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How much do U.S. corporations know (and care) about bilateral investment treaties? Some hints from new survey evidence

by
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A remarkable number of countries have recently entered into bilateral investment treaties (BITs) as a means of protecting and promoting inward foreign direct investment (FDI). But do the treaties "work?" In exchange for giving up some measure of regulatory autonomy, host countries hope to receive increased flows of investment. Scholars have devoted substantial energy to examining whether this so-called "grand bargain" has in fact been realized. Most studies follow a common research design. The number of BITs that a state has signed are counted up, with the resulting independent variable regressed against country-level FDI flow data. Unfortunately, the results of these various and increasingly complex statistical exercises are inconsistent.[1] Some studies show that BITs can have massive positive impacts on foreign investment; others show modest positive impacts; others show no impact at all, or even a negative impact.

A small handful of scholars are attempting to move past this econometric stalemate by returning to the older, less sophisticated, but potentially more enlightening methodologies of surveys and interviews.[2] In a recent working paper, I presented results from a mail-based survey of general counsels in large U.S. corporations. General Counsels were targeted because it is unlikely that busy non-legal senior executives will be in a position to monitor or evaluate the highly technical and relatively inaccessible evolution of BIT jurisprudence. If investment treaties meaningfully

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1 For a valuable collection of the main studies, see Karl P. Sauvant & Lisa E. Sachs, eds. *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treatie, and Investment Flows* (New York: Oxford University Press, 2009).

2 See, e.g., Lauge Skovgaard Poulsen, "The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence", in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy, 2009-2010* (New York: Oxford University Press, 2010), ch. 14.

impact FDI, that influence is likely to flow into the corporation's decision-making process through the General Counsels' knowledge or appreciation of BITs as risk-reducing devices.

The survey was mailed to General Counsels in the top 200 U.S. corporations on the Fortune 500 list. 75 surveys were returned, a relatively respectable response rate given the nature of the respondents, who are, undoubtedly, exceedingly busy. Given the modest sample size, and given that I was able to focus only on General Counsels in U.S. corporations, the survey's results should be viewed as preliminary rather than definitive. Responses were received from corporations across the top 200, including four in the top ten, and included corporations from all major economic sectors.

The basic story is a somewhat surprising one given some claims in the existing empirical literature that BITs matter a great deal to foreign investors. General Counsels reported that they personally were relatively unfamiliar with BITs. On a five-point scale, ranging from "1" ("not at all familiar") to 5 ("very familiar"), the median response for General Counsels was only a "2", with only about 21 percent indicating high familiarity ("4" or "5").[3] General Counsels reported an identical median level of unfamiliarity with BITs by non-lawyer senior executives.[4] General Counsels did not view BITs as providing particularly effective protection against expropriation (median response of "3" on a 5-point scale where "5" means "very effective" and "1" means "not at all effective"), with only about 21 percent rating BITs as highly effective ("4" or "5").[5] They were even less impressed with BITs as an effective shield against adverse regulatory change (median response of "2", with no respondents selecting "5" and only 10 percent selecting "4").[6]

This latter result is intriguing, because classic expropriation has become an exceedingly rare phenomenon. If BITs have an important role to play in reducing investment risk (and thus in encouraging FDI), it is probably by reducing the risk of adverse regulatory change—so-called "regulatory expropriation." In fact, General Counsel's skepticism about the ability of BITs to protect against regulatory change is consistent with the jurisprudence of arbitral tribunals, which have so far refused to read an ambitious regulatory takings doctrine into the treaties. General Counsels also indicated that, on average, BITs are not an important consideration in the "typical" FDI decision (median response rate of "2" on the five-point scale, where "1" is "not at all important"),[7] and only four respondents reported that their company had declined to invest in a specific project because of the absence of BIT protections.[8] Interestingly, those four companies that said that a BIT had impacted a specific project spaned the Fortune 200 (two are in the top 10, one is in the 60s, and one is in the 170s) and included a variety of sectors. One is a defense-industries corporation; one is a natural resources company; one is a large manufacturing conglomerate; and one is a financial services company.

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[3] The question read, "How familiar are lawyers in your office with the basic provisions of Bilateral Investment Treaties (BITs)?"

[4] The question read, "How familiar are nonlawyer senior executives in your corporation with the basic provisions of BITs?"

[5] The question read, "In your view, how effective are international treaties like BITs at protecting foreign investments from expropriation by a foreign government?"

[6] The question read, "In your view, how effective are international treaties like BITs at protecting foreign investments from adverse regulatory change in the foreign country?"

[7] The question read, "How important is the presence or absence of a BIT to your company's typical decision to invest in a foreign country?"

[8] The question read, "To your knowledge, has your company ever declined to invest (or to consider investing) in a particular foreign project specifically because of the absence of a BIT?"

Given the small and geographically non-diverse sample, the survey results should certainly not be understood as saying that BITs never matter to investors when they decide whether and where to invest. Nor do they prove that BITs will not matter more to investors at some time in the future, as knowledge of BITs and confidence in the strength of their protections grow. BITs may indeed influence certain investment decisions. But my survey results suggest that they are unlikely to influence many others.

Of course, there are serious methodological challenges with surveys such as this one. But econometric studies of the links between BITs and FDI inflows have reached the point of diminishing returns. In order to provide a more certain answer to the question of whether BITs "work", researchers should re-focus their energies on exploring in more depth and with more sophistication how and why corporate knowledge and appreciation of BITs does—or does not—actually enter into the corporation's foreign investment decision-making process.

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The Vale Columbia Center on Sustainable International Investment (VCC), led by Dr. Karl P. Sauvant, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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