



Centro de Estudios de Estado y Sociedad

The diffusion of BITs and policy degrees of freedom: A comparison between Latin American and Asian countries[^].

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Abstract

From a development perspective, the signature of bilateral investment treaties (BITs) always limits the degrees of freedom for national policy. In spite of the generalization of the bilateral scheme, the governments' attitudes towards them are far from homogeneous, suggesting that a strategic stance toward BITs signature may be crucial. If the room for differentiation and strategic decisions before signing BITs is substantial, then we would expect a large variability in terms of commitments included in the clauses of the BITs signed and ratified. This is tested by comparing the BITs signed by Latin American and Asian countries.

[^] This research develops the research proposal that received the second prize in the Japanese Award for Outstanding Research on Development at GDN 6th Conference at Beijing. Global Development Network, January 2007. However, the present paper reflects only preliminary results.

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1. Introduction

Since the early 1990s, foreign direct investment (FDI) is on the rise. In order to attract foreign investors, (developing) host countries not only altered both macro and industrial policies, but also they accepted an important institutional change. As a result, foreign investors were favored by the widespread adoption of a new institutional framework by developing countries. This framework included new investment legislation (either general or specific FDI laws), the signature of bilateral investment treaties (BITs)¹ (for investors' protection) and the propagation of a new dispute settlement scheme that allowed for investor-state cases.

As a result of this “market friendly approach”, incoming FDI faced almost no restrictions in Latin American countries. However, this policy decision was not made in a vacuum, but rather it matched the region's increasing disinterest with industrial policies that followed the collapse of the ISI model. After a decade deprived of growth achievements, most economies LA countries embraced *neoliberal* reforms with fervour, including aggressive privatization and deregulation programs and the opening of the economy. The new friendly approach towards foreign investors also included vigorously encouraging them to participate in the privatization and deregulation process. Policy makers throughout the region suddenly became exceptionally enthusiastic about markets.

The Asian economic landscape also changed profoundly after the 1990s, and since then this region has become one of the most dynamic of the world. But, in contrast with Latin American ones, Asian economies relied on a policy-led industrialization process. Furthermore, this region followed a different approach towards foreign investors, as it was more careful about losing national policy space. On the one hand, despite signing several BITs and welcoming foreign investors, Asian countries maintained very restrictive rules towards foreign direct investment – FDI (APEC, 2003). Firstly, and even if many countries became more market-friendly after the 1997 crisis, FDI rules did not disappear. Secondly, for those industries where entry was formally allowed, foreign investors were still prevented from having a majority stake – this was the case, e.g. in Taiwan or in Philippines until recently. In other countries, FDI

¹ BITs: from less than 400 treaties in 1989 to almost 1.700 [in force] BITs by 2004 (UNCTAD, 2005).

was only permitted if associated with local partners – e.g. in China, India or Vietnam². Thirdly, foreign investors had to submit their investment proposals before local authorities before permission was granted – e.g. in Thailand or in the Philippines.

The information presented above may suggest different approaches and design of the BITs signed by Latin American and Asian countries. Previous empirical evidence in fact suggests that constraints imposed by BITs were not fixed (von Moltke, 2000; Peterson, 2004), that is to say, that different clauses can be found, e.g. associated to foreign investor's rights (as concerns most favoured nation and national treatment amongst others). For instance, not all developing countries signing BITs have granted national treatment to foreign investors, and some have even limited the fair and equitable treatment. Similarly, important differences are found in terms of the dispute settlement (DS) scheme.

Until recently, interest in BIT analysis seemed to be confined to legal scholars. From an economic perspective, UNCTAD (1998) offers the first analysis of the relationship between FDI flows and the signature of BITs. Since then, the beneficial role of the BIT scheme in terms of attracting increased FDI flows remains controversial. Whereas some economists found little evidence that BIT ratification increased FDI flows (Hallward-Driemeier, 2003; Tobin & Rose-Ackerman, 2005) others found more optimistic results (Salacuse and Sullivan, 2005; Neumayer and Spess, 2005). Chowla (2005) made the first attempt to determine the extent to which BITs are affecting host countries' policy decision-making process.

In this vein, the present paper seeks to expand Chowla's analysis in order to explain the differences in the BITs signed by Latin American and Asian countries. The main objective of this paper is to analyze BIT main clauses and their regional differences, both at a general and a particular level. The focus mainly concerns the economic policy degrees of freedom implied by different clause design options.

In a first section, the paper introduces a brief description of institutions, FDI policies and development paths followed by these two groups of countries. In contrast to a widely disseminated (and rather simplistic and uniform) vision regarding FDI

² As an example, Vietnam Law on foreign investment considers three forms of investment: business corporate contract (BCC) (mandatory for telecommunications and oil); Joint-Ventures (JV) (required for a wide range of sectors, including transportation, tourism and culture), and 100 foreign ownership (Leroux & Brooks, 2004).

policies and development responses, the institutional response from the fast growing countries in the sample tended to be more varied. Furthermore, despite the symmetries that could arise within each region, responses were particular to each country. In other words, there was no single development path, but an array of them – both, among Latin American countries and Asian ones.

In a second section, two lines of analysis on BIT clauses are presented. Firstly, from a detailed analysis, the main clauses are identified. Secondly, a general analysis and comparison is made. If all agreements followed the same BIT design, there should be no considerable differences among clauses. That is, in general, the case when considering the BITs signed by Latin American countries. By contrast, it is well known that the scope of Asian BITs was fixed in accordance to national laws and policies (Kumar, 2007), and that these countries maintained some restrictive policies [until recently] towards foreign investors. Therefore, in practice, these countries narrowed the level of guarantees granted to foreign investors – something that did not happen in Latin America.

In a thirdly and finally section, a series of conclusions and policy implications are introduced.

2. Comparing Latin America and Asian Countries: Comparing FDI policies, Institutions and Development.

2.1 Latin America & Asia: Development Paths and Institutions

Until recently, developing countries (DCs) evaluated foreign direct investment (FDI) with distrust. Among Latin American countries, this was more notorious among those blessed with natural resources – mainly those rich in oil, gas and minerals³. Similarly, restrictions to FDI were also present in those countries pursuing an industrialization strategy (ISI model) even if quite a few of them profited from multinational firms (MNFs) in their “eclectic” approach towards industrialization. The same attitude could be observed in Asia, as reflected by the experience of Korea, Taiwan (Province of China), and India, all of which kept a check on foreign investors’ involvement in industrialization. However, there were also some important exceptions in both geographical areas. In Latin America, Brazil FDI cum industrialization policy in the seventies was exceptionally liberal at that time. In Asia, Singapore was among the first countries to welcome foreign investors as well as Malaysia and Thailand.

By the end of the 1980s, caution turned into recklessness. The fall in export commodity prices along with the irruption of the debt crisis brought a policy change in Latin America, leading to a friendlier attitude towards foreign investors, who became the promise for the development process. Furthermore, industrial policies not only lost their leading role but also became all but “unspeakable”. While sheltered from the debt problem, Asian countries also became more open to foreign investors. But, at the same time industrial policies continued to lie at the center of the political discourse.

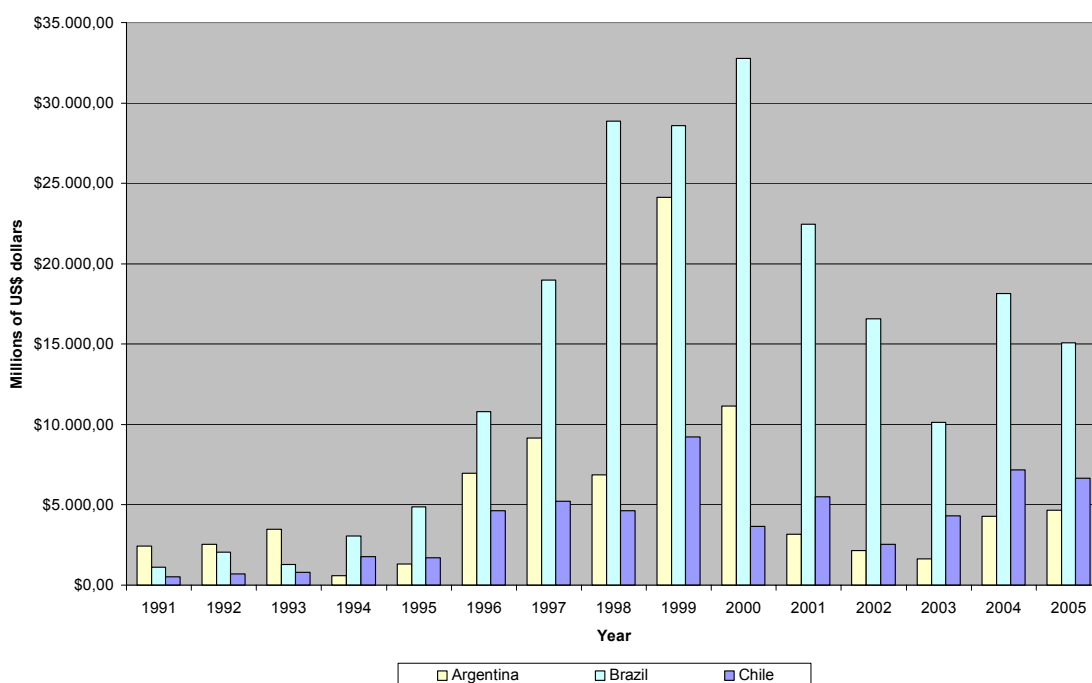
However, since the late 1980s, the global economy experienced a sharp increase in FDI flows. Although most FDI was directed towards developed countries, flows into developing countries regained strength. This new phase initiated a soaring competition process (i.e., incentive wars) amongst developing countries in order to attract foreign investors (UNCTAD, 1996; Oman, 2000).

³ Since the 1950s most states in the region adopted a protectionist view, which later evolved into a more pessimistic opinion. As an example of this new climate, it worth to mention the Andean Pact Decision 24/1971

Among selected Latin American countries, the triad formed by Argentina, Brazil and Chile (the former ABC group) accounted for more than 50% of total inflows over the 1991- 2005 period. In one single year, FDI inflows among selected countries amounted up to US\$ 73 billion⁴. At the individual country level, after receiving US\$ 214 billion in 1991-2005, Brazil outstands as the first regional receptor (followed by Argentina and Chile) - and in the worldwide ranking, it comes second after China.

Additionally, other countries in the region profited from important FDI inflows, notably Colombia, Venezuela and Peru. Even Bolivia (one of the poorest countries in the region) attained a good score, following the privatization program launched in mid 1990s.

Graph 1: FDI flows to ABC countries (1991-2005) (Millions of US dollars)



Source: Own elaboration based on UNCTAD data

In each country FDI flows were mostly explained by privatizations, including the massive acquisition of formerly state-owned assets by MNFs, with Brazil as a late-comer (IDRB, 2005). In terms of sectors, most of the foreign investors appear attracted by the opportunities raised by the primary sector, comprising both energy (petroleum

⁴ At country level, this year was exceptional for Argentina after the selling of YPF. Individually, both Brazil and Chile attained their maximum FDI inflows in the year 2000.

and gas), and minerals. Industry related FDI remained low, with the exception of those funds aiming at MERCOSUR automotive sector, of some specific opportunities in the Brazilian chemical industry and of the agro-business sector at both Argentina and Brazil (Mortimore, 2000). Another relevant fraction of incoming FDI was directed to utilities (mostly in the electricity and telecommunications sectors, but also to ports, trains, post services, water and sewage services), and financial services. Depending on the country and/or the sector, foreign investors were predominantly coming from either the US or the EU (Spain, France, Italy, Portugal and Great Britain), and also from Chile (this country became a net regional supplier of funds). US originated FDI ranked first in 11 countries: Bolivia (40,8%), Brazil (45,1%), Chile (26,4), Colombia (16,2%), Costa Rica (66,5%), Ecuador (42,2%), El Salvador (32,7%), Honduras (43,9%), Panama (25,1%), Paraguay (42,6%) and Venezuela (33,5%)⁵.

Furthermore, the raising share of FDI stock on GDP suggests the growing influence of foreign investors since the eighties. In particular in Chile, this share passed from roughly nil at the beginning of the eighties to a significant 60% at present. In Panama, foreign investor involvement is also quite significant. For the rest of the countries, FDI stock share lies below 50% of GDP. In Brazil, the stock of foreign direct investment is quite low even if the country ranks among the main beneficiary of the FDI boom. To sum up, for the region as a whole, the FDI share is not significant, and (on average) not much different of the one observed among Asian countries.

⁵ Periods: Bolivia: 1992-01; Brazil: 1996-2005; Chile: 1974-2005; Colombia: 1994-2005; Costa Rica: 1997-2005; Ecuador: 1992-01; El Salvador 1998-05; Honduras: 1993-02; Panama: 1990-00; Paraguay: 02-05; and, Venezuela 1992-01. Most of the data come from ECLAC except those for Bolivia, Ecuador and Venezuela (Stanley 2007)

Table 1: FDI Stock as a percentage of GDP – Latin America

Latin American Countries	1980	1985	1990	1995	2000	2005
Argentina	6,9	7,4	6,4	10,8	23,8	30,4
Bolivia	15,1	19,0	21,1	23,4	61,8	47,1
Brazil	7,4	11,5	8,0	6,0	17,1	25,4
Chile	3,2	14,1	33,2	23,8	61,1	64,6
Colombia	3,2	6,4	8,7	6,9	13,1	30,0
Costa Rica	13,9	24,4	25,3	23,3	17,0	25,8
Ecuador	6,1	6,2	15,2	19,4	44,4	43,5
El Salvador	4,3	4,8	4,4	3,1	15,0	24,7
Guatemala	8,9	10,8	22,7	15,0	18,1	17,0
Honduras	3,6	4,7	12,6	16,5	23,6	31,5
Nicaragua	5,1	4,1	11,4	19,2	35,8	49,1
Panama	64,6	58,2	41,4	41,0	58,3	64,8
Paraguay	4,6	9,5	7,6	7,1	17,2	16,0
Peru	4,3	6,1	5,0	10,3	20,8	20,2
Uruguay	7,2	16,8	10,8	8,0	10,4	17,3
Venezuela	2,3	2,5	4,7	9,0	29,3	34,8

Source: Own elaboration based on UNCTAD Data

In terms of trade, the Latin America remains competitive in the sectors where it is favored by resource endowments – thus, Ricardo’s comparative advantage approach still explains most of the regions export specialization. Natural resource-based exports remain the most important source of foreign exchange for most countries in the region. Furthermore, the region’s historical reliance on natural resources enlarged in the 90s, following the abandonment of the ISI model and the embracement of the neoliberal policies – i.e. stressing the importance of deregulation, privatization and of opening the economy [both current and capital account] and to reverse previous industrial policies. Industrial policies were portrayed as highly problematic, generating inflation and fiscal deficits as well as trade distortions. Following this loss of legitimacy, most countries introduced new trade policies, and previous integration experiences were dismantled⁶. Consequently, intra-trade flows remained at very low levels – with some exceptions at firm level, or regarding some specific industries (as the case of the automotive industry in MERCOSUR)⁷.

Among selected Asian countries, China became the main receptor of FDI – attracting US\$ 70 billion in a single year (2005), an accumulating US\$ 622.3 billion during the period 1986-2005. China’s opening of the economy was symbolized by the

⁶ The new experiences followed a different path, a sort of “open regionalism”.

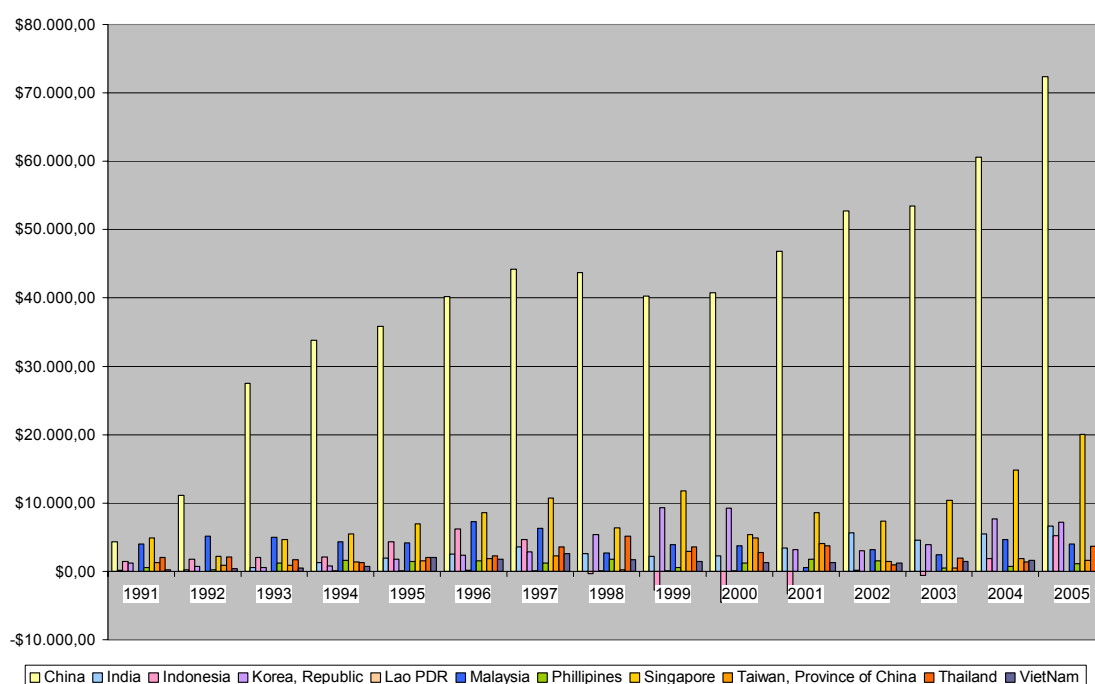
⁷ The share of intra-regional exports on total exports grow a mere 3% in the last 20 years – being at 13,1% in 2005 (Sauvent, 2007).

Chinese-Foreign Joint Venture Law of 1 July 1979. However, foreign investors were only allowed to enter in some “special economic zones” (mostly on the southern coast region), and only those aimed at exports. The Chinese from Hong Kong and Taiwan were those who took advantage of this policy⁸. At the beginning of the 1990s, China intensified the opening program, allowing foreign investors to serve the internal market in those cases where China might profit from technology transfers. Henceforth, FDI was allowed in certain sectors, including telecommunications, transportation, banking and insurance. To sum up, since the economic reform was initiated in 1978, China has become the largest recipient of FDI among the developing world and globally the second only next to the US since the mid nineties.

In second place comes Singapore, who received US\$ 128 billion in the same period. [South] Korea began to receive increasing FDI flows in the aftermath of the 1997 crisis – when it abandoned its previous resistance against foreign investors. Finally, it might also be worth mentioning the case of Vietnam. Since the beginning of the transformation process in the late 1980s (following the *Do Moi* reforms) FDI inflows totalized US\$ 20.3 billion (1988-2005), outperforming other much larger Asian economies (Leproux & Brooks, 2004). With no important FDI inflows India has become the main exception to this trend of FDI in fast growing Asian countries.

⁸ The industry profited from foreign exchange control and exchange rates subsidies.

Graph 2: Asian countries - FDI inflows (1991-2005) (millions of US dollars)



Source: Own elaboration on UNCTAD Database

FDI was basically attracted by the industry sector, in order to supply both the internal and external markets. As an example, 60% of inward FDI coming to China was directed towards the manufacturing industry, while agriculture received less than 2% whereas inflows going to finance and insurance industries accounted for less than 1% (Fan Gang, 2003). As a whole, most incoming FDI in Asia has been vertical, that is, associated with production networks and supply chain networks organized to minimize costs. From a time span perspective, industries are moving from the more developed to the less developed countries in Asia with FDI playing a critical role in the searching of productive efficiency (or efficiency – seeking industrial restructuring FDI), which responds to the “flying geese” hypothesis. As a result, trade within production networks has become the distinctive mark of the investment in the region: trade and FDI flows move in parallel (Gill & Kharas, 2007).

In terms of sources, in contrast to Latin American, an important part of the flows arriving at Asian countries were coming from within the region (including Korea and Japan). In the case of China, funds came from both Hong Kong (China) and Taiwan (China), plus Singapore and South Korea, and also from wealthy expatriates living in the region (K.H. Zhang, 2002). Japan classifies as the main investor in Thailand (Siamwalla et. al., 1999), and Philippines (Balboa & Medalla, 2006). Singapore and

Taiwan are the main investors in Vietnam (Leproux & Brooks, 2004; Bihn & Haughton, 2002), Malaysians in Cambodia and Thais in Laos PDR. However, US investors are also important in the region. They explain a high FDI share in quite a few of the analyzed countries (Philippines, India, Thailand and Singapore) and are investing vast amounts in others –e.g. China (Yingqui Wei, 2003). However, taking into account that most FDI originates in industrial countries, it is striking that the majority of funds arriving in Asia originated within the region. What is more, and surprising at least from a Latin American perspective, much more FDI now originates within the region than was the case prior to the crisis. FDI flows within East Asia have increased since the financial crisis.

The participation of foreign investors in the economy is also on the rise among Asian countries. Furthermore, in one country (Singapore) FDI even surpasses the GNP (national product). Their presence is also remarkable in Vietnam, encompassing a share above 60% of the GDP. However, more impressive is their small role in the region's biggest economies. Notably, and despite the open policy introduced since the early 80s, FDI stock in China remains at very low levels and decreased since the mid nineties⁹. In the cases of Korea, Taiwan and India, foreign investors' share is also modest, but increasing in recent years since these countries embraced more open FDI policies.

Table 2: FDI Stocks as a percentage of GDP – Asia

Asian Countries	1980	1985	1990	1995	2000	2005
Cambodia	2,4	2,0	3,4	12,1	43,8	45,6
China	3,1	3,4	7,0	19,6	17,9	14,3
India	0,6	0,5	0,5	1,6	3,8	5,8
Indonesia	13,2	28,2	34,0	25,0	16,5	7,7
Korea, Republic	2,1	2,3	2,3	2,0	7,3	8,0
Lao RDR	0,3	n.a.	1,5	11,6	32,1	24,5
Malaysia	20,7	23,3	23,4	32,3	58,4	36,5
Myanmar	12,7	11,3	11,1	17,2	54,8	43,6
Philippines	3,9	8,5	7,4	8,2	16,9	2,1
Singapore	52,9	73,6	77,9	71,5	12,7	158,6
Taiwan, Province of China	5,8	4,7	6,1	5,9	5,7	12,1
Thailand	3,0	5,1	9,6	10,4	24,4	33,5
Vietnam	0,2	1,1	4,0	28,5	66,1	61,2

Source: UNCTAD Data

⁹ FDI stock began to show down after the Chinese government introduced a set of fiscal policies coupled by increasing infrastructure works which induced locally founded new investments. Consequently, foreign investors were outperformed by local ones, increasing its contribution to fixed – asset investment (Fan Gang, 2003)

Finally, the region's integration process can be seen in terms of trade. Actually, intra-regional exports accounts for more than half of the total exports made by Asian countries (Sauvant, 2007), as a consequence of the presence of vertical production chains as well as resulting from the emergence of regional distribution networks. As a result, the trade pattern is no longer one-way and based on international differences in resource endowments. What is more, intra-trade growth is expected to continue as well as the regional economic integration process.

3. Investment Treaties Analysis

The analysis focuses on the bilateral treaties signed by 28 different countries from Latin America (15) and Asia (13)¹⁰. The group accounts for almost 1.000 BITs signed, reduced to 704 after sorting out those [treaties] not approved. In the end, as a result of this research, 598 bilateral treaties were analyzed, 252 of them from Latin America and the rest originated in Asia¹¹.

The signature of bilateral agreements became a policy widely followed by almost all Latin American countries during the nineties. Argentina soon became one of the most fervent advocates of the bilateral scheme, signing more than 50 BITs and joining the World Bank's International Centre for Settlement of Investment Disputes (ICSID). Chile was another leading country in the adoption of the bilateral scheme in the past decade. However, the pace slowed in Latin America at the turn of the century¹². Those Asian countries considered in this proposal were also very active in adopting this new scheme during the past decade and continue to use it thereafter. At an individual level, with an astonishing 112 BITs signed since the mid-eighties, China became the most active country in pursuing such a policy. But, also Korea (77), Malaysia (65), India (57) and Indonesia (57) demonstrated to be highly dynamic in this field¹³.

¹⁰ Treaties' information was obtained from the UNCTAD BIT database. For the reason that information was not available, Myanmar was not included in the analysis. Only treaties signed and approved before January 1st 2005 will be considered in the analysis. Therefore, Brazil and Colombia were left aside.

¹¹ In order to avoid duplication, whenever BIT partners come from both regions, the BIT is associated only to one region (Latin America or Asia). Consequently, only 145 BITs are counting in the database.

¹² However, by the same time, numerous countries signed free trade agreements (FTA) with the U.S, either on a national (Chile, Colombia, Panama, and Peru) or regional basis as the case of Central American countries (CAFTA + Dominican Republic, including Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua). The US currently negotiates similar free trade agreements with Ecuador and Uruguay. According to various observers, the investment rules introduced by this new scheme are even more stringent than former BITs.

¹³ Singapore and Thailand have also completed a FTA with the U.S.

Table 3: BITs signed by region

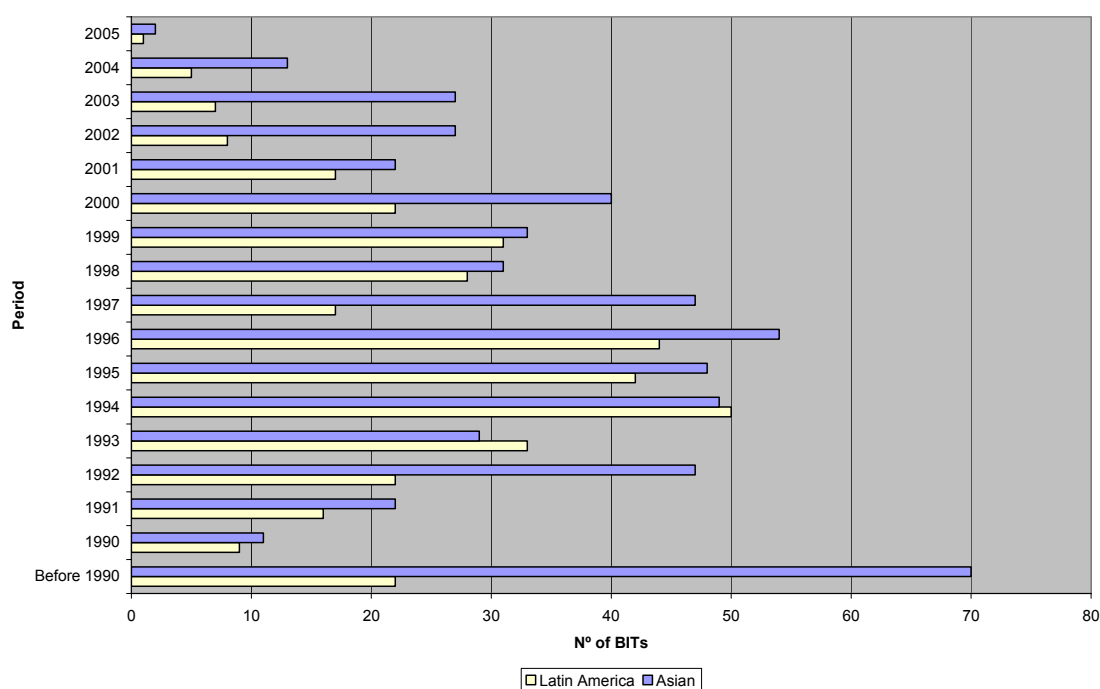
BITs	Asia*	LA**	Total	BITs signed btw Asia & LA countries	Total - Net	Analysed BITs / Total Net
Signed	583	391	974	290	829	72,14%
In force	430	274	704	145		
Analyzed	345	253	598			
Signed before 90s	68	15	83			
Signed during 90s	293	240	533			
Signed after 90s	69	30	99			

Source: own elaboration based on UNCTAD BIT Database

Notes: Latin America: Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Uruguay, and, Venezuela. Asia: Cambodia, China, India, Indonesia, Korea (republic of), Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Taiwan (province of China), Thailand and Vietnam.

As could easily be observed from the above table, the vast majority of treaties were signed in the 1990s (533), although Asian countries continued with the use of this scheme in the present decade (69 new BITs were signed). By contrast, enthusiasm seems to be vanishing among Latin American countries (only 27 BITs were introduced after 2000).

Graph 3: BITs signed by Latin America & Asian countries



Source: own elaboration from UNCTAD Database

One of the main objectives followed by the treaties is investment promotion, that could be attained by the introduction of a stable legal environment and simple rules.

Typically, a BIT first clause includes the definition of investment and investors. Next, most agreements include a series of clauses dealing with provisions designed to grant absolute (“fair and equitable treatment” clause) and relative (“Most Favoured Nation” and “National Treatment” clauses) standards of treatment to foreign investors. After that, most treaties include a series of clauses defining expropriation. A final clause introduces the dispute settlement scheme, which could either be state to state or investor to state.

In addition, the analysis found a series of particular clauses present in some contracts but not in all of them. For instance, Argentina is exceptional in terms of the rights granted to foreign investors – recognizing portfolio investments and allowing for investor’s differentiation (following the special agreement previously signed with Italy and Spain)

In general terms, there are not so many exceptions. Most of the clauses followed a similar structure, beyond partners and regions. When looking at the particular BITs more in detail the picture changes. There are some clauses that only appeared in Latin American BITs, and other clauses only present in those signed by Asian countries.

It should also be kept in mind that there was a local legal framework for FDI (Parra, 1996). In general terms the new framework put pressure on DCs to augment FDI protection. But also new legislation extended liberalization. Although market friendly policies expanded worldwide, some countries transformed their laws less than others. In this sense, most Asian countries maintained very restrictive regulations towards foreign investors during the period considered. To some extent, this is still the case in China, India, Indonesia, Philippines, Taiwan (Province of China), and Vietnam. By contrast, FDI regulations were relaxed in (South) Korea in the aftermath of the crisis.

In what follows, the study introduces a general and particular analysis. Firstly, the BITs clauses are assessed individually as separate dependent variables. Secondly, the analysis goes to the particular clause.

3.1 General clauses in BITs: is there any difference?

In order to analyze BIT differences, clauses were scrutinized for almost six hundred treaties, including: definition of investor and investment; investor's treatment and protection; expropriation and compensation clauses; transfer conditions; and those related to the dispute settlement scheme. For instance, in terms of investor's treatment and protection we considered whether each specific agreement granted: a) fair and equitable treatment; b) MFN treatment; c) national treatment; d) some exceptions to the above clauses (for instance, because the presence of customs unions or free trade agreements); e) Other exceptions to the MFN and NT clauses.

a) Investment definition [^{definition}_{590 x 9}]

The definition of investment is among the key elements determining the scope of the application of rights and obligations under international investment agreements. The definition may also be central to the jurisdiction of the tribunals established pursuant to investment agreement since the scope of application (*rationae materiae*) may depend on the definition of investment. However, there is no single definition of what constitutes foreign investment.

Earlier investment agreements followed a narrow approach towards investment, and preferred to enumerate the transactions covered by these agreements. Modern agreements adopt a broad definition of investment –including direct and portfolio investments (see a detailed list in the annex).

According to UNCTAD's definition and following common practice, 8 specific items were identified plus the inclusion of 1 line for those treaties showing no specification at all.

- Movable and immovable property, which covers tangible property. Some BITs enumerate other property rights such as mortgages, liens, pledges, usufructs and similar right
- Shares, stock and other kind of participation in companies
- Claims to money or to any other performance having a financial value, which suggests that investment includes not only property but also certain contractual rights.
- Intellectual Property Rights, which may include trademarks, patents, copyrights, goodwill, technical processes, and, know how
- Business concessions under public law, including concessions to search for, cultivate, extract or exploit natural resources. Also, rights to engage in economic and commercial activities conferred by law and by virtue of a contract.
- Re-invested funds
- Goods that, under a leasing contract, are place at the disposal of a lessee
- Activities associated with investments, such as the organization and operation of business facilities, the acquisition, exercise and disposition of property rights including IPR / IPR such as copyrights, trademarks, patents, and industrial designs
- No specific list

Table 4: BITs - Most common investment definition

Concept	Frequency	Percent
a) <i>Movable and immovable property</i>	579	98,14 %
b) <i>Shares</i>	579	98,14 %
c) <i>Claims to money</i>	579	98,14 %
d) <i>Intellectual Property Rights</i>	557	94,41 %
e) <i>Business concessions under public law</i>	573	97,12 %
f) <i>Re-invested funds</i>	25	4,24 %
g) <i>Goods under a leasing contract</i>	19	3,22 %
h) <i>Other activities associated with investments</i>	24	4,07 %

Notes: figures relates to the presence of the attribute (value equal to 1)

b) Investment treatment and protection

Most Favored Standard (MFN) means that a host country must extend to investors from one foreign country the same treatment it accords to investors from any other foreign country in like circumstances. Thus, the foreign investor can take advantage of the highest standard of treatment provided to a country in any BIT to which the host country is a party. It potentially applies to all kinds of investments, although some exceptions are common place – as those related to free trade areas, or custom unions.

The vast majority of BITs do not include binding provisions concerning the admission of foreign investment, meaning that the MFN clause applies only to the post-entry phase. However, a number of [new] agreements (particularly, those initiated by the US and Canada) expanded the MFN clause to the pre-entry phase.

From the information above, one might predict that “the biggest the presence, the most liberal the policy followed”. In other words, for those countries that followed a liberal approach, the MFN standard qualifies as an inherent part of their development policies (UNCTAD, 1999).

A special mention deserves the National Treatment clause. By virtue of this clause, foreign investors are given the same treatment as domestic ones, so wiping away the foundation of infant industry protection. Paradoxically, in US BITs special treatment is granted to several (strategic) sectors, bypassing this clause.

Table 5: BITs – Investment Treatment & Protection

Concept	Frequency	Percent
a) <i>Fair & Equitable Treatment</i>	581	98,4 %
b) <i>MFN</i>	583	98,7 %
c) <i>NT</i>	410	67.9 %
d) <i>Exceptions (Customs Union, FTAs, others)</i>	41	92.6 %
e) <i>Other Exceptions</i>	7	1.3 %

Surprisingly, on a detailed look it appears that an important share of BITs is not granting this type of treatment (32%), whereas almost all of them confer MFN treatment to foreign investors (98,7%).

c) Expropriation [E^{definition}_{590 x 3}]

The expropriation of property by Government can result from legislative or administrative acts that transfer title and physical possession (also known as direct taking). But governments can also take property by other “indirect” means. However, this last remains very difficult to distinguish, rising the moral hazard in both investors and host states¹⁴. Most BITs recognize the first type of expropriation, whereas the second is present just in few.

Once the expropriation has been [approved] and made, it is time to compensate the investor. Capital exporting states usually take the position that the Hull standard of prompt, adequate and effective compensation should be met. This requires the payment of full market value as compensation, speedily and in convertible currency. Some developing countries have taken the position that the payment of “appropriate compensation” would be sufficient. Nevertheless, recently the use of Hull formula has received increasing support – as showed by the BITs included in the sample¹⁵.

Accordingly, BITs expropriation clause might be acknowledged by the presence of the following three clauses: a) For a public purpose on a non-discriminatory basis in accordance with the law and against compensation / fair and equitable compensation b)

¹⁴ There are plenty of cases of foreign investors showing this kind of behaviour at NAFTA. But, also the Argentina crisis gives rise to some opportunistic trends (Stanley, 2004).

¹⁵ China might qualify as an exception. Among the several treaties signed, it included a variety of standards on compensation. For instance, with Australia (1988) it includes the Hull formulation, whereas with France (1984) it refers to the appropriate compensation.

Compensation - real value, including interests. Without delay & freely transferable; c) indirect expropriation

Table 6: BITs - Expropriation

Concept	Frequency	Percent
a) <i>For a public purpose</i>	588	99,7 %
b) <i>Compensation – Real Value & Without delay</i>	588	99,7 %
c) <i>Indirect expropriation</i>	22	67.9 %

A related clause relates to reimbursement. The analysis listed 7 different items usually included plus one option for those treaties not introducing any sort of list. Among the items, the most commonly included are:

Table 7: BITs – Reimbursement clauses

Concept	Frequency	Percent
a) Initial capital and additional amounts to maintain or increase an investment	342	57.1
b) Returns, interest, dividends and other current incomes	525	88.9
c) Funds in repayment of loans	519	87.1
d) Proceeds from total or partial liquidation of investment	513	86.9
e) Payment for compensation / expropriation	322	56.7
f) Payments arising out of the settlement of an investment dispute	56	9.5
g) Earnings of nationals of the other Contracting Party who works in connection with an investment in the territory of the one Contracting Party	419	71.1
h) Royalties, fees	289	48.9

Notes: figures relate to the presence of the attribute (value equal to 1)

d) Dispute Settlement

Among the array of new rules and commitments, the new scheme introduced a new international system of dispute settlement that allowed investors to directly sue host states¹⁶. This became the real innovation, not only by recognizing rights to foreign investors but by agreeing to give them a forum where to redress alleged wrongs. Dispute resolution is a standard part of almost all BIT treaties and a key factor at the investor's decisional matrix. This helps to explain why, for a vast majority of legal scholars, establishing a DS scheme became BITs' essential purpose.

But, while some treaties permit parties either to litigate their BIT claims before national courts or arbitral tribunals, other limit the acceptable dispute resolution

¹⁶ In the past, foreign investor's actions were limited either to sue the local government at the domestic courts, or to ask their home government to negotiate diplomatically on their behalf.

mechanisms to arbitral tribunals. Moreover, some BITs require the exclusive use of national procedures and remedies, others require the prior exhaustion of domestic remedies in the host country before recourse to international dispute settlement systems, and there are some that allow foreign investors to direct their claims at international arbitral courts from the outset. In order to evaluate these differences, a DS tree was constructed for each country in the sample.

The vast majority of DS provisions in BITs began with a clause (1st node) specifying that partners (investors and home country) might first negotiate amicably amongst them. Next, if dispute cannot be settled the DS game could either continue at local courts or international [arbitral] tribunals, without delay or after a certain period (3 or more months). In all cases, the second node could be solved cooperatively (following the agreement between the investor and the host country) or according to investor’s selection. To some extent, the first alternative replicates a “soft-Calvo” doctrine, in the sense that disputes should be settled firstly before national courts. Once this alternative is explored, foreign investors are set free to use some type of international DS mechanism. But, some countries (notably Indonesia) only allow investors to go until international bodies after exhausting the national alternatives. Finally, a few BITs (basically, older ones) also include a diplomatic solution. Under the second alternative, foreign investors are entitled to directly set its disputes with the host country before international fora. Although local courts might be accepted, investors could opt between that option and the different arbitral alternatives at hand [ICSID, ICSID AF, Ad-Hoc UNCITRAL, ICC, etc.). Alternatively, some treaties accord investors a direct access to a DS scheme. This alternative may be classified as investor – friendly.

As a consequence of the above differentiation, countries in Latin America are more open to international courts.

Table 8: BITs Tree – Latin America differentiation

	Argentina	Bolivia	Chile	Costa Rica	Ecuador	El Salvador	Guatemala	Honduras	Nicaragua	Panama	Paraguay	Peru	Uruguay	Venezuela
Total	43	11	31	12	14	13	8	6	15	12	13	25	22	20
1) Negotiations - Settled Amicably	43	11	31	11	11	11	7	5	13	12	10	22	22	17
2) if dispute cannot be settled, both parties	15	5	1	1	2	0	1	0	3	3	2	13	11	3
3) if dispute cannot be settled, investors	30	5	30	11	9	11	7	5	10	10	8	9	11	17
4) International Arbitration - Directly	0	1	0	0	2	2	0	0	2	0	3	0	0	0
5) International Arbitration - After exhaustion LC	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6) Diplomatic	0	1	0	0	1	0	0	1	0	0	0	2	0	0

In contrast, most Asian countries might be less enthusiastic.

Table 9: BITs Tree – Asian differentiation

	Cambodia	China	India	Indonesia	Malaysia	Korea	Lao PDR	Philippines	Singapore	Taiwan	Thailand	Vietnam
Total	13	62	21	42	29	76	8	23	15	4	30	21
1) Negotiations - Settled Amicably	13	59	21	37	25	66	7	21	10	4	25	21
2) if dispute cannot be settled, both parties	4	55	15	9	2	49	1	4	10	0	9	6
3) if dispute cannot be settled, investors	9	10	3	30	23	26	5	16	0	4	16	14
4) International Arbitration - Directly	0	0	0	0	1	1	1	2	1	0	0	0
5) International Arbitration - After exhaustion LC	0	0	14	0	2	5	0	0	4	0	7	0
6) Diplomatic	0	16	0	3	2	8	1	1	0	0	0	1

A more detailed analysis is included at the annex (after introducing two graphs), where it differentiates each principal node (2 and 3) according at the time the claim could be settled at courts. In the case both parties can initiate the dispute, timetable is as follows:

- Without delay
- After 3 months
- After 6 months
- After 9 months
- After 12 months
- After 18 months

In case investors are the single entitled to initiate the dispute, timetable is as follows:

- Without delay
- After 3 months
- After 4 months
- After 5 months
- After 6 months
- After 9 months
- After 12 months

- After 18 months

In both cases, an array of tribunals is present, including: local courts, ICSID, ICSID AF, Ad-Hoc UNCITRAL; and, other Ad-Hoc Tribunals + ICC.

e) Duration

Most of the BITs included in the analysis shows a 10 years period, with or without an automatic renewal for a similar period at the expiration date. However, some treaties signed to last perpetually (30 BITs).

Table 10: BITs - Duration

Duration (years)	Frequency	Percent	Cumulative
5	23	3.94	3.94
10	427	73.12	77.05
15	101	17.29	94.35
20	19	3.25	97.60
30	2	0.34	97.95
100 (indefinite)	12	2.05	100.00
Total	584	100.00	

3.2 BITs particular clauses or where the differences lie

a) Investment definition

On the one hand, one of the few exceptions to the MFN clause at Argentina’s BITs relates to the treatment promised to those investors coming under the special agreement signed with Spain and Italy. Therefore, instead of preserving some policy space, the asymmetries granted by Argentina to foreign investors merely introduced some privilege for one group over another.

But also Argentina stand outs as being one of the few countries to recognize portfolio investment among the items qualifying as “investment” – after its introduction in the BIT signed with the US.

On the other hand, one of the few exemption introduced by Chile relates to the capital movement safeguard imposed in the 1990s by the government in order to prevent short term movements in the capital account (1 year wall). Consequently,

Chilean BITs only recognize investment promotion and protection for those investors staying longer.

- b) Investment treatment and protection plus bilateral treaty scope – A sign of distinction coming from Latin America & Asia plus Indonesia’s investment law.

There are several ways in which restrictions could be introduced in the agreement.

In some cases, restrictions are just introduced in the scope clause. For instance, all Indonesia BITs state that investment has to be previously admitted by the government – in accordance with Foreign Investment Law N° 1/1967. For example, at the Indonesia- Malaysia BIT (Article X - Applicability for this Agreement), the parts agree that “ *this agreement shall apply to investment by investors of Malaysia in the territory of the Republic of Indonesia which have been previously granted admission in accordance with the Law N° 1 of 1967 concerning Foreign Investment and any law amending or replacing it*”. Similarly, at the Australia – Indonesia BIT (Article III – Scope of the Agreement), the parts agree that “*Investments by investors of Australia in the territory of the Republic of Indonesia which have been granted admission in accordance with the Law N° 1 of 1967 concerning Foreign Investment or with any law amending or replacing it*”.

In other cases, the agreement recognizes the requirement to pursue some approval procedure. In the article 2 of the China - Thailand BIT “ *The benefits of this Agreement shall apply only in cases where investments of the nationals and companies of one Contracting Party in the territory of the other Contracting Party have been specifically approved in writing by the competent authority of the latter Contracting Party*”. Furthermore, in the annex of the BIT agreement with Belgium-Luxembourg it states that “*Investment projects which may be approved by the Committee [Thailand], are those which have the following characteristics: a) investment using mainly local contents, b) Import substitution, c) labor intensive; d) export oriented, e) promoted investment such as pharmaceuticals, electronics, telecommunications, etc.; f) transfer of know-how and technology to Thai nationals*”.

Also restrictions may relate to foreign ownership participation, in the form of a threshold level – which varies for each specific industry. As an example, most of India’s BITs define companies as meaning *"any corporation, firms and associations incorporated or constituted under the law in force in the territory of either Contracting Party, or in a third country if at least 51% of the equity interest is owned by investors of that Contracting Party, or in which investors of that Contracting Party control at least 51% of the voting rights in respect to shares owned by them"*.

But, also in some BITs signed by Korea specifically mention the possibility of asymmetric treatment among investors [local and foreign] if that was previously recognized by law. As for example, at the article 10 of the Korea – Pakistan BIT *"The provisions of this agreement are subject to the laws and regulations of each Contracting Party in regard to foreign investment and to any distinction that these laws and regulations provide between the local investors of one Contracting Party and the investors of the other Contracting Party having investments in the territory of the former Contracting Party"*. Similarly, in Thailand – Korea BIT states that exceptions could be admitted when *"[granted] to a particular person or company of the status of a "promoted person" under the laws of Thailand on the promotion of investment"* (article 8, numeral d).

As in the BIT signed with Australia, it is stated: *"For the purposes of this Agreement, a company is regarded as being controlled by a company or by a natural person. If that company or natural person has the ability to exercise decisive influence over the management and operation of the first mentioned company, specifically demonstrated by way of: (i) ownership of 51% of the shares or voting rights of the first mentioned company, or (ii) the ability to exercise decisive control over the selection of the majority of members of the board of directors of the first mentioned company."*

In Australia – China BIT, the agreement states that *"a) Each contracting party shall encourage and promote investment in its territory by national of the other CP and shall, in accordance with its law and investment policies applicable from time to time, admit investments, 2) Each CP reserves the right to refuse to admit the investment of any company of the other CP if nationals of any third country control such company, or if has no substantial business activities in the territory of the other CP, 3) this agreement*

shall not affect the right of a CP to allow or prohibit the making of investment within its territory by nationals of a third country.

Sometimes, the majority of shares are required in order to settle a dispute before international courts. As an example, Malaysian bilateral agreements with Kazakhstan, Kyrgyz, Mongolia, Norway, Peru, Spain, UAE and UK "*A company which is incorporated or constituted under the laws in force in the territory of one CP and in which before such a dispute arises the majority of shares are owned by investors of the other CP shall in accordance with Article 25.2.b of the (ICSID) Convention be treated for the purpose of this Convention as a company of the other CP*".

Exceptions are also present among Latin American countries. Surprisingly, Chile came out as one of the leading examples: its mining sector is almost closed to foreign investors, in such a way that any activities related to this sector are subjected to a Presidential Decree.¹⁷

Finally, in various BITs signed by former communist countries declare the protection [to investors] after some date in the past (i.e.: after the collapse of the regime)¹⁸.

c) Expropriation

Recent BITs signed by US include the indirect expropriation (or takings) clause.

In the case of China, expropriations shall be carried out under domestic due process of law and, on a non-discriminatory basis.

d) Dispute Settlement – The China exemption

China was very prudent when drafting the dispute settlement (DS) clauses in their BITs, as the evidence suggest. Early BITs signed by China required that all

¹⁷ See, for example, Chile-Brazil BIT, where it declares that: "*de acuerdo con lo dispuesto en el artículo 19 N° 24 de la Constitución Política de la República y los artículos 7° y 8° del Código de Minería, la exploración y explotación de los hidrocarburos, líquidos y gaseosos, sólo se puede ejecutar directamente por el Estado o por sus empresas, o por medio de concesiones administrativas o de contratos especiales de operación, con los requisitos y bajo las condiciones que el Presidente fije para cada caso, por Decreto Supremo*".

¹⁸ In the present analysis, the exception goes in hand to those countries belonging to the Asia group (China and Vietnam), comprising also those countries that became independent along the decolonization process (Indonesia)

substantive claims were required to resolve before national courts¹⁹. Recourse to international arbitration was only available where the dispute concerned the amount of compensation to be paid for expropriation after conditions precedent as to negotiation and resort to local remedies has been satisfied. In other words, only after the local authority had determined the existence of an expropriation could the foreign investor initiate arbitration under the relevant BIT to determine the amount of compensation.

This could help explain why the country has no cases before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) or other international arbitration bodies - although they hosted a large amount of FDI inflows. Surprisingly, reliance on national courts systems and limited access to arbitration has not stopped investors from making substantial investment in China – suggesting that investors are keen to gain a place in a developing market.

However, and despite its attitude towards incoming investors, a China originated investment in Peru initiated a claim recently.

To some extent that might be in line with China recent move towards international standards, after a new [second generation] BITs consented to the unconditional submission to international arbitration of all disputes between investors and a contracting state (Rooney, 2007). The first to include such a clause was the treaty between China and Botswana.

A similar statement could be found in the Korea – Russia BIT, allowing investors to claim before the UNCITRAL tribunals just in case of disagreement over expropriation or reimbursement²⁰.

e) Other Clauses – Industrial “Policy Space” and beyond

In this part, we introduce those clauses that prevent host countries to introduce some kind of policy favoring local firms and home production. Among those

¹⁹ See Agreement between the Government of the People's Republic of China and Government of the Kingdom of Denmark Concerning the Encouragement and Reciprocal Protection of Investment (December 1986) art. 8, providing that if a dispute is not settled by negotiation, the dispute shall be “submitted to the competent court of the Contracting Party accepting the investment but permitting the amount of compensation resulting from expropriation to be determined through international arbitration (available at http://www.unctad.org/sections/dite/ia/docs/bits/china_denmark)

²⁰ The agreement made at Moscow (December 14, 1990), was signed by the government of former URSS.

considered, we look at differences in the following clauses: entry & sojourn; pre and post establishment investment treatment; and, performance requirement.

Its inclusion in the particular rather than in the general part, has to do with its specificity: most of the considered contracts do not mention (or do mention) this particular clause. Being so rarely observed it renders statistical testing impractical. Additionally, we also consider some other specific clauses as transparency, environmental or cultural exemptions granted in the new BITs initiated, among others, by Canada.

To begin with, ban on performance requirements are being imposed by the US²¹ and Canada²² new BITs model. However, surprisingly some DCs are also introducing this type of requirement, as showed by El Salvador²³ and the Dominican Republic²⁴. It also appears among the investment agreements recently initiated by Japan²⁵. Nevertheless, specific bans on PR are rarely observed – just 23 BITs among 590 observed include a ban on PR.

Table 11: BITs – Performance Requirements

	Frequency	Percentage
0 – Absent	567	96.1
1 - Included	23	3.9
		100.0

As an example of US ban, the BIT signed with Bolivia bans the following actions:

- i) To achieve a particular level or percentage of local content, or to purchase, use or otherwise give a preference to products or services of domestic origin or from any domestic source

²¹ US BITs with: Argentina (1992); Bolivia (1999); Ecuador (1993); El Salvador (1999); Honduras (1995); Nicaragua (1995); Panama (2000); and, Uruguay (2005).

²² Canada BITs with: Costa Rica (1998); El Salvador (1999); Panama (1996); Uruguay (1997); and Venezuela (1996).

²³ Along with the above mentioned with US and Canada, El Salvador included a PR ban clause in its agreements with Nicaragua (1999); Peru (1996); and, Korea (1998).

²⁴ As seen in the BIT signed with Ecuador (1998).

²⁵ Japan is a newcomer in the bilateral field. In terms of this clause, it come along the BITs signed with Korea (2002); Vietnam (2003).

- ii) To limit imports by the investment of products or services in relation to a particular volume or value of production, exports or foreign exchange earnings
- iii) To export a particular type, level or percentage of products or services, either generally or to a specific market region
- iv) To limit sales by the investment of products or services in the Party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings
- v) To transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative or tribunal or competition authority to remedy an alleged or adjudicated violation of competition law
- vi) To carry a particular type, level or percentage of R&D in the Party's territory

In the case of Canada, Article VI in the Canada-Panama BIT states that : Neither CP may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment":

- i) To export a given level or percentage of goods;
- ii) To achieve a given level or percentage of domestic content
- iii) To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- iv) To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- v) To transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor,

except when the requirement is imposed or the commitment or undertaken is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of the competition laws or acting in a manner not inconsistent with other provisions of this Agreement.

Lastly, in the BITs signed by Korea and El Salvador (article 3) and Japan (article 9), it prohibits any imposition as:

- a) Export a determined type, level, or percentage of goods or services, in general terms or towards a specific market;
- b) Reach a fixed degree or percentage of the national context
- c) Acquire, utilize or grant preference to goods or services of national origin or of any internal source;
- d) Relate in any form the volume or value of imports with the volume or value or export, or with the amount of the entry of foreign exchange, associated with such investment;
- e) Restrict in its territory the sale of goods or services which such investment produces or provides, relating in any manner such sales to the volume or value of its production and its exports, or to the profits in foreign exchange generated; or
- f) Transfer to a natural or judicial person, in its territory, technology, productive process or other reserved knowledge, except when the requirement is imposed by a judicial or administrative tribunal

Where the following are exclusive in Korea/Japan BIT:

- g) To locate headquarters of that investor for a specific region or the world market in its territory (Only in BIT with Japan).
- h) To achieve a given level or value of R&D in its territory
- i) to hire a given level of its nationals,

- j) to supply or more of the goods that the investor produces or the services that the investor provides to a specific region or the world market, exclusively from the territory of the former CP

The appearance of a pre-establishment requirement is not widespread, but, again, increasingly popular among the new BITs originated at the US and Canada.

Table 12: BITs – Pre & Post Establishment

Value	Frequency	Percent	Cumulative
0 – Absent / no data	106	18.1	18.1
1 – Only Post	474	80.7	98.8
2 – Both, Pre & Post	7	1.2	100.0
	587	100.0	

Finally, the entry & sojourn clause is included by 53 BITs (from a total of 588).

4. Some [preliminary] conclusions

There is a growing concern about the effects exerted by globalization on developing countries. For those with a critical vision, the effects are poorly beneficial. The vision becomes more pessimistic when considering the effects introduced by the new global rules. Certainly, the new institutional architecture introduced during the past few years has diminished the policy space for development. But, to make those new rules account for wrongdoing at the local level is incorrect.

International rules are highly important and necessary. Moreover, development economists have long recognized the importance of institutions in order to provide incentives for growth and development. Unfortunately, this vision was largely rejected until recently by the mainstream, and also by quite a few developing countries. For the former, institutions began to be recognized only after the structural adjustment failed (Meier, 2001). Until then a “one-size-fits-all” approach prevailed (Rodrik, 2004). The approach among DCs was to accept this new institutional scheme as a panacea. In the process of transformation involving the departure from the industrialist and highly bureaucratic development model, most countries gave a welcome recognition to this new market oriented approach. However, there were exceptions. Firstly, some countries decided not to sign any treaty at all - Brazil. Secondly, a further choice for the participants was not to sign an investment agreement with the US - none of the Asian countries considered in the present sample signed any agreement with the US, strategy which sounds in line with Dani Rodrik’s suggestion to avoid such commitment²⁶ (Rodrik, 2004)

A system of bilateral investment treaties emerged under these circumstances. With doubts on local government’s commitments and disbelieving of judicial power autonomy, international pressure was initiated in order to introduce “impartial and well functioning institutions”.

²⁶ “[T]here remains much scope for coherent industrial policy, especially if countries do not give up policy autonomy voluntarily by signing up for BITs with USA”. D. Rodrik (2004).

The above reflects one vision of foreign investment, in terms of external financing from a balance of payments perspective. This view tends to promote foreign investment aiming at a large volume of inflows, taking a “*the more the better*” point of view. It could be argued that this approach was adopted by most Latin American countries in the 1990s. The underlying idea is that the mere presence of foreign investment produces benefits that favor national growth and development. The danger here is that host governments limit their foreign investment policy to opening the economy, liberalizing, privatizing and deregulating, as measures to attract foreign investment. This can lead to speculative business practices and predatory negotiating strategies with host Government (ECLAC, 2004). But, the “*race to the bottom*” approach was not followed by all developing countries, and not even by all Latin American countries²⁷.

The other view focuses primarily on foreign direct investment from a strategic perspective, as the Asian experience highlights. This emphasizes the quality of investment flows, in particular, as regards impacts, such as the transfer and assimilation of foreign technology, the training of national human resources, the construction of local production linkages, and national enterprise development. It generally assumes that the benefits are not automatic and specialized policies are required to obtain them. The danger here is that overly active or interventionist government policies may scare away potential investors.

Both perspectives can result in success or failure; however, the successful cases usually define national development priorities and the role of foreign investment in obtaining them. Therefore, some lessons could be derived regarding institutions and FDI.

Moreover, a different pattern is found in the BITs signed by Latin American and Asian countries and this might also be signaling a new Asian exception²⁸. In normative terms, such a differentiation might reinforce Gerschenkron (1962) statement, recently

²⁷ Besides the case of Brazil, Chile’s position is also worth mentioning. Following its interest to disincentive short term capital inflows, Chilean BITs introduced an exemption [at the expropriation clause], in order to allow for the capital control policy.

²⁸ The previous one highlights the differences in industrial policies followed by East Asian and Latin American countries (Amsdem, 1989; Wade 1990; Stiglitz, 1996, Lall, 2004).

acknowledged by the World Bank (2005)²⁹, that there is no institution that serves all countries, so individual country strategies should be examined in deep.

Furthermore, this kind of arrangement did not prevent Asian countries to profit from globalization; neither did it preclude multinational companies to enter the market. To some extent, BITs showed a limited impact on Asia's integration process (Sauvé, 2007) where the institutional framework looks relatively immature (Soesastro, 2005; Gill & Kharas, 2007).

Nowadays the picture looks totally different. Instead of being driven by market forces, institutions are increasingly shaping the Asian integration process – mainly by virtue of preferential trade agreements (PTAs) and free trade agreements (FTAs). The investment provisions included in the new Asian agreement schemes have tended to follow a progressive liberalization approach given the varying levels of development existing in the region. In other words, investors are now obtaining more concessions – most of them rejected under the BITs scheme signed in the 1990s (Kumar, 2007). However, exceptions persist under the new agreements scheme (Urata & Sasuya, 2007), suggesting that, to some extent, the “rules of the game” continue to be shaped according to development needs and strategies³⁰.

To sum up, instead of asking if Asian countries could offer to Latin American ones any lesson on industrial policy, this research seeks answers or lessons regarding institutional design. In this sense, this study can also assist Latin American countries to devise new strategies when negotiating BITs, in order to recuperate policy space. For the time being, the main policy advice that Latin American countries should hear is that the challenge for developing countries is to find the right balance between the promises offered by BITs and the loss of policy autonomy that they entail (UNCTAD, 2003).

²⁹ The World Bank (2005) “central message is that there is no unique universal set of rules...[and that we] need to get away from formulae and the search for elusive “best practices”.

³⁰ But, the move towards institutions does not mean just instant investment liberalization, neither at local or regional level nor a single path towards it. In early 2007 Thailand's government approved measures that limit foreign investors to holding no more than 50% of the shares or the voting rights in companies. In July 2007 Indonesia greatly expanded its “negative investment list” of local industries in which foreign investment is partly or wholly restricted. The new list will affect at least 338 business sectors, up substantially from 38 previously. Korea is likely to remain a difficult place to do business, reflecting residual hostility towards foreign ownership, continued lack of corporate transparency and persistent labour militancy. Last, but not least, China. This country has already established a defence mechanism, in the form of a “National Economic Security Review Mechanism, under which approval is required for some acquisitions (EIU, 2007)

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Annexes

✓ Treaties analyzed

Annex - Table 1: Latin America BITs

Country	BITs signed	BITs in force	Before 1990	1990s	Post 1990s	Analysed BITs	Analysed/BI Ts signed
Argentina	58	53	0	50	3	43	74,14%
Bolivia	24	18	0	18	0	11	45,83%
Brazil	14	0				5	35,71%
Chile	51	36	0	34	2	31	60,78%
Colombia	6	0				3	50,00%
Costa Rica	20	13	1	10	2	12	60,00%
Ecuador	28	21	2	17	2	14	50,00%
El Salvador	24	20	1	16	3	12	50,00%
Guatemala	14	4	0	2	3	8	57,14%
Honduras	9		0	5	1	6	66,67%
Nicaragua	18	11	0	8	3	15	83,33%
Panama	16	11	4	4	3	12	75,00%
Paraguay	24	19	2	17	0	13	54,17%
Peru	31	26	0	25	1	25	80,65%
Uruguay	29	21	5	13	3	22	75,86%
Venezuela	26	21	0	20	1	20	76,92%
Total	392	274	15	239	27	252	64,29%

Source: own elaboration

Annex - Table 2: Asian BITs

Country	BITs signed	BITs in force	Before 1990	1990s	Post 1990s	Analysed BITs	Analysed/BITs signed
Cambodia	16	6	0	5	1	12	75,00%
China	114	86	19	60	6	62	54,39%
India	56	44	0	32	12	21	37,50%
Indonesia	58	37	4	32	1	42	72,41%
Korea, South	80	68	16	37	15	76	95,00%
Lao, PDR	21	16	1	5	10	8	38,10%
Malaysia	66	42	14	27	1	28	42,42%
Myanmar	4	2	0	1	1		0,00%
Philippines	35	25	2	21	2	24	68,57%
Singapore	26	21	8	11	2	15	57,69%
Taiwan	22	14	0	13	1	4	18,18%
Thailand	38	31	4	15	12	30	78,95%
Vietnam	47	38	0	34	4	21	44,68%
Total	583	430	68	293	68	343	58,83%

Source: Own elaboration

✓ BITs Tree – Latin America countries

Annex - Graph 1: BITs Tree – Latin America countries

	Argentina	Bolivia	Chile	Costa Rica	Ecuador	El Salvador	Guatemala	Honduras	Nicaragua	Panama	Paraguay	Peru	Uruguay	Venezuela
Total	43	11	31	12	14	13	8	6	15	12	13	25	22	20
1) Negotiations - Settled Amicably	43	11	31	12	14	13	8	6	15	12	13	25	22	20
2) If dispute cannot be settled, both parties	15	5	1	1	2	0	1	0	3	3	2	13	11	3
2.1) Without delay	7	5	0	0	2	0	1	0	0	0	0	3	1	3
a) Local courts	7	1	0	0	0	0	0	0	0	0	0	3	1	1
b) ICSID	0	4	0	0	0	0	1	0	0	0	0	1	1	2
c) ICSID AF	0	2	0	0	0	0	1	0	0	0	0	1	0	2
d) Ad-Hoc UNCITRAL	0	5	0	0	0	0	1	0	0	0	0	0	1	1
e) ICC or other Ad-Hoc Tribunal	0	1	0	0	0	0	0	0	0	0	0	0	0	0
2.2) after 3 months	1	0	0	0	0	0	0	0	0	0	0	3	1	0
a) Local courts	1	0	0	0	0	0	0	0	0	0	0	1	1	0
b) ICSID	0	0	0	0	0	0	0	0	0	0	0	3	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2.3) after 6 months	7	0	1	1	2	0	0	0	3	3	2	7	9	0
a) Local courts	7	0	1	0	1	0	0	0	1	0	2	4	9	0
b) ICSID	5	0	0	1	2	0	0	0	3	0	1	5	1	0
c) ICSID AF	3	0	0	0	1	0	0	0	0	3	1	0	1	0
d) Ad-Hoc UNCITRAL	5	0	0	0	0	0	0	0	1	0	0	2	1	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	1	0	0	0	1	0
2.4) after 9 months	0	0	0	0	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2.5) after 12 months	0	0	0	0	0	0	0	0	0	0	0	1	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	0	0	0	0	0	0	0	0	1	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	1	0	0
2.6) After 18 months	8	0	1	0	0	0	0	0	0	0	1	3	9	1
a) Local courts	8	0	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	8	0	1	0	0	0	0	0	0	0	1	1	6	1
c) ICSID AF	7	0	0	0	0	0	0	0	0	0	0	0	0	1
d) Ad-Hoc UNCITRAL	7	0	0	0	0	0	0	0	0	0	0	2	5	1
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	1	0	5	0
3) If dispute cannot be settled, investors	30	5	30	11	9	11	7	5	10	10	8	9	11	17
3.1) without delay	2	1	0	0	1	2	0	1	1	2	0	0	1	3
a) Local courts	2	1	0	0	1	2	0	1	1	2	0	0	1	1
b) ICSID	1	0	0	0	0	1	0	0	0	1	0	0	0	3
c) ICSID AF	0	0	0	0	0	1	0	0	0	1	0	0	0	1
d) Ad-Hoc UNCITRAL	1	0	0	0	0	0	0	0	0	0	0	0	0	2
e) ICC or other ad-hoc	2	1	0	0	1	1	0	1	1	1	0	0	1	0
3.2) after 3 months	0	1	15	1	0	2	4	2	3	2	1	2	1	2
a) Local courts	0	0	14	1	0	1	4	0	2	1	1	1	1	0
b) ICSID	0	1	14	1	0	2	4	2	3	2	1	2	1	2
c) ICSID AF	0	1	2	1	0	1	1	1	2	1	0	0	1	2
d) Ad-Hoc UNCITRAL	0	1	8	1	0	1	1	2	2	1	0	2	1	2
e) ICC or other Ad-Hoc Tribunal	0	1	1	0	0	1	1	2	1	1	0	0	0	0
3.3) after 4 months	0	0	1	0	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	0	1	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	1	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
e) Ad-Hoc Diplomatic	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3.4) after 5 months	0	0	2	1	0	0	0	1	0	0	0	0	0	0
a) Local courts	0	0	2	1	0	0	0	1	0	0	0	0	0	0
b) ICSID	0	0	2	1	0	0	0	1	0	0	0	0	0	0
c) ICSID AF	0	0	1	0	0	0	0	1	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	2	0	0	0	0	0	0	0	0	0	0	0
e) Ad-Hoc Diplomatic	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3.5) after 6 months	27	3	12	9	9	8	3	3	6	6	7	7	10	12
a) Local courts	26	2	12	4	5	5	3	2	5	4	7	7	8	8
b) ICSID	24	2	12	8	9	8	3	3	6	5	7	7	10	12
c) ICSID AF	21	0	3	6	4	1	2	0	1	3	1	2	6	11
d) Ad-Hoc UNCITRAL	26	3	5	7	8	5	3	3	4	4	6	7	10	11
e) ICC or other Ad-Hoc Tribunal	2	0	0	1	1	0	0	2	0	1	1	0	1	0
3.6) after 12 months	0	1	0	0	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	1	0	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	1	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	1	0	0	0	0	0	0	0	0	0	0	0	0
3.7) After 18 months	2	0	0	0	0	0	0	0	0	0	0	0	0	0
a) Local courts	2	0	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	1	0	0	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	2	0	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4) International Arbitration - Directly	0	1	0	0	2	2	0	0	2	0	3	0	0	0
a) ICSID	0	1	0	0	2	2	0	0	2	0	3	0	0	0
b) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0	0	0
c) ICC	0	1	0	0	0	0	0	0	0	0	0	0	0	0
d) Stockholm Cours	0	1	0	0	0	0	0	0	0	0	0	0	0	0
e) Ad-hoc Tribunals	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6) Diplomatic	0	1	0	0	1	0	0	1	0	0	0	2	0	0

✓ BITs tree – Asian countries

Annex - Graph 2: BITs Tree – Asian countries

	Cambodia	China	India	Indonesia	Malaysia	Korea	Lao PDR	Philippines	Singapore	Taiwan	Thailand	Vietnam
Total	13	62	21	42	29	76	8	23	15	4	30	21
1) Negotiations - Settled Amicably	13	59	21	37	25	66	7	21	10	4	25	21
2) If dispute cannot be settled, both parties	4	55	15	9	2	49	1	4	10	0	9	6
2.1) without delay	0	3	1	2	1	34	1	4	0	0	4	1
a) Local courts	0	3	1	2	1	34	1	4	0	0	1	1
b) ICSID	0	0	0	0	0	0	1	3	0	0	4	1
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	1	0	0	0	1	3	0	0	1	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0
2.2) after 3 months	0	1	3	0	0	3	0	0	1	0	0	1
a) local courts	0	1	1	0	0	0	0	0	1	0	0	0
b) ICSID	0	1	0	0	0	3	0	0	1	0	0	1
c) ICSID AF	0	0	0	0	0	1	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	2	0	0	1	0	0	0	0	0	1
e) ICC or other Ad-Hoc Tribunal	0	0	1	0	0	1	0	0	0	0	0	0
2.3) after 6 months	4	45	13	3	1	34	0	1	9	0	5	4
a) Local courts	0	42	9	2	0	3	0	0	0	0	2	0
b) ICSID	3	5	13	3	1	34	0	1	9	0	3	3
c) ICSID AF	1	0	2	0	0	33	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	1	0	1	1	1	34	0	1	3	0	1	3
e) ICC or other Ad-Hoc Tribunal	1	6	0	0	0	30	0	0	0	0	0	0
2.4) after 9 months	0	0	0	0	0	1	0	0	0	0	0	0
a) local courts	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	0	0	1	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	1	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	1	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	1	0	0	0	0	0	0
2.5) after 12 months	0	29	0	3	0	2	0	0	0	0	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	16	0	3	0	2	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	2	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	16	0	1	0	2	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	18	0	0	0	2	0	0	0	0	0	0
2.6) After 18 months	0	0	0	3	0	7	0	0	0	0	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	3	0	7	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	7	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	7	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	7	0	0	0	0	0	0
3) If dispute cannot be settled, investors	9	10	3	30	23	26	5	16	0	4	16	14
3.1) without delay	0	0	0	1	0	0	1	0	0	0	1	2
a) Local courts	0	0	0	1	0	0	0	0	0	0	0	2
b) ICSID	0	0	0	1	0	0	1	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	1	0	0	0	1	2
e) ICC or other ad-hoc	0	0	0	0	0	0	0	0	0	0	0	0
3.2) after 3 months	2	1	0	2	14	7	1	3	0	4	6	3
a) Local courts	1	0	0	1	1	3	0	2	0	0	6	0
b) ICSID	2	1	0	2	14	6	0	3	0	0	5	3
c) ICSID AF	0	0	0	2	2	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	2	0	0	2	0	4	1	0	0	4	4	3
e) ICC or other Ad-Hoc Tribunal	1	1	0	0	0	0	0	0	0	4	0	0
3.3) after 4 months	0	0	0	1	0	0	0	0	0	0	0	1
a) Local courts	0	0	0	1	0	0	0	0	0	0	0	1
b) ICSID	0	0	0	1	0	0	0	0	0	0	0	1
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	1
e) Ad-Hoc Diplomatic	0	0	0	0	0	0	0	0	0	0	0	0
3.4) after 5 months	0	1	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	1	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0
e) Ad-Hoc Diplomatic	0	0	0	0	0	0	0	0	0	0	0	0
3.5) after 6 months	7	6	3	26	9	19	3	13	0	4	9	8
a) Local courts	5	3	3	26	5	19	0	12	0	0	6	6
b) ICSID	6	6	3	25	9	12	2	13	0	0	8	6
c) ICSID AF	0	0	3	0	1	12	0	13	0	0	3	0
d) Ad-Hoc UNCITRAL	7	1	3	10	6	12	2	13	0	0	7	8
e) ICC or other Ad-Hoc Tribunal	2	1	0	0	0	12	0	0	0	4	0	0
3.6) after 12 months	0	5	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	1	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	2	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	5	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0
3.7) After 18 months	0	0	0	0	0	0	0	0	0	0	0	0
a) Local courts	0	0	0	0	0	0	0	0	0	0	0	0
b) ICSID	0	0	0	0	0	0	0	0	0	0	0	0
c) ICSID AF	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-Hoc UNCITRAL	0	0	0	0	0	0	0	0	0	0	0	0
e) ICC or other Ad-Hoc Tribunal	0	0	0	0	0	0	0	0	0	0	0	0
4) International Arbitration - Directly	0	0	0	0	1	5	1	2	1	0	0	0
a) ICSID	0	0	0	0	1	5	1	1	1	0	0	0
b) ICSID AF	0	0	0	0	0	5	1	0	0	0	0	0
b) ICC	0	0	0	0	0	0	0	0	0	0	0	0
c) Stockholm Cours	0	0	0	0	0	0	0	0	0	0	0	0
e) Ad-hoc Tribunals	0	0	0	0	0	0	0	1	0	0	0	0
5) International Arbitration - After exhaustion LC	0	0	14	0	2	1	0	0	4	0	7	0
a) ICSID	0	0	14	0	2	1	0	0	0	0	0	0
b) ICSID AF	0	0	12	0	0	0	0	0	0	0	0	0
b) ICC	0	0	0	0	0	0	0	0	0	0	0	0
d) Ad-hoc Tribunals	0	0	13	0	0	0	0	0	0	0	0	0
e) other international body	0	0	2	0	0	0	0	0	4	0	7	0
6) Diplomatic	0	16	0	3	2	8	1	1	0	0	0	1

✓ BITs – Independent variables³¹

When accounting for differences between Latin American and Asian countries' BITs we look firstly at the effect of the usual explanatory factors such as the size of the economy (measured by population and GDP) and the institutional quality – proxy by some index of transparency. Another plausible explanation could relate to the development strategy followed in each region, indirectly implying a differentiation in the type of FDI attracted. Whereas in Latin America most of the incoming FDI aimed at the exploitation of natural resources (including investors attracted by the oil & gas privatization) and services (mainly due to the privatization program), in Asia most FDI flows were absorbed by the industrial sector (mostly, greenfield investment). In addition, relative negotiation power between governments and investors was likely affected by the amount of capital sunk (more stringent rules for Latin American countries given the larger amount of capital sunk in the receiving sector), or by the investor's country of origin. After leading with these factors, the research maps host countries' options and strategies at the negotiation table when signing BITs³².

Another independent variable included is the date of signature (Year). BITs were broken into three classifications - before 1990, from 1990 to 199, after 2000.

	Before 1990	1990 – 1999	After 2000	No data
N° of BITs	76	402	106	6
Share	12,9%	68,1%	17,9	1,0

At the moment, the model includes three independent variables: host country' market size, income, and, FDI inflows. Variables are being measured in the year of treaty signing – in order to model how they might be affecting negotiations. As in Chowla (2005), the first and third variables are measure using GDP in constant 2000 dollars, logged to reduce the skewness of the variable, whereas the secondly is measured as per capita GDP at average market rates in constant 2000 dollars. Figures were obtained from IMF and UNCTAD Database.

The model includes a series of dummies for signaling the region of both partners, following usual practices.

³¹ These variables are to be used at the time to construct and estimate the model.

³² Although, these group of explanatory variables rest to be included in the analysis – it might be introduced later, in order to discuss its explanatory power. However, the region variable might be working as a proxy, as long as is assume regions followed different growth models (Latin America: Natural Resource oriented; Asia: Industrialisation)