Comments on Conceptual and Empirical Papers

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Why BITs/FTAs Investment chapters matter in FDIs
Questions rise from three things: Policy realities, costs, and impact research

- **UNCTAD: Bilateral Investment Treaties**
  - Total: 2926
  - Total in force: 2278

- **UNCTAD: Other International Investment Agreements**
  - Total: 360
  - Total in force: 285

- **Costs**: administrative, political and socio-economic cost to engage, conclude and implement BITs and IIAs
  - (ex) ISD: complicated and a sovereign issue

- **Impact**: existing Research on BIT(FTA) and Impacts on FDI: lack of consensus
Source: UNCTAD Investment Policy HUB (http://investmentpolicyhub.unctad.org/IIA)
Coverage: World
Period: Year of signature and/or year of entry into force
Status: Signed and/or in force
Availability of treaty texts: Regardless of texts
Protocols and side instruments: Regardless of protocols and side instruments
Relationship with other agreements: Regardless of relationship
Number of Other International Investment Agreements (IIA)

Source: UNCTAD Investment Policy HUB (http://investmentpolicyhub.unctad.org/IIA)
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Period: Year of signature and/or year of entry into force
Status: Signed and/or in force
Availability of treaty texts: Regardless of texts
Protocols and side instruments: Regardless of protocols and side instruments
Relationship with other agreements: Regardless of relationship
- BITs and RTAs are treated as homogeneous entities despite the fact that the provisions they include can vary widely across treaties.

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Expropriation, Indirect Expropriation</td>
<td>yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ISD</td>
<td>yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Non conforming measures: Ratchet and negative list</td>
<td>Yes and elaborated</td>
<td>no</td>
</tr>
<tr>
<td>Investment with environment and labor</td>
<td>yes</td>
<td>no</td>
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The contributions of the papers

• The conceptual paper: provides legal and policy perspectives on the FDI impact of BITs and RTAs.

• The empirical paper:
  – Effects of heterogeneous BITs and RTIAs on heterogeneous FDI projects in heterogeneous countries.
  – BITs and RTIAs strongly encourage greenfield and M&A FDI projects in all sectors and most countries as long as these treaties include specific investment provisions.
  – In the case of BITs, the presence of an ISD is the only provision which appears to matter.
  – In the case of RTIAs, anti-discrimination provision (TREAT) may matter.
• Conceptual paper
• Structures and concepts are well set up, and contents will be filled further
• Policymakers want to know: design, implementation, benefits (impact), costs,
  – How to design and implement BITs/FTAs BITs to promote FDIs to meet development policy goals: developing countries’ policy goals, advanced countries policy goals
  – While decreasing the cost of engaging negotiations and implementation of BITs

• Lessons may come from Actual Case Analysis:
  – what kind of BITs/FTAs’ BITs other countries are engaging and concluding:
  – what are the main components, features, issues, what were concluded, getting BITs concluded, and the impact of BITs
  – NAFTA, North-South FTAs such as Korea-US FTA, EU FTAs, German BITs with Developing economies, in particular China.
• Common Templates (NT, MFN, PR, Derogation, SMBD, Subrogation…); differences and coherent elements concluded in new BITs; **how to design pro-FDI BITs while observing ‘right to regulate’** (so called public policy purposes such as public health and welfare)

• ISD cases analysis in the conceptual perspective with some policy examples: NAFTA and other cases with EU, developing economies

• Actual cases with convergence or fragmentation of BITs and FTAs’ BITs:
  – all BITs are different;
  – Why they are different;
  – What are different
  – What are commonly included: recently US BITs, EU BITs
  – EU BITs/FTAs and or EU countries BITs(Germany) vs US BITs/FTAs
• For example, in actual ISDs, the most frequently used arguments against the governments’ measures are (i) NT; (ii) Expropriation and compensation; (iii) and Fair and Equitable Treatment.

• NAFTA ISD Cases: the 77 known NAFTA investor-state dispute settlement (ISDS) claims up to January 1 2015.
  – These include 35 against Canada, 20 against the U.S., and 22 against Mexico.
  – Canada has paid out NAFTA damages totaling over $CAD172 million, while Mexico has paid damages of $US204 million.
  – The U.S. has yet to lose a NAFTA chapter 11 case.

• Based on conceptual and actual cases, policy makers may receive objective advice of having better design, implementation, and negotiation of BITs/FTAs BITs to foster FDIs, and job creation.
Main Innovation of the Empirical Paper

• The paper estimates the impact of bilateral investment treaties (BITs) and regional trade investment agreements (RTIAs) on foreign direct investments (FDIs).

• The main innovation of the paper is the use of a granular approach:
  – using detailed and under-exploited databases (such as BITsel),
  – accounting for the heterogeneity of both BITs and RTIAs as well as FDIs,
  – distinguishing between entry modes and destination sectors, and controlling for country-specific and FDI-specific factors.
  – 11 provisions to 5 categories: Entry, Treat, Scope, Protec, ISDM
<table>
<thead>
<tr>
<th>FTA</th>
<th>BIT</th>
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<tbody>
<tr>
<td>Definition of investment</td>
<td>Definition of investment</td>
</tr>
<tr>
<td>narrow = 1, broad = 2</td>
<td>narrow = 1, broad = 2</td>
</tr>
<tr>
<td>Admission vs establishment</td>
<td>Admission vs establishment</td>
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<tr>
<td>Admission = 1, establishment = 2</td>
<td>Admission = 1, establishment = 2</td>
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<tr>
<td>National Treatment</td>
<td>National Treatment</td>
</tr>
<tr>
<td>Yes = 2, No = 1</td>
<td>broad = 2, narrow = 1</td>
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<tr>
<td>Most Favoured Nation Clause</td>
<td>Most Favoured Nation Clause</td>
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<tr>
<td>Yes = 2, No = 1</td>
<td>broad = 2, narrow = 1</td>
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<tr>
<td>Fair and Equitable Treatment</td>
<td>Fair and Equitable Treatment</td>
</tr>
<tr>
<td>Yes = 2, No = 1</td>
<td>Yes = 2, No = 1</td>
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<tr>
<td>Direct and Indirect Expropriation covered</td>
<td>Expropriation</td>
</tr>
<tr>
<td>Yes=2; No=1</td>
<td>direct and indirect = 2; direct only = 1</td>
</tr>
<tr>
<td>free Transfer of investment-related funds</td>
<td>Free Transfer of investment-related funds</td>
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<tr>
<td>Yes=2; No=1</td>
<td>Yes = 2; restricted = 1</td>
</tr>
<tr>
<td>Non-economic standards</td>
<td>Non-economic standards</td>
</tr>
<tr>
<td>Yes=1; No=2</td>
<td>Yes=1; No=2</td>
</tr>
<tr>
<td>Investor-State Dispute Mechanism</td>
<td>Investor-State Dispute Mechanism</td>
</tr>
<tr>
<td>Yes = 2, No = 1 Subject to unilateral condition=3(in bracket reserving state)</td>
<td>Yes = 2, No = 1 Subject to unilateral condition=3(in bracket reserving state)</td>
</tr>
<tr>
<td>Umbrella clause</td>
<td>Umbrella clause</td>
</tr>
<tr>
<td>Yes = 2, No = 1</td>
<td>Yes = 2, No = 1</td>
</tr>
<tr>
<td>Temporal scope of application</td>
<td>Temporal Scope of Application</td>
</tr>
<tr>
<td>Short = 1, Long = 2</td>
<td>Short = 1, Long = 2</td>
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</table>
• Empirical analysis

• Better have BITs Trend analysis and or FTAs’ BITs analysis (from signed BITs over the period)
  – Investigate various BITs components
  – Descriptive statistics to explain current features, trends in BITs/FTAs BITs

• Details of the elements of the vector CONTij:
  – the paper shows that the vector of dyadic control variables, which include geographical distance, time zone difference, and the existence of a common border/language/religion/legal origin/colonial past
  – May need details on these data, for example source, measurement, and specification in the regression models
• The inclusion of FDI03ij and the reporting of the estimated coefficients of FDI03ij
  – Specific justification of FDI03ij
  – Persistence of FDI or demonstration effects?
  – All of the regression results do not report the estimated coefficient of FDI03ij

• Table 1 and Table 2: aggregate analysis
  – BITs and RTAs tend to have a large and positive impact on FDI:
  – When DTT is signed, FDI tends to increase significantly.
  – (interesting result): none of interaction dummies such as BIT*Governance, BIT*Rule of Law, BIT*OPENNESS, BIT*BITSTOCK, are statistically significant.
  – (interesting result): In the column (6) in table 1, the effects of BITs depending on the direction of the country pairs (North-South, South-South) do not appear: this result shows the similar outcome in table 5 (hetero analysis)
• In the specification of difference-in-difference approaches in page 14
  – In the table 3, the results of columns (5)-(7) confirms the hypothesis of the BIT impact on larger **FDI in investment intensive sectors** relative to investment-light sectors.

  – But, given developing economies’ status where some DMCs are service focused (usually investment light sectors), we may want to consider interaction terms of, for example, (BIT*manufacturing), (BIT*Services industry), (BIT*Business services including financial services), etc.

  – Is there any specific reason not to include interaction terms between BITijt and year dummies in the analysis?
Heterogeneous BITs
• Table 4 presents important findings on the effects of heterogeneous BIT provisions on FDIs.
  – At the individual impact of each main category of investment provisions: significant, positive, and large
  – (interesting): ‘Entry’ effect is particularly large: interesting results; ‘Treat’ shows the least in size of the coefficient;
  – (proposal): Given the heterogeneity, fragmentation, and different sets of elements in BIT: we may think some mix of combinations of those elements such as ‘ENTRY*TREAT*ISDM’ based on the Conceptual Paper’s guidance.
• Most important BIT provisions: ISDM

– (interesting estimation results): In table 8, among all provisions, **ISDM is the only category which remains statistically significant**.

– (Policy implication): ENTRY, TREAT, SCOPE, PROTECT **do not individually matter** once we control for the presence of ISDM.
RTIAs and FDI
• TABLE 10: favorable investment provisions in RTIAs(ENTRY, PROTECT) are particularly relevant when South countries are involved, possibly because the latter provide a more uncertain and regulated business climate than North countries.

• Table 12: disaggregating FDI by entry and sectors
  – (interesting in table 12):
    • Potential exception is FDI in service sectors which appears to be strongly influenced by the presence of an anti-discrimination provision with RTIAs.
    • Interesting is a comparison with the table 7, the service interaction term of “SERV*PROVISION’ was insignificant with BITs.
  – (policy implication): (i): Service sectors are more regulated than other industries; (ii) Either push BITs or RTIAs to promote service sector development.
• Relative importance of the RTIA provisions in table 13
  – Different from the table 8 (most important BIT provisions), the table 13 shows that ‘TREAT’ is the only category which remains statistically significant.
  – (policy implication): how we can interpret is a question as RTIA effect takes place in more comprehensive ways than BITs.
  – Recently, more and more RTIAs include goods, services, investment, IPR, pharma, etc.
Some points to think
• The potential link between some provisions and sectors (or modes)
  – The effects of these various provisions do not appear to differ across entry modes and destination sectors of FDI.
  – However, for example, market access and local presence may attract more services sector FDI. Financial services may consider ‘transfer of funds’ issue more.
• North-South BIT/FTAs: ratchet mechanisms and subrogation may be important as much as NT in terms of promoting FDIs due to policy natures of developing economies.

• PR, Ratchet effects, subrogation: how we can include and reflect those important treatments in the conceptual and empirical analyses is a matter of further consideration.

• Templates and policy focus may be different among DMCs and between US BITs and EU BITs: US BITs appear focused more on treatment, protection, ISDM while EU BIT seems more flexible.

• Asian DMC policymakers may have to think what types of BITs/FTAs BITs given a country specific circumstance and development goals.
• (Scope Category): the definition of investment should in most of the cases, especially over the 2003-2010, be ‘broad based’, not narrow based.

• Fair and equitable treatment may move to TREAT: seeking comments from the conceptual paper.

• Quality of ISD matters: transparency and ethics of arbitrators, domestic remedies, government agreement prior to the ISD, exemptions of ISD, amicus curiae, arbitration process.