990) ("[Developed states] primary objective has been to create clear international legal rules and effective enforcement mechanisms to protect investment by their nationals in the territories of foreign states.").

⁵ Despite its relevance, this topic has been almost entirely ignored in the academic literature. *But see* KENNETH J. VANDELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 26 (2009).

abroad, organized labor would have likely put effort into opposing BITs.⁶ But given the fact that the evidence that American BITs have actually increased investment flows is mixed at best,⁷ it is perfectly rational that corporations have expended little effort lobbying for the passage of BITs and that labor groups have expended little effort opposing the passage of BITs.⁸

Table 1: United States Senate Consideration of Bilateral Investment Treaties

Country	Introduced	Passed	Country	Introduced	Passed
D.R. Congo	3/25/1986	10/20/88	Jamaica	9/19/1994	6/27/96
Morocco	3/25/1986	10/20/88	Belarus	9/23/1994	6/27/96
Senegal	3/25/1986	10/20/88	Estonia	9/26/1994	6/27/96
Turkey	3/25/1986	10/20/88	Ukraine	9/26/1994	6/27/96
Cameroon	5/28/1986	10/20/88	Mongolia	6/26/1995	6/27/96
Bangladesh	5/30/1986	10/20/88	Georgia	7/10/1995	6/27/96
Egypt	6/2/1986	10/20/88	Latvia	7/10/1995	6/27/96
Grenada	6/3/1986	10/20/88	Trinidad & Tobago	7/11/1995	6/27/96
Panama	3/25/1986	10/28/90	Albania	11/6/1995	6/27/96
Poland	6/19/1990	10/28/90	Uzbekistan	2/28/1996	10/18/00
R. Congo	2/19/1991	8/11/92	Bahrain	5/23/2000	10/18/00
Tunisia	5/17/1991	8/11/92	Bolivia	5/23/2000	10/18/00
Sri Lanka	8/20/1991	8/11/92	Croatia	5/23/2000	10/18/00
Czech Republic	6/2/1992	8/11/92	El Salvador	5/23/2000	10/18/00
Slovakia	6/2/1992	8/11/92	Honduras	5/23/2000	10/18/00
Russia	7/28/1982	8/11/92	Jordan	5/23/2000	10/18/00
Kazakhstan	9/7/1993	10/21/93	Mozambique	5/23/2000	10/18/00
Romania	8/3/1992	11/17/93	Lithuania	9/5/2000	10/18/00
Argentina	1/19/1993	11/17/93	Azerbaijan	9/12/2000	10/18/00
Bulgaria	1/19/1993	11/17/93	Uruguay	4/4/2006	9/12/06
Armenia	9/8/1993	11/17/93	Rwanda	11/20/2008	9/26/11
Kyrgyzstan	9/8/1993	11/17/93	Haiti	3/26/1986	NA
Moldova	9/8/1993	11/17/93	Nicaragua	6/26/2000	NA
Ecuador	9/10/1993	11/17/93			

Note: NA is used for BITs that were introduced to the Senate but have not yet been passed.

⁶ *Id.* at 26.

⁷ See Clint Peinhardt & Todd Allee, *Failure to Deliver: The Investment Effects of US preferential Economic Agreements*, 35 WORLD ECON. 757 (2012).

⁸ Another piece of evidence against an investment-centric view of BIT formation is recent scholarship suggesting that BITs do not appear to influence the decisions of companies or insurance companies. See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2010).

In light of the lack of interest in the investment potential of BITs that their treatment by the Senate helps to illustrate, it is worth considering if the United States signed these agreements for other reasons. My theory is that the United States has used BITs as a way to improve relationships with developing countries that are strategically important to American interests.⁹ An initial starting point of this theory is the claim that BITs have several features that make them useful foreign policy tools: (1) unlike foreign aid, BITs do not require appropriation of funds; (2) the legal protections the United States offers in BITs are largely redundant as a result of existing property rights already in effect (or, at least, the protections were initially viewed this way); (3) BITs are relatively easy to sell domestically because they provide new legal rights for American companies; and (4) the United States uses a model BIT that reduces negotiation costs.

Of course, signing new BITs is not entirely costless; the United States should only be expected to sign BITs when there are benefits that outweigh these (admittedly low) costs. I theorize that benefit exists when a strategically important developing country indicates its interests in signing the model U.S. BIT. The developing country might have been interested in having a BIT with the United States because there was initially at least the possibility that the treaty would lead to new investment, or instead simply because signing an economic treaty with the United States produces domestic political benefits for the foreign leader. When there is a country that would like to sign a BIT with the United States for either of these reasons (or potentially several others), and the United States would like to support that government, a BIT will be signed. I argue this is true even if the potential partner country is not a likely destination for American investments. The clear, and testable, implication of this theory is that political considerations should be better than investment considerations at predicting the countries with which the United States previously signed BITs.

The delay in the BITs the United States signed with Senegal and Morocco going into effect is one anecdote that illustrates this theory. The United States signed a BIT with Senegal in 1983, and with Morocco in 1985.¹⁰ Both of these treaties were ratified by the United States in 1988. Despite Senate approval of the investment agreements, Senegal did not ratify its BIT with the United States until late 1990 and Morocco did not do so until the summer of 1991. The reason that these countries delayed ratification is that they were waiting to ratify the BITs until there was a sufficiently prominent ceremony in their own country to highlight the occasion.¹¹ In other words, Senegal and Morocco were willing to wait nearly three years to gain the investment benefits of the treaties because they were determined to extract a domestic political benefit from having signed a treaty with the United States. Perhaps more interesting is the fact that an Assistant Secretary of State in the U.S.

⁹ It is worth noting that the motivations behind current BIT negotiations—like the one with China—may be different.

¹⁰ See Table 1.

¹¹ *Bilateral Investment Treaties Treaty Doc. 99-14 and Treaty Doc. 101-18: Hearing Before the Senate Committee on Foreign Relations*, 101st Cong. 11 (1990) (testimony of Eugene J. McAllister, Assistant Secretary for Economic and Business Affairs, Department of State).

State Department testified to Congress that a visit from him would provide a sufficiently important ceremony for the treaties to be ratified, but he was not implored by Congress to promptly do so.¹²

My recent research uses empirical methods to test my theory that the countries that the United States has signed BITs with can be better explained by political considerations than investment considerations. The early results of that analysis have consistently suggested that variables that measure political considerations are better predictors of U.S. BIT partners than variables that measure investment considerations. Of course, this does not mean that investment concerns have never influenced the United States decision to sign BITs. It is my contention, however, that a political theory of BIT formation fits both the qualitative and quantitative data better than an investment-centric account, and as a result, it is time for the narrative that BITs were signed to protect American investments to change.

¹² *Id.*

Readers with comments should address them to:

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