The Rise and Fall of BITs

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Over the past two years (2013-2014), bilateral investment treaties (BITs) have become highly controversial both in the Global South and in OECD states. One after another, countries such as Bolivia, Brazil, Ecuador, India, South Africa, Pakistan, Venezuela, , and most recently Indonesia, announced that they are revisiting their BITs and that they would allow them to lapse once they reached the end of their tenure. But OECD citizens have also started to have second thoughts about these treaties. As I write, Australia is facing a legal arbitration challenge from Philip Morris Asia in terms of the Australia – Hong Kong BIT, following the decision by Australia to allow only plain packaging of cigarettes. In Europe, and in particular in Germany (the originator of BITs way back in the late 1950s[1]) the public is concerned that if not approached cautiously and in a transparent manner, the proposed Transatlantic Trade and Investment Partnership, and especially its foreseen investment guarantees, could jeopardize national regulatory autonomy. The threat that BITs hold for national autonomy is very real -- a bitter lesson that developing states have learnt and are still learning.

As **Fig. 1** below shows, the era of high globalization during the last two decades of the 20th century witnessed a rapid increase in the number of new BITs being signed. The number of BITs has multiplied rapidly to reach a cumulative total of 2,902 and almost all states (including the Palestinian Authority) have at least one BIT, and in some cases 100 or more (The Netherlands, for instance). In the 1990s, on average a hundred BIT-signing ceremonies were held annually. However, there is clear evidence of a tapering off, with only 30 BITs agreed to in 2013, down from close to 200 per year in the mid-1990s (UNCTAD, 2014: 114). Saturation of coverage is just one, and a minor, reason for that, as we will see. In recent years, as noted above, a number of states have

[1] According to the UNCTAD Country-Specific Lists of Bilateral Investment Treaties, Germany signed an Agreement with Malaysia in 1960. This was (probably/as far as we can tell) the first BIT to be concluded. See: http://unctad.org/Sections/dite_pcbb/docs/bits_germany.pdf

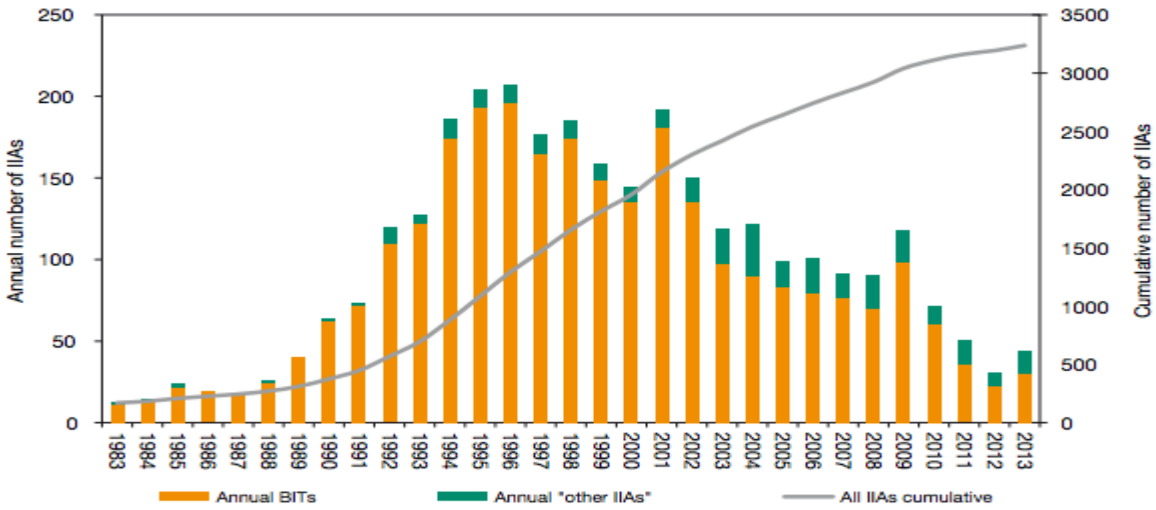
decided to allow BITs to lapse without renewal, and in other ways have signalled their dissatisfaction with BITs as an international legal instrument. In 2013, forty-three BITs were 'terminated', among them South Africa's BIT with Germany, the Netherland, Switzerland, and Spain. Hence, the title of this paper: BITs rose spectacularly during the era of high globalization, but they (or at least fundamental parts of them) are less-and-less popular.

While it is quite obvious why BITs have become questionable, to say the least, it is not so obvious why almost all states in the world, and even aspiring states such as the Palestinian Authority, signed up for BITs in the first place, and with such haste. The purpose of this paper is to review and supplement the explanations for this puzzle as provided in the literature, and to briefly explore the implications of BITs. There is a range of probable explanations and many of them are not mutually exclusive. I suggest, however, that the explanations offered so far tend to underestimate the indirect and subtle coercion under which developing states made their initial choices to sign-up to these bilateral treaties. First, however, lets look at what BITs are and why the issue area of investment protection is dominated by a bilateral global regime (while in other issue areas, such as trade or the environment, multilateralism is preferred).

What are BITs?

A bilateral investment treaty is one type of International Investment Agreement – others include regional or preferential trade and investment agreements (and, until recently, also double taxation agreements, but these are no longer counted as such). BITs are agreements between two states, stipulating actionable standards of conduct by the host government with respect to private investment by nationals and companies from the other contracting party. These standards aim at guaranteeing 'fair and equitable treatment' of foreign investors - normally equated with 'national treatment' or 'most favoured nation status'. They also provide protection against expropriation, and guarantee free transfer of means and full protection and security. Often, BITs make provision for 'alternative dispute resolution' in the form of international/independent arbitration. It is this later feature of BITs that has contributed most to the controversy surrounding these international legal instruments in recent years.

Fig. 1: Trends in IIAs, 1983-2013



Source: UNCTAD (2014)

Originally, BITs stepped in to fill the void after WWII left by the slow demise of bilateral Friendship, Commerce and Navigation treaties which the European colonial powers and the USA had been concluding for a long time, in the case of the USA since the 1770s (Vandevelde, 2010: 21), and in the absence of a multilateral agreement. While echoes of these FCNs can be found in BITs, the former focused primarily on trade facilitation and was inadequate to solve the problem of so-called time inconsistency that faced foreign investors increasingly from the 1950s onwards. The drive towards a liberal global trade and investment regime, launched at Bretton Woods in 1944, was met by a counter-movement of an increasing number of recently independent colonies embarking on policies of expropriation of foreign owned assets for national development purposes. Between 1960 and 1974, 875 instances of such expropriation across 62 states were recorded (Bandelj and Mahutga, 2012: 102), thus posing a significant concern for potential investors from capital rich states and a challenge for decision makers in capital poor states. Why was an explicit multilateral response not found for this common concern, and why is a multilateral response to the regulation of FDI still eluding us (despite Schill's argument that the bilateral system actually functions analogously to a multilateral system – see Schill. 2009)? After all, since 1944 multilateralism has emerged as a dominant meta-script for the world when dealing with the provision of global public goods.

Part of the answer is to be found in the divisive international politics around trade and investment that characterized much of the 1960s and 1970s accompanying the call for and resistance to a New International Economic Order (Schill, 2009). In a context in which foreign investment by capital exporting states was perceived by many to be part of of neocolonial expansion and coercion, it was not likely that a generally accepted agreement could be reached. The divisie politics surrounding foreign direct investment continued late into the 20th century and also scuppered attempts by OECD states to agree to and sell to others the proposed Multlateral Agreement on Investment (MAI), which would have provided a set of multilateral norms and procedures to protect the interests of investors. Exactly because the MAI was perceived to be heavily biased towards the interests of investors, it faced stiff opposition not only from capital importing countries, but also from social justice movements in OECD states.[2]

The inability to establish a binding and widely agreed-to set of global rules still elude us today, even though most of the significant promoters of the NIEO have come around to endorse a global economy based essentially on liberal principles as the only game worth playing. So, the answer cannot lie in the divisive politics around Foreign Direct Investment (FDI) alone.

Perhaps a more general answer is to be found in the constraints/incentives that features of this specific issue impose on decision makers on the side of the 'initiator' and the 'recipient' of an agreemnt on investment protection. In their study on the dynamics of international regime design, Thompson and Verdier (2013) identify transaction costs (the costs of negotiating and guaranteeing agreements) and what they call the 'member surplus' as two crucial features that determine overall institutional choice. While multilateralism reduces transaction costs for the initiator, this incentive may not be sufficient to make up for the fact that the initiator of a multilateral regime has to offer one deal for all participants, geared to elicit cooperation from the state that faces the highest compliance costs. Other members free ride on the offer made to the state with the highest compliance costs (they get benefits that they do not earn, so to speak). This creates a 'member surplus' analogous to the 'producer surplus'[3] faced by producers in a competitive market who are willing to sell for less than the price determined by the market. A bilateral arrangement, while more costly in terms of transaction costs is less 'wasteful' from the point of view of the 'initiator', as each bilateral agreement can offer only the incentives necessary to persuade the specific negotiation partner and no more. Tailor-made in this case is better than mass produced according to the wishes of the most demanding customer, one can say, because the former is less costly for the initiator. BITs reduce the member surplus by allowing initiators to relax or tighten the compliance burden according to the 'customer' with which it is dealing. It also secures universal coverage of the

[2] See Nunnenkamp and Pant (2003) for a detailed overview of the different expectations and options of capital exporting and capital importing states.

[3] 'Producer surplus' is the difference between the amount that a producer of a good receives and the minimum amount that she would be willing to accept for the good. The difference, or surplus amount, is a benefit that the producer receives for selling the good in the market. See *Investopedia*, at http://www.investopedia.com/terms/p/producer_surplus.asp

regime. Not noted by Thompson and Verdier, this specific regime-architecture can undermine the legitimacy of the bilateral regime in the longer term if one group of states is burdened with heavier compliance costs than others, necessitated by the variance in the quality of domestic institutions, for instance. As a rule, capital-hungry (developing) states face higher compliance costs than OECD states in the BIT regime. This can happen in the case of multilateralism as well, but some multilateral deals have built-in redistributive mechanisms to subsidize the cost (the Montreal Protocol on Ozone Depletion is one example). So, while the choice of a bilateral regime is rational (both from the viewpoint of the initiator and the recipient) it may not be optimal in terms of its distributional implications. I would suggest that these distributional imbalances are one of the factors that are contributing to the delegitimization of BITs, especially in developing states.

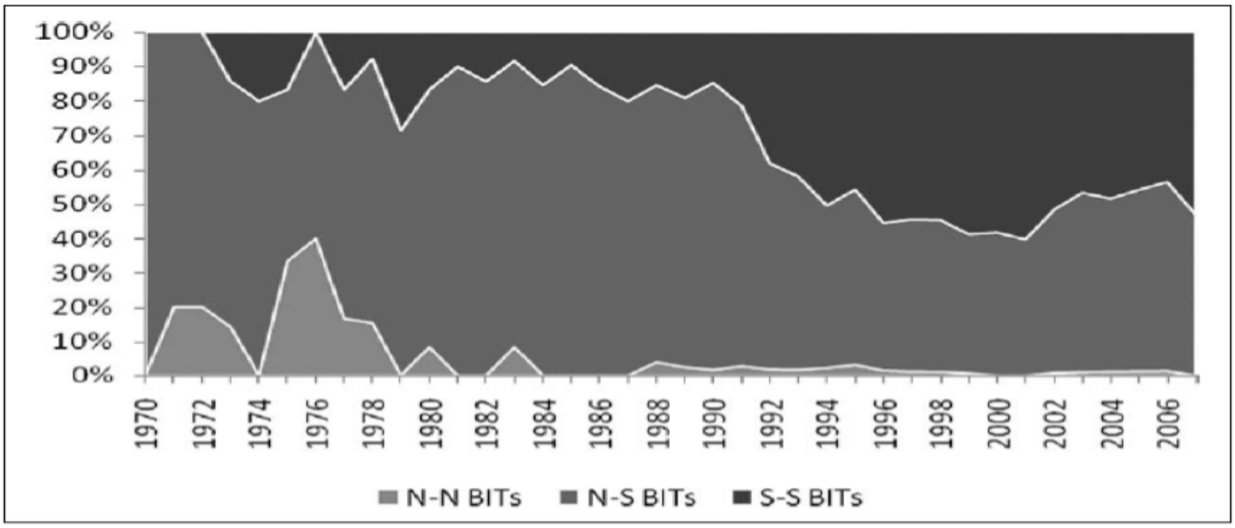
Explaining the rise and fall of BITs

It is easier to explain why bilateralism is the preferred institutional vehicle in the investment protection regime for both capital sending and capital receiving states, than it is to account for the spectacular rise of BITs and their subsequent decline. Clearly, a bare-bone rational choice explanation (see, for example, Guzman, 1997-98) of why states prefer these types of treaties cannot account for significant variation in demand over time. Yes, these treaties do provide a means by which capital scarce states can credibly commit to policy consistency and to augmenting weak domestic institutional capacity, while private and corporate investors from capital rich states are encouraged to commit to direct foreign investment. But leaving it at that misses both the politics involved in BITs and ignores the variation in behaviour over time.

To begin with, it is somewhat misleading to consider the process of the rise and fall of BITs as comprising of just two phases. As Jandhyala, Henisz and Mansfield (2011) show, there are actually three discernable phases. During the first, from the first BIT in 1960 to the late 1980s, the number of BITs increased steadily but slowly, and most were between capital rich (North) and capital poor (South) states. In this phase, the search for a solution to the time-inconsistency problem, exacerbated by numerous instances of the expropriation of foreign-owned assets, was the primary driver.

The number of of BITs increased considerably during the 1990s, and a significant number of newly agreed-to BITs were between pairs of developing states (see Fig. 2). In their attempt to provide a framework for analysing the diffuson of liberal economic norms in the era of high globalisation, Simmons et al (2006) suggest four possible explanations, namely, *competition*, *learning*, *emulation* and *coercion*. Elkins et al (2006) suggest that in the case of the diffusion of BITs, *competition* between developing countries for scarce capital provide a credible explanation for the headlong rush. For Jandhyala *et al.* (2011) the second phase can be accounted for by reference to the practices of emulation, learning, and norm cascading – processes which are often referred to in explaining the rapid diffusion of norms across national borders despite the absence of strong domestic demand for those norms (see Finnemore and Sikkink, 1998). Cleraly, there is evidence that BITs became established as one of the means through which developing countries, amidst a lingering debt crisis, could signal their commitment to what was perceived to be standard of appropriate state behaviour (= norms) in a world economy increasingly being defined by the so-called Washington consensus. Jandhyala *et al.* also highlight the role during this phase of norm disseminators, such as UNCTAD who became (and still is) the leading UN chapter in providing advice on international investment instruments and in monitoring (and reporting on) their implementation.

Fig 2: Bilateral Investment Treaties by Dyad Type



Source: Jandhyala *et al*. (2011)
Note: N = OECD states
S = Global South

This leaves the notion of *coercion* (in the list that Simmons et al. suggest). We will return to this later. But, note that there is also a fifth possible explanation suggested in the literature. In a number of publications Poulsen and co-authors have argued that, at least in some cases, the rapid increase of BITs in the 1990s was more like a 'mass tumble' than a 'norm cascade'. That is, the steep increase was the result of less-than-careful calculation on the part of developing states of the costs and benefits involved, and resulted in an outcome that was exceedingly "investor friendly' (Poulsen, 2013). Based on a specific interpretation of the notion of bounded rationality, Poulsen and Aisbett

(2013) argue that analogous to the behaviour of consumers who often ignore low-probabililty, high-impact risks, developing countries 'tumbled' into these treaties without adequately considering the legal implications. Using South Africa as a case, Poulsen (2013) shows how a rehabilitated international pariah state, in a head-over-heels rush to join the bandwagon of the global 'gamble on investment' (Nattrass, 1996; see also Nel, 2002), concluded one after the other BITs with whomever was willing to do so, without carefully considering the costs. South Africa concluded more than 50 such treaties between 1994 and 2009, the majority before 2000 with capital-exporting states (since 2000, most SA BITs were with other developing states). South Africa was not the only state who rushed into these treaties. South Korea and many others followed the same pattern of 'herd behaviour.' Their behaviour looks even less 'rational' if one considers the empirical findings that show that the conclusion of BITs only has a minor impact on the flow of FDI (Egger and Pfaffermayr, 2004; Nunnenkamp and Pant, 2003).

The explanations surveyed above are not mutually exclusive, of course. But neither on their own nor in combination do they capture the excessive 'pressure' that developing states were under in the period under review. What is missing from most of these accounts, all of which add some valuable insights, is an explanation of how developing states were *persuaded* in the first place to enter into *the grand gamble on investment*. This is a tale that would have to consider on the demand-side the scarcity of capital in the late 1980s and early 1990s due to the debt crisis, reductions in US ODA, and more stringent loan conditions applied by international financial institutions (Vandevelde, 2010: 60-61). But it will also, on the supply-side, have to document the ways in which influential state actors (USA, UK, Japan), international financial institutions (IMF, World Bank, regional Development Banks) and other intergovernmental organisations (UNCTAD and the OECD), multinational corporations, and a transnational epistemic community of economists, have all contributed to constructing a 'common sense' understanding of what developing states have to do to grow. This will have to be complemented by tracing how in domestic politics the emergence of a second and third post-independence generation of political elites created hegemonic allies for the actors mentioned above. In the case of South Africa, the role of the business community in facilitating the deal that led to the end of apartheid, and to persuade the ANC and its allies to abandon a leftish programme of expropriation and redistribution, is part of the story (see Marais, 2011; Bond, 2000).

Existing explanatory candidates also ignore the subtle coercive processes of choice that confront developing states when they have to decide whether to join existing regimes or not. As Lloyd Gruber has argued, liberal internationalist understandings of state-state coopertion and coordination focuses only on the benefits of cooperation through formal treaty-signing and ignore the limited options that developing states often face. When confronted with the choice of either joining an existing regime and in so doing accepting norms/standards/rules that may harm your interests, or of staying outside of the regime, developing states often regard the costs of 'being left-out' or 'of missing an opportunity forever' as outweighing those imposed by the detail of the regime itself. For Gruber, that was the Sophie's choice that confronted Mexico in deciding whether to join NAFTA or not, and that confronted some 'weaker' European nations when joining the Eurpean Monetary System was offered to them. International bargaining is a power game, as we all know. But, there may be ex-ante power differentials between 'initiators' and 'recipients' that heavily bias decision making in a manner that goes against some of the most fundamental interests of recipients (Gruber, 2000).

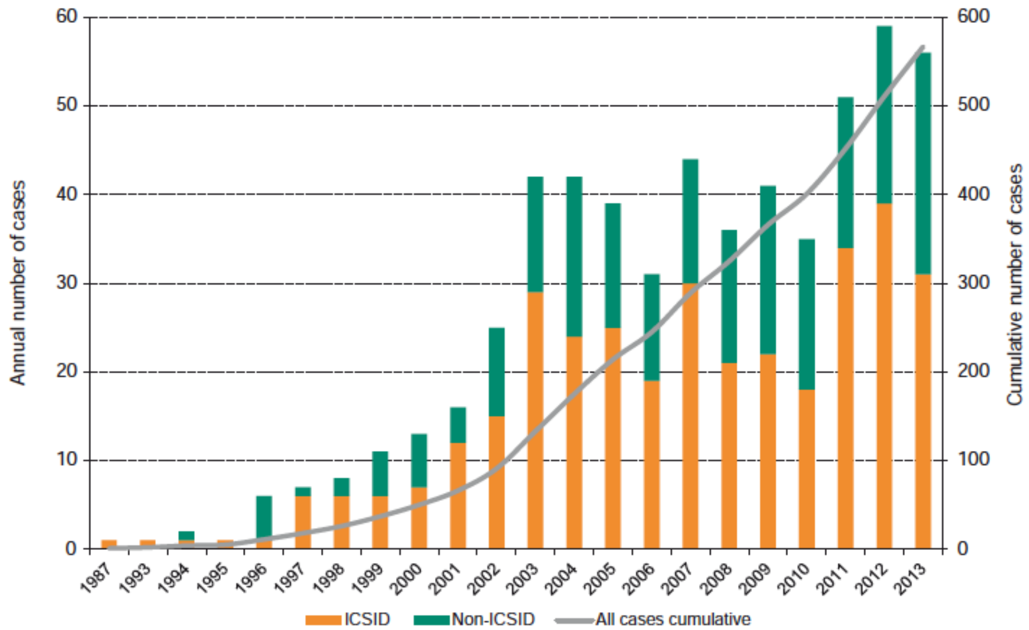
Although Gruber focuses on multilateral regimes exclusively, the power logic that he decerns is clearly at work also in the generalized bilateral regime of BITs. When confronted with the choice – provided, of course, that the options were clear to them – developing states prefer the costs of signing-up to stringent bilateral investment arrangements rather than the threat of exclusion from sources of scarce investment capital. Structural conditions in the global economy, such as increased competition for foreign direct investment, may bias the decision even furher in favour of 'joining' rather than being 'left out'. Hence, without discounting the effect of the bounded rationality that Poulsen highlights, a more comprehensive explanation of the tumble into BITs must reflect an appreciation of the power of persuasion and threathened exclusion. Coercion in international politics takes on many forms, and one-to-one relational power is but one of them (Barnett and Duvall, 2005).

Be that as it may, it is clear that we have now left the second phase of the rise and fall of BITs well and truly behind. A third phase, beginning around the time of the East Asian financial crisis (1998-2000) and the Argentinian crisis (1999-2002), can be referred to as the era of the 'fall' of BITs. This phase can be attributed partly to the disappointment of many developing states who, despite all the promises made in favour of capital mobility, still are nett capital exporters. But it is also due to the emergence of alternative South-based sources of investment capital. As a consequence, focus shifted in the late 1990s and early 2000s to the signing of South-South BITs, as can be seen in Fig. 2.

Thirdly, and perhaps most importantly, many states have come to realise that the costs of some aspects of the existing BIT regime are simply too high to bear. In particlar, the provisions made for delegation of arbitration authority in the case of disputes between investors and the host state, have strarted to bite. While it may be premature to claim that a general loss of confidence in BITs as an instrument *per se* is occurring, it is clear that there is growing discontentment with the role of 'international arbitration' as an enforcement mechanism.

The last phase that we are looking at is thus defined by the reaction against the delegation to third parties of authority to interpret and enforce investement-protection measures. There is some variation across BITs as to the exact nature of the enforcement mechanisms evoked, but 'international arbitration' play a role in most cases of South-North BITs. Arbitration arrangements can take on different forms: They operate as a final resort (once all domestic means of redress have been exhausted – the so-called Calvo Doctrine, or in the absence of adequate domestic institutions); as an ad hoc process defined by the BIT itself or based on UNCITRAL rules; or as an explicitly defined procedure involving a standing arbitration institution. The International Centre for the Settlement of Investment Disputes (ICSID) – set up by an international convention, and linked to the World Bank – is the most prominent and powerful example of the latter. Its awards are binding, with no appeal possible to a tribunal external to the ICSID. 156 states have signed the ICSID Convention and it is by far the dominant arbitration institution in international investment law (Allee and Peinhardt, 2010: 4-6). Fig. 3 shows that the number of (known) cases involving investor-state disputes has rapidly increased in recent years to 568 in 2013, with 98 states involved.

Figure 3: Known Investor-State Dispute Settlement Cases, 1987-2013



Source: UNCTAD (2014)

What is not so evident from Fig. 3 is that by far the most of these cases involve investor-initiated claims against states – not the reverse. According to UNCTAD in 2013, investors initiated at least 56 known international investment cases: Nineteen against developing states, 11 against economies in transition, and 26 against developing states. Eighty-five per cent of all the cases known by the end of 2013 were brought by investors from developed states (UNCTAD, 2014). As far as UNCTAD's records go, 42 arbitral decisions were issued in 2012, including the highest ever award in the history of investor-state dispute settlement, when US$1,77 billion (plus interest) was awarded to Occidental in its oil expropriation case against Ecuador (UNCTAD 2013b). At least five decisions in 2013 awarded compensation to the investors, including an award of $935 million plus interest, the second highest known award in the history investor-state disputes (UNCTAD 2014). While investors do not always win (actually, forty per cent of known cases have been decided in favour of states), the large compensation burden rests almost exclusively on the shoulders of tax payers.

Part of the growing frustration amongst states (not only developing states) with BITs has to do with the lack of transparency and suspicions of bias in the arbitration regime attached to IIAs. The role of the ICSID in particular has been come in for heavy criticism due to perceived incidences of conflict of interest and a bias towards investors. A 2009 study claimed that over the 30 years in which arbitration on state-investor disputes has been practiced, no counter-claim by any state had been successful (Vohryzek-Griest, 2009).

It is also claimed that a majority of cases before the ICSID are being heard by an 'inner mafia', a small group of tribune members who act as both arbitrators and counsels and call on each other as witnesses (see REPORT on injustices). In one report the South Centre suggests that the ICSID might be the 'world worst judicial system'.

Given these circumstances, it comes as no surprise that a large number of states have decided to review, revise, and/or suspend BITs and BIT-related activities. A short recent record of these steps follow:

- South Africa in 2013 submitted a notice of termination, informing to the Belgo–Luxembourg Economic Union that it would not renew the existing BIT that would expire in 2013. SA is also revoking its other BITs with European partners and is in the process of considering a new national investment law (UNCTAD 2013a; DTI, 2011).

- South American governments in April 2013 formed an alliance in opposition to the increasing number of lawsuits initiated against them by transnational companies under bilateral investment treaties. The alliance is known as "the Conference of Latin American

States affected by transnational interests" (Ecuador, Bolivia, Cuba, Nicaragua, Dominican Republic, St. Vincent and Grenadine and Venezuela).

- Venezuela, Bolivia and Ecuador have withdrawn from the ICSID Convention (IISD Investment Treaty News, 13 April 2012).
- In 2013, Brazil made it known that refuses to ratify any of the 14 BITs it had signed up until 2013.
- India announced in 2013 that it was reviewing its existing BITs and suspending negotiations on new treaties.
- Pakistan followed suit by announcing that it is in the process of developing its own 'model' of bilateral investment agreements, rejecting the standard model as not appropriate to its national agenda.
- Australia in 2011 decided to exclude investor-state dispute arbitration from future trade agreements.
- In March 2014, Indonesia announced that it was revising all of the 67 BITs that it had entered into. This does not amount to 'a termination' of these agreements (as the *Financial Times* inaccurately reported, probably following a press declaration by the Dutch Embassy in Jakarta), but it is likely that state-investor relations will increasingly be scrutinized in order to enhance national regulatory autonomy.[4]

One general conclusion that emerges from all these cases, and the discussions surrounding them, is that states are increasingly concerned that the way in which state-investor disputes related to IIAs are adjudicated, and the principle of delegation itself, clearly impose constraints on states to pursue national health policies, and policies aimed at sustainable development and national justice (Sy, 2011; Mann, 2013). Autonomy in each of these policy domains are being challenged, or could potentially be challenged, by international arbitration proceedings in terms of IIAs. As far as BITs are concerned, it should be kept in mind that there is credible evidence that for those states who are already heavily constrained by their dependence on the global economy 'the inclusion of ICSID clauses within BITs is not so much a choice as a requirement' (Allee and Peinhardt, 2010: 23).

[4] For the text of this declaration, see http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html
For a more correct interpretation of Indonesia's intentions, see the comments made by Arif Havas Oegroseno, Indonesia's ambassador to Belgium, Luxembourg, the European Union and the World Custom Union in an RSIS Commentary piece, No. 140/2014, available at http://www.rsis.edu.sg/rsis-publication/rsis/indonesias-bilateral-investment-treaties-modernising-for-the-21st-century/

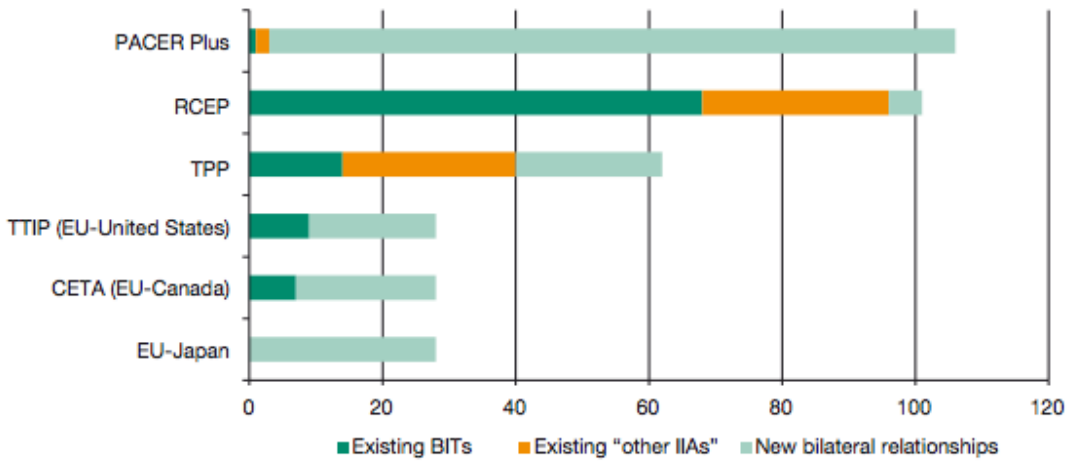
Conclusions

BITs should be of special interest to students of the global political economy for two reasons. The one is that their evolution since the first BIT was signed in 1960 not only mirrors the travails of liberal globalization, but also acts as a barometer of the political pressure behind and opposed to liberal globalization. The second reason why BITs should be of interest is because BITs (and IIAs in general) represent the one issue area, following trade that is, in which the *legalization* of world politics is most advanced. I follow Abbot et al. (2000) in describing legalization as a form of institutionalization that is characterized by heightened obligations, greater precision in rules and, perhaps most crucially, *the delegation of rule interpretation and enforcement to third parties*. Clearly, this larger process has fundamental implications for how cooperation is organized and power is institutionalized in world politics. Unfortunately, the literature on the legalization of world politics has only recently started to take note of BITs (e.g. Allee and Peinhardt, 2010). This contribution is aimed at raising the profile of BITs as important examples of the on-going legalization of world politics, and in particular of the delegation of authority to interpret and enforce rules and obligations.

At the same time, it is clear that the process of legalization is neither inevitable nor unstoppable. In various domains, states are trying to reclaim national regulatory space and are challenging (and in some cases reversing) the legalization trend in international investment agreements. This is true also of OECD states (Australia, Canada) and not only of G77 members. In the absence of a balanced multilateral agreement governing investment (and it is unlikely that one will emerge soon), capital-poor developing states will continue to compete with one another for FDI, but it is hoped that the evolution of investor-state relations from soft to hard law (Abbott and Snidal, 2000) will be curtailed.

Are we witnessing the end of BITs? If that impression was created by the title of this paper, then that impression stands in need of correction. As I said before, it is likely that states will continue to use this legal instrument. They might be more circumspect in what they sign, and they might want to follow the example of states who deliberately insert clauses protecting their domestic regulatory autonomy. But, foreign investment would be severly limited or made increasingly tenuous if investors face no protection against the risks that they could face in jurisdictions where local institutions may not be adequate in terms of the rule of law and the protection of property rights. Seen from one perspective, there is the possibility that the number of BITs/IIAs will increase, rather than decline. This depends on the degree of success that is to be achieved in the so-called mega-regional trade and investment negotiations of which the Transatlantic Trade and Investment Partnership (TTIP) and the Transpacific Partnership (TPP) are two examples. If these mega agreements come to fruition, they will create a large number of 'new' bilateral investment relations not yet covered by existing IIAs (see Fig. 4). But given the fall in popularity of existing BITs, it is likely that the content of these new arrangements will differ from what became the norm in the period of high globalization. Whether the stipulations of these agreements do become more development and sovereignty friendly ultimately depends on the vigilance of the publics in the participating states. The fact that the negotiations in some of these mega-regional agreements are conducted behind closed doors, gives room for concern. *Cave! Hic dragones.*

Fig. 4: The Potential Effect of Mega-Regional Trade and Investment Agreements on the Number of IIAs and BITs



Source: UNCTAD 2014 World Investment Report, p. 121

Notes: 'New bilateral relationships' refers to the number of new IIA relationships created between countries upon signature of a mega-regional agreement.
CETA involves the EU (28) and Canada; the Tripartite Agreement is an interregional agreement in Africa, linking COMESA, EAC, and SADC; PACER Plus is a Pacific agreement, involving the Pacific Islnds Forum, developing states, New Zealand and Australia; RCEP involves Australia, China, Japan, India, South Korea, New Zealand, and ASEAN countries; the TTIP is between EU(28) and the USA; and TPP involves Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA, and Vietnam.

References

Abbott, Kenneth W. and Duncan Snidal (2000) 'Hard and Soft Law in International Governance'. *International Organization* 54: 421– 456.

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal (2000) 'The Concept of Legalization'. *International Organization*, 54: 401-419.

Allee, Todd, and Clint Peinhardt. (2010) 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions'. *International Studies Quarterly* 54: 1–26.

Alvarez, Jose. (2011) *The Public International Law Regime Governing International Investment*. Hague: Hague Academy of International Law.

Bandelj, Nina and Matthew C. Mahutga (2013) 'Structures of Globalization: Evidence from the Worldwide Network of Bilateral Investment Treaties, 1959-2009'. *International Journal of Comparative Sociology*, 54(2): 95-123.

Barnett, Michael and Raymond Duvall (2005). 'Power in International Politics', *International Organization*, 59, pp 39-75.

Bond, Patrick (2000) *Elite Transition: From Apartheid to Neoliberalism in South Africa*. London and Pietrmaritzburg: Pluto Press.

Corporate Europe Observatory (CEO) (2012) *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom*. Brussels/Amsterdam: CEO and Transnational Institute.

Department of Trade & Industry (DTI), Republic of South Africa. (2009) 'Government Position Paper on Bilateral Investment Treaty Policy Framework Review'.

Egger, Peter and Michael Pfaffermayr (2004) 'The impact of bilateral investment treaties on foreign direct investment'. *Journal of Comparative Economics* 32: 788–804.

Elkins, Zachary, Andrew Guzman, and Beth Simmons. (2006) 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000'. *International Organization* 60: 811–846.

Finnemore, Martha and Kathryn Sikkink (1998) 'International Norm Dynamics and Political Change'. *International Organization* 52 (4) 887-917.

Gilardi, Fabrizio. (2012) 'Transnational Diffusion: Norms, Ideas and Policies'. In *Handbook of International Relations*, 2nd edition, edited by Water Carlsnaes, Thomas Risse and Beth Simmons. Thousand Oaks, CA: Sage.

Gruber, Lloyd. (2000) *Ruling the World: Power Politics and the Rise of Supranational Institutions*. Princeton: Princton University Press.

Gurowitz, Amy. (2006) 'The Diffusion of International Norms: Why Identity Matters'. *International Politics* 43: 305–341.

Guzman, Andrew. (1997-98) 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties'. *Virginia Journal of International Law* 38(3): 639–688.

Guzman, Andrew. (2008) *How International Law Works: A Rational Choice Theory*. New York: Oxford University Press.

Jandhyala, Srividya, Witold Henisz, and Edward Mansfield. (2011) 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy'. *Journal of Conflict Resolution* 55: 1047–1073.

Mann, Howard (2013) 'Reconceptualizing International Investment Law: Its Role in Sustainable Development'. *Lewis & Clarke Law Review*, 17(2): 521-544.

Marais, Hein (2011) *South Africa Pushed to the Limit: the Political Economy of Change*. London: Zed Books.

Nattrass, Nicoli (1996) 'Gambling on Investment: Competing Economic Strategies in South Africa'. *Transformation* 31: 25-42.

Nel, Philip (2002) 'Untangling the "Gamble on Investment": Élite Perceptions of Globalization and South Africa's Foreign Policy During the Mandela Era', in *Globalization and Emerging Trends in African States' Foreign Policy-Making Processes: A Comparative Perspective of Southern Africa*, edited by Adar, K. & R. Ajulu, Aldershot: Ashgate: 153-172.

Nunnenkamp, Peter and Manoj Pant. (2003) 'Why the case for a multilateral agreement on investment is weak', Kieler Diskussionsbeiträge, No. 400, ISBN 3894562471, available at http://hdl.handle.net/10419/2931

Peterson, Luke Eric (2006) 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights'. *Dialogue of Globalization* (published by the Friedrich Ebert Stiftung and the IISD), No 26.

Poulsen, Lauge. (2010) 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence'. In *Yearbook on International Investment Law & Policy 2009–2010*, edited by Karl Sauvant. New York: Oxford University Press.

Poulsen, Lauge. (2013) 'Bounded Rationality and the Diffusion of Modern Investment Treaties'. *International Studies Quarterly*, online early publication.

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

Ranjan, Prabash. (2010) 'Indian Investment Treaty Program in Light of Global Experiences'. *Economic and Political Weekly* 45: 68–73.

Reed, Lucy and Robert Kirkness (2012) 'Old Seeland, New Netherland and New Zealand: Some Thoughts on the Possible "Discovery" of Investment Treaty Arbitration in New Zealand'. *Victoria University of Wellington Law Review* 43: 687-709.

Schill, Stephan. (2009) *The Multilateralization of International Investment Law*. Cambridge: Cambridge University Press.

Simmons, beth A., Frank Dobbin and Geoffrey Garrett (2006) 'Introduction: The International Diffusion of Liberalism'. *International Organization*, 60: 781-810

Sy, Debora (2001) 'Warning: Investment Agreements are Dangerous to your Health'. The George Washington International Law Review, 43: 625-661.

Thompson, Alexander and Daniel Verdier (2013) 'Multilateralism, Bilateralism, and Regime Change'. *International Studies Quarterly*, online early publication.

UNCTAD (2013a) 'IIA Investment Notes', No 4, June.

UNCTAD (2013b) *World Investment Report 2013*. New York and Geneva: United Nations.

UNCTAD (2014) *World Investment Report 2014*. New York and Geneva: United Nations.

Vandevelde, Kenneth (2010) *Bilateral Investment Treaties: History, Policy, and Interpretation*. Oxford: Oxford University Press.

Vohryzek-Griest, Ana (2009) 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure', *Revista Colombiana de Derecho Internacional*, 15: 83-124.

Yackee, Jason. (2009) 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality'. *Fordham International Law Journal* 32: 1550–1613.

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