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Paradoxical Pacts: Understanding the BIT Phenomenonand the Rejection of a Multilateral Agreement on Investment

Natasha Marusja Saputo

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Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment

NATASHA MARUSJA SAPUTO

ABSTRACT

Beginning in the 1960s, lesser-developed countries ("LDCs") began a campaign to abolish customary international law's "Hull Rule," which required prompt, adequate, and effective compensation to foreign investors for expropriations. Paradoxically, shortly thereafter, many LDCs began to enter Bilateral Investment Treaties ("BITs") containing provisions very much like the Hull Rule and, in many cases, providing even greater protection to foreign investors. Since the 1990s, BITs have exploded. They now constitute the principle framework for the promotion and protection of foreign direct investment ("FDI"). To add another layer of paradox, while there is little substantive variation across BITs, both developing and developed States have consistently rejected attempts to create a comprehensive multilateral agreement on FDI. Nevertheless, the similarity of BIT provisions has led some to contend that BIT provisions may represent a sort of *de facto* multilateral agreement on FDI or, indeed, customary international law itself. This paper examines these paradoxes from a public choice perspective and ultimately concludes that when viewed from the public choice lens, preference of bilateral agreements over comprehensive multilateral agreements on FDI is not paradoxical—this explains why BITs have prevailed and will continue to do so in the future.

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I. INTRODUCTION

Beginning in the 1960s, lesser-developed countries ("LDCs") began a campaign to abolish customary international law's, "Hull Rule," which required prompt, adequate, and effective compensation to foreign investors for expropriations.[1] Paradoxically, shortly thereafter many LDCs began to enter Bilateral Investment Treaties ("BITs") containing provisions very much like the Hull Rule and, in many cases, providing even greater protection to foreign investors.[2] Since the 1990s, BITs have exploded.[3] They now constitute the principle framework for the promotion and protection of foreign direct investment ("FDI").[4] To add another layer of paradox, while there is little substantive variation across BITs, both developing and developed States have consistently rejected attempts to create a comprehensive multilateral agreement on FDI.[5] Nevertheless, the similarity of BIT provisions has led some to contend that BIT provisions may represent a sort of *de facto* multilateral agreement on FDI or, indeed, customary international law itself.[6]

This paper examines these paradoxes from a public choice perspective. Part II provides a brief historical overview of the BIT, including the

1. Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 267-68 (2008).
2. *Id.* at 268-69.
3. Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1554 (2008).
4. *Id.*
5. Elkins, *supra* note 1, at 266.
6. Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSAT'L L. 123, 129-30 (2003).

abolition of the Hull Rule and the emergence of the BIT as the primary vehicle for FDI.[7] Part III analyzes some of the leading theories attempting to explain the apparently paradoxical behavior of LDCs.[8] Using public choice insights, this Part argues that the LDCs perceived self-interest explains such behavior.[9] Finally, Part IV addresses the interaction between BITs and international law, arguing that bilateral FDI agreements are superior to a comprehensive multilateral agreement.[10] Moreover, the substantive similarity of BIT provisions does not alter this conclusion, nor should these similarities be regarded as establishing customary international law.[11] Ultimately, this paper concludes that when viewed from the public choice lens, preference of bilateral agreements over comprehensive multilateral agreements on FDI is not paradoxical—this explains why BITs have prevailed and why they will continue to do so in the future.

II. BIT OF HISTORY

The ability of a State to regulate, or even prohibit, foreign investment has long been understood to be an inherent part of State sovereignty.[12] Since there is no comprehensive multilateral agreement relating to foreign investment,[13] each State makes its own decisions regarding foreign investment. Such agreements can take the form of regional trade agreements involving multiple States such as the North Atlantic Free Trade Agreement ("NAFTA") or Bilateral Investment Treaties between two States.[14] BITs, contracts that establish the terms of investment between a "home" (investor), State's individuals, and companies, and a "host" (invested-in) State are far more common.[15] BITS premiered on the

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7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part IV.C-D.
12. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 83 (1994).
13. Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 101 (2005). While attempts to craft such an arrangement have been suggested, multinational corporations, which are the predominant players in FDI, are vehemently opposed to the idea. *Id.* at 98. However, States themselves have also been resistant to the idea as was evidenced by their failure to even agree whether to enter negotiations on the issue at the WTO Conference in Cancun in 2003. *Id.* at 102-03.
14. *Trade Agreements*, OFFICE OF THE U.S. TRADE REP., available at http://www.ustr.gov/trade-agreements (last visited Oct. 20, 2014).
15. Elkins, *supra* note 1, at 265.

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international investment stage in 1959,[16] and they now constitute the predominant legal instrument governing FDI.[17]

A. The Sinking of the Hull Rule

Prior to BITs, FDI was largely unregulated, subject only to the so-called "Hull Rule," a concept of customary international law, which provided that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore."[18] During the spate of nationalizations in the 1950s,[19] however, the Hull Rule came under fire from LDCs, which agitated for its abrogation before the United Nations.[20] LDCs sought a Declaration of a New International Economic Order[21] ("NIEO Declaration") recognizing the "[f]ull permanent sovereignty of every State over its natural resources and all economic activities . . . including the right to nationalization or transfer of ownership to its nationals."[22] Despite developed States' "very serious misgivings" about the NIEO Declaration's consistency with customary international law principles, a U.N. General Assembly Resolution passed by consensus.[23] Riding on the momentum from the NIEO Declarations, LDCs pushed for consideration of the Charter of Economic Rights and Duties of States ("CERDS").[24] Although "[h]ard negotiation [by developed States] removed much of the extreme language" of the NIEO Declaration from CERDS,[25] it did acknowledge the "right" of nationalization, subject to "appropriate" compensation."[26] Unsurprisingly, not a single developed

16. The first BIT was entered into on November 25, 1959 between West Germany and Pakistan. RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 1 (1995).

17. Elkins, *supra* note 1, at 265.

18. *Id.* at 267. *But cf.* Yackee, *supra* note 3, at 1565 (stating that there is disagreement about whether the Hull Rule was ever part of customary international law).

19. This includes the prominent nationalization of British oil interests in Iran and the nationalization of the Suez Canal in Egypt. Elkins, *supra* note 1, at 267.

20. *Id.*

21. *See generally* Declaration of the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974), *available at* http://www.un-documents.net/s6r3201.htm.

22. *Id.* at Art. 4(e).

23. Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908, 909 (1987). Notably, because of vehement opposition by developed States, the NIEO Declaration, despite its passage, was never implemented. Mosoti, *supra* note 13, at 113.

24. *See generally* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. Doc. A/Res/29/3281 (Dec. 12, 1974), *available at* http://www.un-documents.net/a29r3281.htm.

25. Denza, *supra* note 23, at 909.

26. *See* Charter, *supra* note 24, at Art. 2(c) (recognizing the right of a State "[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures . . . .").

State voted in favor of it.[27] Nevertheless, LDCs saw CERDS as legitimizing nationalization, and in the ensuing months LDCs "carr[ied] out systematic and widespread expropriation."[28] Compensation, however, was not regularly offered.[29] Moreover, even when it was, "it was neither prompt, adequate nor effective[,]" as had been the Hull Rule's standard.[30] In sum, although the Hull Rule did not create a particularly secure environment for FDI, its elimination made the world of FDI virtually lawless,[31] with Home State's investors subject to the whims of Host States in the event of nationalization or expropriation. Host States believed that they were entitled to both nationalize foreign investments and determine what, if any, compensation to provide.[32]

About this time, however, something strange occurred. The very same LDCs that had fought for the abolishment of the Hull Rule began to enter into BITs featuring provisions quite similar to the Hull Rule.[33] Indeed, in many cases these BITs created an even more stringent regime, requiring an explicit commitment by the governments of Host States to provide more substantive and procedural protections than the Hull Rule.[34]

Of particular significance was the standard BIT provision, which provided that any disputes would be submitted to international arbitration, typically either under the International Centre for Settlement of Investment Disputes ("ICSID") or *ad hoc* arbitration under the U.N. Commission on International Trade Law ("UNCITRAL").[35]

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27. Lowenfeld, *supra* note 6, at 124.
28. Denza, *supra* note 23, at 909.
29. *Id.*
30. *Id.*
31. *But cf. infra* Part III.E. (arguing that private investor-State agreements were enforceable under and protected by international law).
32. *See* Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), ¶ 4, U.N. Doc. A/5217 (Dec. 14, 1962) (stating that in the event of nationalization or expropriation "the owner shall be paid *appropriate* compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.") (emphasis added), *available at* http://www2.ohchr.org/english/law/pdf/resources.pdf [hereinafter Permanent Soverignty]; Permanent Sovereignty Over Natural Resources, G.A. Res. 3171 (XXVIII), ¶ 3, U.N. Doc. A/9030 (Dec. 17, 1973) (affirming that in the event of nationalization, the "State is entitled to determine the amount of *possible* compensation and the mode of payment . . . .") (emphasis added), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/282/43/IMG/NR028243.pdf?OpenElement [hereinafter Natural Resources]; Charter, *supra* note 23, at Art. 2(c) (stating that each State has the right to nationalize or expropriate foreign property and compensation should be paid "taking into account its [the nationalizing State's] relevant laws and regulations and all circumstances that the State considers pertinent" and that any controversy "shall be settled under the domestic law of the nationalizing State . . . ."), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement.
33. Elkins, *supra* note 1, at 269.
34. *Id.* at 268.
35. *Id.* at 269.

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While the U.N. Resolutions following the elimination of the Hull Rule recognized the possibility that Host States would agree to submit disputes to international arbitration, they certainly did not require it.[36] Indeed, the resolution contemplated that such disputes would be subject to the sole jurisdiction of the Host State.[37] Thus, the international arbitration provision in BITs represented significant ceding of power by the Host State.

Western European States were the first developed States to become parties to BITs with LDCs.[38] The reticence of the United States to enter into BITs was possibly due in part to its vehement adherence to the continued applicability of the Hull Rule and the fear that becoming a party to a BIT would indicate that FDI was not protected under customary international law via the Hull Rule.[39] Ultimately, however, the United States followed the lead of the Western European States.[40] By the mid-1980s most developed States with large multinational corporations, key players in FDI, "had nearly converged on a single treaty model" which was presented to LDCs on a "take-it-or-leave-it" basis.[41]

Today, distinct from other types of international law, the obligations imposed by international investment law (IIL) are not merely aspirational—they are directly enforceable under binding dispute resolution mechanisms.[42] Unlike customary international law, whose principles derive from long-standing, consistent State practice and the belief among States that such practice is obligatory (*opinio juris*), the rights and responsibilities under IIL are established by a State's *ad hoc* decision to contract for its citizens' benefit with a fellow State.[43] Entered into for the benefit of private

36. *See* Permanent Sovereignty, *supra* note 32, at ¶ 4 (stating that any dispute resulting from nationalization or expropriation would be subject to the jurisdiction of the host State but that "upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."); Charter, *supra* note 24, at Art. 2(c) (stating that disputes arising from nationalization or expropriation are subject to the domestic law of the host State "unless it is freely and mutually agreed by all States concerned that other peaceful means be sought . . . ."), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement.

37. Charter, *supra* note 24, at Art. 2(c).

38. Elkins, *supra* note 1, at 269-70.

39. *Id.* at 270-71. For a detailed discussion of possible reasons for U.S. hesitancy to enter into BITs, *see generally* Kenneth J. Vandevelde, *The BIT Program: A Fifteen-Year Appraisal*, 86 AM. SOC'Y INT'L L. PROC. 532 (1992).

40. *See e.g.*, Letter of Submittal of U.S.-Turkey Bilateral Investment Treaty from George P. Schultz, U.S. Secretary of State, to Ronald Reagan, U.S. President (Feb. 19, 1986) (stating that "[o]ur BIT approach followed similar programs that had been undertaken with considerable success by a number of European countries . . . ."), *available at* http://www.state.gov/documents/organization/43615.pdf.

41. Elkins, *supra* note 1, at 272.

42. Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law*, 38 GA. J. INT'L & COMP. L. 63, 64 (2009).

43. *Id.* at 66-7.

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investors, BITs are unique in international law because they are atypical in their enforcement—a breaching Host State may be readily haled before an international arbitral tribunal by an aggrieved investor.[44] Absent such a provision, to the extent that an investor could even bring claims directly against a Sovereign State, such suits would typically require filing in the host State's domestic courts—courts unlikely to treat the foreign investor favorably.[45] Only after the investor has exhausted local remedies (or has demonstrated that such an attempt would be futile), does the investor have the option of petitioning the Home State to "espouse" the claim, i.e., bring the claim on behalf of the investor.[46] Relief through espousal is entirely discretionary with the Home State, and the investor's interests may be subordinated to the Home State's foreign policy concerns.[47] Even if not subordinated, espousal entails ceding all control over the claim to the Home State, which "is free to settle or abandon the claim as it sees fit."[48] Importantly, this ceding of control over the claim means that the harmed investor does not necessarily receive payment of any recovery the Home State procures.[49]

B. Putting the BITs Together

Although every BIT is different, each generally contains four core components, including: (1) the definition of what transactions are covered; (2) the standard of treatment for investors of the Parties to the BIT; (3) the provisions relating to nationalization and expropriation; and (4) the dispute resolution mechanism.[50]

1. What BITs Cover

Most BITs have a broad definition of what constitutes an investment.[51] For example, the United States Model BIT defines "investment" to

44. *Id.* at 66.
45. *Id.* at 73.
46. *Id.* Notably, even under espousal, remedies are limited to those provided under the domestic law of the Host State. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 206 (4th ed. 2003).
47. Ryan, *supra* note 42, at 73.
48. *Id.*
49. While many States do turn over this compensation to the victim-citizens, this is not required. SLOMANSON, *supra* note 46, at 179. For example, when Iran espoused a claim on behalf of its citizens whose relatives had been killed when the United States shot down a commercial Iranian airliner in 1988, the United States agreed to settle the claim on condition that any compensation would be paid directly to the Iranian families, not the Iranian government. *See Iran-United States Claims Tribunal: Partial Award Containing Settlement Agreements on the Iranian Bank Claims Against the United States and on the International Court of Justice Case Concerning the Aerial Incident of July 3, 1988*, 35 I.L.M. 553, 553 (1996).
50. Mosoti, *supra* note 13, at 116 (describing the major provisions of BITS).
51. *Id.*

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include "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[52] The definition then goes on to provide an illustrative list of investments.[53] Not only are the definitions broad, they are regularly enforced by arbitration tribunals constituted to hear disputes arising under BITs.[54]

2. Non-Discrimination and Most-Favored-Nation Treatment

Customary international law requires a certain minimum standard of treatment for aliens;[55] however, it permits a certain level of discrimination against aliens.[56] BIT provisions calling for fair and equitable treatment, definable as providing only for this international minimum standard of

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52. UNITED STATES MODEL BILATERAL INVESTMENT TREATY (2004), *available at* http://www.state.gov/documents/organization/117601.pdf.

53. *Id.*

54. In-kind contributions of chattels have been determined to constitute an investment under a BIT with language similar to that of the US Model BIT. For example, in *Sedelmayer v. The Russian Federation*, the Tribunal found that an "in kind contribution of chattels" to the capital of the investment enterprise and vehicles and equipment constituted an investment under Article 1(a) of the Germany-USSR BIT, which contains language similar to the US Model BIT. Sedelmayer v. The Russian Federation, 2 STOCKHOLM ARB. REP. 39 (1998). A BIT provision defining investment broadly has been found to include intangible assets. In *M.C.I. Power v. Ecuador*, the Award Tribunal found that the definition of an "investment" under the BIT was broad and consequently, "intangible assets of accounts receivable, [and] the existence of an operating permit" would fall within that broad definition. *M.C.I. Power v. Ecuador*, ICSID Case No. ARB/03/6, at 36-37 (July 31, 2007), *available at* http://ita.law.uvic.ca/documents/MCIEcuador_000.pdf. The provision included several examples including "tangible and intangible property" which itself was followed by examples such as "mortgages, liens and pledges". (Award ¶161) *Id.* A contribution of capital to a commercial activity within the territory of the host State has been found to constitute an investment. Alcoa Minerals of Jamaica, Inc. v. Jamaica, ICSID Case No. ARB/74/2 (July 6, 1975) *described in* John T. Schmidt, *Arbitration under the Auspices of the International Centre for Settlement of Disputes (ICSID): Implications of the Decision on Jurisdiction in* Alcoa Minerals of Jamaica v. Jamaica, 17 HARV. INT'L L. J. at 90-109 (1976).

55. J.L. BRIERLY, THE LAW OF NATIONS 276 (Sir Humphrey Waldock ed., 6th ed. 1963). Even "if a state has a low standard of justice towards its own nationals," an alien is still entitled to the certain objective level of treatment required under international law. *Id.* at 278. While there are no precise rules governing the international standard, "[i]t is the standard of the reasonable state" with reasonableness judged in light of "notions that are accepted in our modern civilization." *Id.* at 279-80.

56. *Id.* at 278.

> In general a person who voluntarily enters the territory of a state not his own must accept the institutions of that state as he finds them. He is not entitled to demand equality of treatment in all respects with the citizens of the state; for example, he is almost always debarred from the political rights of a citizen; he is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law.

Id.

treatment[57] or can be interpreted to provide for greater protection.[58] However, many BITs afford foreign investors national treatment—which places the foreign investor on the same playing field as domestic investors—or contain a Most Favored Nation ("MFN") provision allowing a foreign investor the benefit of the most advantageous protections the Host State may offer or offer in the future to other foreign investors.[59]

3. Nationalization and Expropriation

"Nationali[z]ation poses the greatest threat to foreign investment."[60] Moreover, as a general matter, foreign investment is in the interests of both the Home State and the Host State.[61] However, the Home State risks having its citizens' property expropriated without compensation.[62] BIT provisions define circumstances when nationalization is permissible, for example, only permitting nationalization for public purposes, and only if compensation is paid.[63] Moreover, BITs provide a way for developed States to not merely obtain a promise of "appropriate compensation" but actually secure a promise of full compensation.[64]

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57. *See* UNITED STATES MODEL BILATERAL INVESTMENT TREATY, *supra* note 52, at Art. 5(2) (providing that fair and equitable treatment means the international minimum standard of treatment).

58. OECD, *Fair and Equitable Treatment Standard in International Investment Law* (Org. for Econ. Cooperation and Dev., Working Paper No. 2004/3, 2004) (examining the various approaches to the fair and equitable standard of treatment in international investment law), *available at* http://www.oecd.org/dataoecd/22/53/33776498.pdf.

59. *See* HANS W. BAADE et al., ESSAYS ON EXPROPRIATIONS 23-24 (Richard S. Miller & Roland J. Stanger eds., 1967).

> Non-discrimination is not a rule of customary international law. Otherwise, most-favored-nation provisions in commercial and other treaties would be superfluous or, by sheer volume, merely declaratory by now. Nobody claims that this is the case. Since states are free to decide with whom to trade, they must also be free to decide with whom to stop dealing—subject, of course, to as yet unexpired treaty obligations.

Id.

60. SORNARAJAH, *supra* note 12, at 239.

61. *See* Elkins, *supra* note 1, at 266 (describing increase in foreign direct investment).

62. SORNARAJAH, *supra* note 12, at 239.

63. *See e.g.*, UNITED STATES MODEL BILATERAL INVESTMENT TREATY, *supra* note 52, at Article 6(1)(a), (c) (providing that "[n]either Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization . . . except: (a) for a public purpose . . . on payment of prompt, adequate, and effective compensation").

64. *Id.* at Article 6(2). Compensation in the event of a nationalization or expropriation must:

> (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable.

Id. Notably, the United States Model BIT still includes the language of the Hull Rule calling for "prompt, adequate, and effective compensation." *Id.* at Art. 6(1)(c).

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4. *Investor-State Dispute Resolution*

The vast majority of BITs contain dispute resolution provisions requiring submission to an international arbitral tribunal in the event that the dispute cannot be resolved quickly between the parties. [65] While States are parties to BITs, disputes arising under BITs are usually between private investors and the host State, hence the term "investor-State" dispute."[66] It is important to note that BIT dispute resolution differs from trade dispute resolution under the auspices of the World Trade Organization ("WTO").[67] Although some BITs have State-State dispute settlement provisions, it is rare to have State-State FDI disputes settled, other than through diplomatic channels.[68] Conversely, States are members of the WTO and only States are called to account when disputes arise under the WTO framework.[69] Rather than compensation, the goal of WTO dispute resolution is to secure compliance by the member State with WTO rules. [70] Indeed, the WTO's Dispute Settlement Understanding, the legal text governing dispute settlement, emphasizes the *temporary* and *voluntary* nature of compensation.[71] Conversely, dispute settlement under BITs is predominantly between investors and States, and in the vast majority of cases, undertaken to obtain a binding monetary award.[72]

III. WHY BITS?

There are a number of theories set forth in order to explain the BIT paradox—why LDCs, flush with the hard won concessions of the NIEO Declaration and CERDS, decided to enter BITs with their significant constraints on nationalization and expropriation.[73] This Part examines five

65. *Id.* at Art. 24 (Submission of a Claim to Arbitration).

66. James Politi, U.S. Econ. & Trade Correspondent, Conference on the Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs (May 20, 2014, 9:00 AM).

67. Mosoti, *supra* note 13, at 121-27.

68. *Id.* at 122. However, when diplomatic efforts break down, then States may become parties to a contested case in front of the International Court of Justice. Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 GEO. WASH. INT'L L. REV. 2, 19 (2009).

69. Mosoti, *supra* note 13, at 125.

70. *Id.* at 126.

71. *See* WTO, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Art. 3.7 *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf ("The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a *temporary* measure pending the withdrawal of the measure which is inconsistent with a covered agreement.") (emphasis added) *and* Art. 22.1 ("Compensation and the suspension of concessions or other obligations are *temporary* measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time . . . Compensation is *voluntary* and, if granted, shall be consistent with the covered agreements.") (emphasis added).

72. Mosoti, *supra* note 51, at 125-26.

73. When considering the possible theories it is important to remember that while LDC's share many similar characteristics and interests, they do not constitute a homogenous unit. Thus, there could be various reasons behind any particular LDC's decision to enter into a BIT. Indeed, there are

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of the leading theories and explains how they fail to account for key public choice insights.

A. Opportunism

Naked opportunism, Professors Ryan Bubb and Susan Rose-Ackerman argue, drove not only the campaign to eliminate the Hull Rule, but also the willingness of LDCs to sign BITs soon thereafter.[74] By eliminating the Hull Rule, LDCs, many of which were newly decolonized, could reap financial benefits by expropriating foreign investments made during colonialism.[75] By entering BITs shortly thereafter, LDCs could reenter the FDI market.[76] The data supports this theory— at least in part—expropriations increased throughout the campaign to eliminate the Hull Rule in the 1960s, peaked shortly after the NIEO Declaration, and then nearly disappeared as LDCs began to enter BITs.[77] The fact that BITs were known prior to the 1960s further supports this theory; indeed, the first BIT was signed in 1959.[78] However, LDCs did not seek to enter into them until after much of the foreign investment from the colonial period was expropriated.[79] Yet, Bubb and Rose-Ackerman candidly acknowledge, many BITs applied retroactively.[80] In theory, expropriated colonial investments require compensation under these BITs.[81] Thus, a litmus test for the opportunism theory is how these expropriations were dealt with under these BITs.[82] Unfortunately, this empirical research remains to be done.[83] Until it is, the robustness of the opportunism thesis remains uncertain.

B. Investment Promotion and Protection

International legal scholar M. Sornarajah asserts, "the principal reasons for developing countries concluding such treaties is [sic] the belief that they will lead to greater investor confidence by dispelling any impression of risk

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innumerable subjective factors which are unknowable including the internal thought processes of those in positions of authority within the government. Nevertheless, the actions of States are arguably the best objective indication of their motivation and it is these objective indicators upon which the analysis of this paper is based.

74. Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT'L REV L. & ECON 291, 298-300 (2007).

75. *Id.* at 306.

76. *Id.*

77. *Id.*

78. *Id.* at 307.

79. Bubb, *supra* note 74, at 306.

80. *Id.* at 307.

81. *Id.*

82. *Id.*

83. *Id.* (stating that their suggestion still needs to be tested given the fact that BITs cover past investments and proposing further questions).

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associated with the country in the past."[84] Put simply, "these treaties are signed in the belief that they will result in the inflow of foreign investment."[85] Moreover, by signing a BIT, the LDC strengthens its relationship with the developed State in the hopes of obtaining "other benefits and favors" stemming from this relationship, such as increased foreign aid and national security cooperation.[86]

In support of the notion that BITs provided protection to FDI where there was none, Sornarajah notes that the volume of BITs refute the notion that they were simply codifications of customary international law.[87]

Rather, countries adopted BITs because there was no customary international law regarding protection for foreign investment.[88] The "confused state of the law" prompted States to enter BITs in order to create "clear and enforceable rules to protect and facilitate foreign investment."[89] In accord, Professor Jeswald Salacuse posits that LDCs entered BITs with a "dual objective of investment promotion and investment protection."[90]

This theory, while sound so far as it goes, fails to account for: (1) the fact that BITs continue to be entered into despite the, at best, inconclusive evidence as to whether they actually promote FDI;[91] (2) the long line of *pacta sunt servanda* jurisprudence holding States accountable to investors under private contracts;[92] and (3) how Brazil was able to throw off the LDC mantle to become an emerging economic powerhouse without ever having entered into a single BIT.[93] This article will further discuss the public

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84. SORNARAJAH, *supra* note 12, at 217.

85. *Id.*

86. Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 159 (2007).

87. SORNARAJAH, *supra* note 12, at 213.

88. *Id. But cf.* Yackee, *supra* note 3, at 1662 (arguing that agreements between private investors and States were protected under international law before, during and after the NIEO movement as evidenced by arbitral tribunal jurisprudence). *See also infra* Part III.E.

89. Salacuse, *supra* note 86, at 158-59.

90. *Id.* at 159.

91. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 115 (2005). However, the data on whether BITs directly impact FDI flows is mixed. *See* Yackee, *supra* note 3, at 1551-52 (finding no evidence to support the contention that BITs have any influence over FDI decisions); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, LSE RESEARCH ONLINE (May 2005), *available at* http://129.3.20.41/eps/if/papers/0411/0411004.pdf (suggesting there is evidence that BITs do increase FDI to LDCs); Mary Hallward-Dreimeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, (World Bank, Working Paper No. 3121), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf (suggesting that BITs have resulted in increased FDI flows); *Prospects for Foreign Direct Investment and the Strategies of Transnational Corporations*, UNCTAD (2005), *available at* http://www.unctad.org/en/docs/iteiit20057_en.pdf (suggesting that economic liberalization, of which BITs are only a single manifestation, increase FDI flows).

92. Yackee, *supra* note 3, at 1602-03.

93. Hallward-Dreimeir, *supra* note 91, at 9.

choice answers to these questions. However, they briefly suggest that: (1) even if the data is inconclusive as to whether BITs increase FDI inflow, they are perceived as doing so and thus, having a BIT at least does not hurt the prospects of increased FDI so while the BIT may not be a positive it is at least neutral with respect to increasing a State's inward FDI flows;[94] (2) many investors do not have the resources or leverage necessary to negotiate international arbitration clauses in order to secure such a neutral tribunal which would recognize *pacta sunt servanda*—these are international tribunals propounding this jurisprudence, not domestic courts and certainly not the domestic courts of Host States; and (3) Brazil is arguably an atypical example because of its vast economicresources and size and as the vast majority of other States are not so well-endowed they must do something else to attract FDI suitors to them.[95]

C. Economic Liberalization

Bilateral treaties, of course, require partners. Building on his explanation of why LDCs entered BITs, Sornarajah posits that developed States entered BITs out of a desire "to promote the free market and liberali[z]ation of the international economy."[96] BITs were liberalizing "not because they contained any norms on liberali[z]ation itself, but because of the belief that protection of foreign investment increased flows of foreign investment," which led to economic development.[97] Professor Jeswald Salacuse concurs, arguing that developed States, especially the United States, may have viewed "BITs as a means to facilitate liberali[z]ation of the economies of developing countries."[98] In addition, while this goal may not be explicit in the BIT itself, such motivation lies in the "background documents" of various BITs.[99]

Moreover, economic liberalization may also explain why LDCs began to enter into BITs.[100] Facially, the practice would demonstrate to developed States that LDCs were committed to liberalizing their economies and facilitating economic growth by throwing off government-planned economies in favor allowing the private sector to drive the economy.[101] This, in turn, would also make an LDC more attractive to international

94. Query whether the concessions the Host State makes in the BIT is too great a cost if the BIT hast little to no impact on increasing FDI inflows. *See* discussion *infra* Part IV.
95. *See* discussion *infra* Part IV.
96. SORNARAJAH, *supra* note 12, at 215.
97. *Id.*
98. Salacuse, *supra* note 86, at 160.
99. *Id.*
100. *Id.*
101. *Id.*

financial institutions, on whose assistance some LDCs depended.[102] Indeed, some international financial institutions required liberal economic policies, virtually forcing dependent LDC to sign BITs.[103] For example, at the same time LDCs began to sign BITs, the International Monetary Fund ("IMF") imposed new standards for its structural adjustment programs which required States seeking assistance to adopt national economic policies friendly to foreign private investment.[104] The World Bank also emphasized that States hoping to receive assistance should adopt liberal economic policies regarding foreign investment.[105] In essence, what the preferences and prerequisites of the IMF or World Bank amounted to was a condition on assistance—LDCs had to liberalize their rules on foreign investment before these financial institutions would do anything—and for LDCs these two were the only game in town.[106] Further forcing the LDCs' hand, the economic liberalization required by these financial institutions required capital in order to finance such a radical change, but the IMF and World Bank would not assist until institutions made these changes, thus requiring private investors.[107] Indeed, the World Bank refused to consider loans to developing States if private investors were willing to make similar loans on reasonable terms.[108] Thus, LDCs had to attempt to attract foreign investors before reaching out to the World Bank.[109] In sum, a confluence of factors lead LDCs to liberalize their economies: "the debt crisis, the abandonment of command economy models. . . the decline in official development assistance, and the internal economic restructuring demanded by international financial institutions."[110] This ideological shift in economic policy, notably the trend toward privatization, spearheaded by Margaret Thatcher and Ronald Reagan, began to gain ground with economists in LDCs who gradually began to see multinational corporations as an opportunity rather than a threat.[111]

Thus, the Economic Liberalization thesis, while an interesting theory, is incomplete because it fails to explain why LDCs were willing to undertake

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102. *Id.* at 159.
103. Asha Kaushal, Note, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 503-04 (2009).
104. *Id.* at 504.
105. *Id.* at 505-06.
106. *Id.*
107. *Id.* at 507.
108. Kaushal, *supra* note 103, at 507.
109. *See id.*
110. *Id.* at 502.
111. *See generally* SARA BABB, BEHIND THE DEVELOPMENT BANKS: WASHINGTON POLITICS, WORLD POVERTY, AND THE WEALTH OF NATIONS (2009) (chronicling the change in approach of the development banks and noting the special role of U.S. President Ronald Reagan and U.K. Prime Minister Margaret Thatcher).

binding international commitments under BITs when through national legislation that could easily be repealed the same result was reachable.[112] LDCs could have simply adopted national legislation purporting to liberalize their approach to foreign investment.[113] Such legislation would pay lip-service to the demands of IMF and World Bank.[114] However, because the State can change national legislation on a whim, investors would still be unlikely to invest. Thus, the LDCs could claim that despite their liberalization investors were still unwilling to invest—the two prerequisites to obtaining assistance from the IMF and World Bank.[115] Consequently, LDCs would be entitled to receive financial assistance without making binding and enforceable international law commitments.[116] The public choice explanation for the shortcomings of the Economic Liberalization thesis is that LDCs wanted to be an independent player in the global economic marketplace rather than a suckling dependent upon the teat of international financial institutions, which could continue to dictate the terms under which it provided nourishment.[117] Moreover, the reason for this change in approach was likely due to the influence of the Reagan-Thatcher economic policies whose success attracted the attention of LDC economic planners.[118] While entering into binding agreements did limit the whimsy of LDCs' economic policy it also promised greater independence and advancement than remaining a ward of the international assistance institutions ever would.[119] In short, Economic Liberalization did not require the adoption of BITs by LDCs.[120] Rather, LDCs chose to enter into BITs because binding commitments, while requiring LDCs to tie their own hands to a certain extent, portended to provide a greater pay-off in the future.[121]

D. Guzman and the Prisoners' Dilemma

By far the most popular explanation for the seeming paradoxical behavior of LDCs with respect to the BIT phenomenon is that of Professor Andrew T. Guzman, who identifies the "dynamic inconsistency problem"—the inability to follow through on a course of action without establishing a "commitment mechanism"—as a motivating force behind the BIT

112. *See* Salacuse, *supra* note 86, at 160.
113. *See id.*
114. *Id.* at 163.
115. Kaushal, *supra* note 103, at 506-07.
116. *See id.*
117. *See id.*
118. *See* Babb, *supra* note 111, at 78-83.
119. *See* Salacuse, *supra* note 86, at 160.
120. *See id.*
121. *See* Kaushal, *supra* note 103, at 506-07; Salacuse, *supra* note 86, at 160.

paradox.[122] Guzman's theory as to why as a group LDCs opposed the Hull Rule and fought for its elimination but individual LDCs were and are willing to sign BITs which offer even "greater protection tha[n] the Hull Rule ever did"[123] has been widely accepted and serves as a key premise of BIT studies.[124] States face a "dynamic inconsistency problem"—because a State is sovereign, it has the prerogative to change its laws self-servingly, regardless of the promises it may have previously made to attract the foreign investor.[125] A "commitment mechanism" is necessary to solve this problem—with a binding agreement like a BIT, the host State can "credibly bind itself to a particular set of legal rules w hen it negotiates with a potential investor."[126]

Notwithstanding the popularity of this explanation, Professor Jason Webb Yackee argues that it is fundamentally flawed because it rests on the false premise that international law does not offer any protection to the investor because international law does not require the State to honor its promises.[127] Put simply, Guzman's entire thesis is predicated on the assumption that *pacta sunt servanda*[128] is dead.[129] Notwithstanding this critique, examined in greater detail in Part II.E below, as Guzman's thesis is currently the leading theory, it merits careful attention.[130]

Elaborating on the "dynamic inconsistency problem," Guzman notes that in the absence of a binding commitment mechanism, the dynamic between the investor and the host State changes as soon as the foreign investment is made.[131] *Ex post* the Host State has an incentive to recant its promises.[132] Outright nationalization is not necessary, or desirable, as it will scare off future investors.[133] Rather, the Host State gradually extracts more value from the investment to the detriment of the investor by, for example, increasing the tax rate,[134] a process known as "creeping expropriation."[135]

122. Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 658 (1998).

123. *Id.*

124. *See e.g.* Neumayer, *supra* note 91, at 1567 (starting with the premise that BITs are the only way to guarantee FDI, finding that BITs do increase FDI flow to LDCs).

125. Guzman, *supra* note 122, at 658-59.

126. *Id.*

127. Yackee, *supra* note 3, at 1566-67; *See infra* Part II.E.

128. *Pacta sunt servanda*—promises must be kept—is a universally recognized rule of international law. *See* Vienna Convention on the Law of Treaties, preamable, Art. 26 (May 23, 1969), *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

129. Yackee, *supra* note 3, at 1566-67.

130. *See* discussion *infra* Part IV.E.

131. Guzman, *supra* note 122, at 658, 661.

132. *Id.* at 662.

133. *Id.* at 663-64.

134. *Id.* at 661-62.

135. *Id.* at 664.

The Host State knows that withdrawing from the investment would entail costs to the investor and that, given the investment itself is largely a sunk cost, it may still be more cost-efficient for the investor to remain in the Host State and countenance creeping expropriation—even though had these measures been in place *ex ante* the investor would not have invested.[136] The Host State pursuing such a course of action must engage in a careful balancing act, however, because if the Host State gets too greedy, and extracts so much value from the investment such that it outweighs the investor's cost of exit, then it becomes cost-effective for the investor to leave.[137] Guzman discounts, perhaps unreasonably, the reputational costs of creeping expropriation.[138] FDI is, of course, a repeat game.[139] And a LDC's reputation for creeping expropriation will damage its prospects for future foreign investments.[140] Yet reputation is a soft power mechanism—a binding mechanism ensuring a Host State will honor its FDI agreements is far more likely to increase FDI flows.[141]

Guzman emphasizes that the interests of LDCs as a group are different than the interests of LDCs as individual States.[142] As a group, LDCs would prefer to hold the line drawn in the NIEO Declaration and CERDS.[143] But on the individual level, given the dynamic inconsistency problem, a single LDC would gain a competitive advantage in foreign investment if it were willing to sign a BIT, as the LDC's willingness to enter a binding agreement would increase the amount of investment in that State.[144] Moreover, even if other LDCs enter BITs, reducing the competitive advantage gained by entry, it would still be in the next LDC's interest to enter a BIT, even though this entry will further erode the competitive advantage gained.[145] According to Guzman, this means that "regardless of what other countries are doing, a developing country has a strong incentive to be enthusiastic about signing a BIT."[146]

However, Guzman is explicit that while individual LDCs may benefit from this contract regime, LDCs as a group do not.[147] To gain a competitive advantage, an individual LDC will make concessions to make it more

136. Guzman, *supra* note 122, at 661-65.
137. *See id.* at 664-65.
138. *See id.* at 663-65.
139. *Id.* at 665.
140. *Id*.
141. Guzman, *supra* note 122, at 665-66.
142. *Id.* at 669.
143. *See id.* at 649-50, 672-74.
144. *Id.* at 669-70.
145. *Id.* at 670-71.
146. Guzman, *supra* note 122, at 670-71.
147. *Id.* at 671-72.

attractive than its competing LDCs.[148] And as more LDCs enter the FDI market, the size of the concessions will grow as well.[149] Economic theory predicts that each Host State will provide incentives to attract potential investors up to the point where the Host State will not receive a net gain from the investment.[150] Thus, the potential investor can "simply choose the location that offers the highest overall return."[151] While this may be the most efficient result, LDCs lose their ability to extract monopoly prices from a non-competitive market.[152]

Because of the loss of this monopoly power, Guzman opines, the BIT regime is less advantageous for LDCs as a group than the CERDS regime.[153] This is not to say that Guzman asserts that the CERDS regime is without flaws; indeed, he believes these flaws help explain the BIT paradox.[154] As a regime predicated on monopoly power, CERDS is susceptible to the particular problems of that economic order.[155] For example, the CERDS regime can be likened to a cartel facing the classic prisoners' dilemma—each host State had an incentive to "defect" and enter a BIT to gain a competitive advantage in attracting FDI.[156] Historically, of course, cartels have proven notoriously unstable, and a sprawling cartel with numerous members spread out geographically even more so.[157] Thus, despite the "collusive agreement" of CERDS, "[j]ust as members of a cartel may seek to defect from the cartel to increase their sales, individual LDCs embraced BITs as a way to compete for foreign investment."[158] By signing a BIT, an individual LDC gained an advantage over other LDCs—the problem (from the defecting LDCs' perspective) was that soon nearly all the LDCs were defecting—resulting in intense competition and a diminished value of the earlier defection.[159] Given this result, it may seem reasonable to assume that LDCs would be willing, even eager, to have a multilateral agreement on FDI to restore the cartel.[160] However, according to Guzman, just like the attempt by the CERDS cartel to bind its members depriving

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148. *Id.* at 671.
149. *Id.*
150. *Id.* at 671-72.
151. Guzman, *supra* note 122, at 672.
152. *Id.* at 672, 677.
153. *Id.* at 672-73, 677.
154. *Id.* at 673-74.
155. *See id*.
156. Guzman, *supra* note 122, at 678. Guzman asserts that the effect of the Hull Rule's elimination was tantamount to "an explicit agreement among all developing countries that they would not bid against one another for investment," i.e., they created a cartel. *Id.*
157. Michael Rauscher, *Cartel Instability and Periodic Price Shocks*, 55 J. ECON. 209, 212 (1992).
158. Guzman, *supra* note 122, at 678.
159. *See id.* at 688.
160. *See id.*

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them of the advantage of defecting, "[i]f an investment treaty binds all LDCs, no single country gains that advantage."[161]

Along similar lines, Professor Christopher Ryan contends that LDCs as a group could have been more successful at suppressing competition if they had formalized their *de facto* cartel.[162] Acting as "a unified negotiating block,"[163] Ryan suggests, LDCs would have been able to formalize their cartel through the memorialization of a multilateral investment treaty with terms favorable to the LDCs. Of course, LDCs did not take this path.

What Guzman's and Ryan's analyses fail to account for is the basic problem faced by all cartels—whether *de facto* or formalized—defection.[164] Even if LDCs were able to negotiate a multilateral treaty with terms more favorable to the LDCs, and key developed States were willing to accept these terms, this would not solve the Prisoner's Dilemma.[165] Admittedly, the incentives for individual LDCs to "defect" from a codified cartel regime might be reduced (as punitive measures could be included in the treaty to deter defection), but the temptation could not be eliminated.[166] The only way to prevent defection effectively would be to declare as void all international investment agreements executed by a State Party outside the comprehensive multilateral investment agreement.[167] The provision would have to require that such *ultra vires* agreements be unenforceable in the courts or arbitral tribunals seated in State Parties.[168] However, it is highly unlikely that a sufficient number of States, let alone the major State players in FDI would agree to such a draconian (yet effective) provision, because everyone wants the possibility of securing a better deal.[169] In short, developed States would be unlikely to enter such a treaty because developed States would get better deals and more advantageous terms outside the multilateral framework.[170] Similarly, LDCs would be loath to pass up on an opportunity to attract more FDI by offering sweeter deals to investors.[171]

While Guzman's analysis is spot-on with respect to the nature of cartels and the Prisoners' Dilemma, he assumes that LDCs undertook the

161. *Id.* at 679.
162. *See* Ryan, *supra* note 42, at 77.
163. *Id.*
164. *See* Guzman, *supra* note 122, at 678; Ryan, *supra* note 42, at 65-66.
165. *See* Guzman, *supra* note 122, at 666-67; Yackee, *supra* note 3, at 824.
166. *See* Guzman, *supra* note 122, at 678 (stating that there is temptation to defect to better compete for foreign investment).
167. *See id.* (stating that without BIT's it was impossible for any single country to defect from the agreement).
168. *See id.* at 660 (describing enforcement by an arbitral tribunal as a prerequisite for a credible commitment).
169. *See id.* at 666-67.
170. *See* Bubb, *supra* note 74, at 307-09.
171. *See id.*

elimination of the Hull Rule and the establishment of a New International Economic Order in order to benefit themselves as group.[172] If this is the underlying assumption, then defecting from the regime is certainly paradoxical.[173] However, public choice provides a more realistic assumption—actors do what will be ultimately beneficial to them as individuals.[174] By eliminating the Hull Rule, individual LDCs' subsequent offers to provide prompt, adequate, and effective compensation seemed even more attractive and were only slightly more onerous than their previous obligation under the Hull Rule.[175] Conversely, if the Hull Rule had remained in place, individual LDCs would have had to make especially drastic concessions in order gain an advantage in FDI.[176] Thus, while the elimination of the Hull Rule could be said to benefit LDCs as a group, public choice analysis strongly suggests that this collective action was undertaken to secure an individual advantage at the expense of the collectivity in the long-run.[177]

E. Debunking Guzman

As noted above, Yackee contends that Guzman's thesis is flawed in that it assumes that *pacta sunt servanda* is dead.[178] That is, Guzman's thesis is predicated on the myth that when the Hull Rule was eliminated, States were free to break their contractual promises because these contracts were not enforceable under international law.[179] To debunk the myth, Yackee proffers a long, uninterrupted line of international jurisprudence holding that agreements between private investors and States are presumptively enforceable under international law.[180] Consequently, LDCs should not have to adopt BITs in order to attract FDI because even in the absence of a BIT, contracts between private investors and States are enforceable under international law.[181] Moreover, contractual provisions for international arbitration of disputes guarantee neutral enforcement and adequate compensation.[182] As a threshold matter, it should be noted that Yackee's argument makes sense. France has no BIT with the United States, the

172. *See* Guzman, *supra* note 122, at 666-67, 678-79, 688.
173. *See* Yackee, *supra* note 3, at 1564; Guzman, *supra* note 122, at 669.
174. *See* Guzman, *supra* note 122, at 666-67.
175. *See id.* at 642-43.
176. *See id.* at 671-72.
177. *See id.* at 666-67.
178. Yackee, *supra* note 3, at 1566-67.
179. *Id.*
180. *Id.* at 1551.
181. *Id.* at 1552.
182. *Id.* at 1551-52. While national laws could also provide for redress, investors are often hesitant to litigate domestically due to a concern that the courts of the host State will be biased in favor of the State. Ryan, *supra* note 42, at 73.

United States has no BIT with the United Kingdom, Italy, or New Zealand, and the United Kingdom has no BIT with Spain, Italy, or Austria.[183] Admittedly, these are developed States, not LDCs. Nevertheless, these States' promises are consistently enforced—a paradoxical state of affairs if *pacta sunt servanda* is actually dead.[184] The standard rejoinder to this seeming paradox is that developed States have stable legal institutions and a good rule of law record.[185] This explanation, however, does not explain why developed States would leave so much to chance.[186] If there is truly no effective protection for private investor-State agreements under international law, and given the enormous amount of wealth involved in FDI transactions between developed States, it is unlikely that these States would simply trust that, because promises made in the past were honored, they would be honored in the future.[187]

Returning to Yackee's argument, what troubles him most about Guzman's account is that it assumes that the elimination of the Hull Rule meant that investment agreements between private investors and States were completely without protection and States were free to breach them with impunity.[188] Guzman writes that even if there were protections for contract rights under international law, they are so ambiguous and unreliable to be of "little or no value to the investor."[189] According to Yackee, that this contention is wrong is bad enough, that it is highly influential is worse.[190] Adopted by other scholars, it has skewed BIT research.[191] This, in turn, has led LDCs to believe there is no way to exit the BIT regime—as individual investor-State agreements have no protection under international law, they are not a viable alternative.[192]

"[D]eveloping countries are perfectly capable of offering credible guarantees to investors on a case-by-case basis," Yackee asserts, "without the need to enter into BITs."[193] Yackee rests his argument on *pacta sunt servanda*, averring that this principle has enjoyed consistent and uninterrupted application in international investor-State disputes before, during, and after the NIEO movement.[194] As early as 1958, arbitral tribunals applied the concept of *pacta sunt servanda* to agreements between

183. Guzman, *supra* note 122, at 680.
184. Yackee, *supra* note 3, at 1551.
185. Bubb, *supra* note 74, at 296.
186. *See id.*
187. *See* Guzman, *supra* note 122, at 665.
188. Yackee, *supra* note 3, at 1566-67.
189. Guzman, *supra* note 122, at 660.
190. Yackee, *supra* note 3, at 1568.
191. *Id.*
192. *Id.* at 1568-69.
193. *Id.* at 1569.
194. *Id.* at 1569-96.

private investors and States.[195] That year, of course, marked the landmark award in *Saudi Arabia v. Arabian American Oil Company* ("*ARAMCO*"),[196] followed by the equally important 1963 award in *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* ("*Sapphire*").[197] The arbitral tribunal in *ARAMCO* rejected Saudi Arabia's claims that State sovereignty precluded arbitration, given that Saudi had voluntarily agreed in advance to arbitrate.[198] The tribunal explained, "Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting the concessionaire irretractable rights."[199] And while the tribunal looked to the text of the agreement as the primary source of law to be applied, it also cited general principles of law regarding the binding nature of contracts between States and private investors.[200] Similarly, in *Sapphire*, the sole arbitrator explicitly held that "it is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship."[201] Yackee contends that many more pre-CERDS private investor-State arbitrations occurred, but, because the International Chamber of Commerce decided them, they remained confidential.[202]

The most revealing evidence that *pacta sunt servanda* survived CERDS is the timing of several seminal arbitration awards, such as the Libyan Trilogy, rendered at the same time (or just after) CERDS was passed.[203] Significantly, although different arbitrators rendered the awards of the Libyan Trilogy, each reached the same conclusions on the same grounds, upholding similar contract provisions breached under similar

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195. Yackee, *supra* note 3, at 1578-79.

196. 27 I.L.R. 117 (Arb. Trib. 1958).

197. 35 I.L.R. 136 (Arb. Award 1963).

198. *ARAMCO*, 27 I.L.R. at 152.

199. *Id.* at 168.

200. *Id.* General principles of international law were often applied by tribunals regardless of the parties' agreement. *See* V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Root of Three Ideas*, 47 INT'L & COMP. L.Q. 747, 750 (1998) (applying general principles of law recognized by "civilised nations" to enforce the contract even though "the parties had not agreed on the application of public international law or the general principles of law."); *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, 1 INT'L & COMP. L.Q. 242, 251 (1952) (applying "principles rooted in the good sense and common practice of the generality of civilised nations—a sort of "modern law of nature" " because the agreement did not contain a choice of law provision); Earl Snyder, *Protection of Private Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L.Q. 469, 492 (1961) (citing *Ruler of Qatar v. International Marine Oil Company, Ltd.*, in which the sole the sole arbitrator, determined that absent a choice of law provision, the parties must have intended for the agreement to be governed in accordance with "the principles of justice, equity and good conscience").

201. *Sapphire*, 35 I.L.R. at 181.

202. ICC decisions remain confidential unless the parties to the dispute agree otherwise. Yackee, *supra* note 3, at 1582-83.

203. *Id.* at 1584-85.

circumstances.[204] In the *British Petroleum*[205] award, the arbitrator found that Libya's nationalization measures constituted "a fundamental breach of the BP Concession as they amount to a total repudiation of the agreement and the obligations of the Respondent [Libya] . . . . Further the taking by [Libya] . . . clearly violates public international law."[206] In the *TOPCO*[207] award, the arbitrator found that

> recourse to general principles is to be explained not only by the lack of adequate legislation in the State considered . . . . It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties.[208]

The arbitrator was explicit that *pacta sunt servanda* was an essential part of these general principles, stating, "No international jurisdiction whatsoever has ever had the least doubt as to the existence, in international law, of the rule *pacta sunt servanda: it has been reaffirmed* vigorously."[209] The *LIAMCO*[210] arbitrator likewise found general principles of law support enforcement of contracts between private investors and States even in the event of nationalization[211] and that even CERDS requires good faith in the

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204. *Id.* at 1584.

205. BP Exploration Co. (Libya) Ltd. v. Gov't of the Libyan Arab Republic, 53 I.L.R. 297, 329 (Arb. Trib. 1974).

206. Yackee, *supra* note 3, at 1576-78 (citing *BP*, 53 I.L.R. at 329).

207. Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Gov't of the Libyan Republic, 17 I.L.M. 1 (Arb. Trib. 1978) [hereinafter *TOPCO*].

208. *Id.* at 28 ¶ 42. It is notable that the agreement contained a choice of law provision for the agreement to be governed by Libyan law and the principles of international law. *Id.* at 26 ¶ 38. However, the arbitrator found that such a provision merely created a hierarchy with Libyan law at the top, followed by the general principles of international law, and finally general principles of law. *Id.* Specifically,

> [i]n the present dispute, general principles of law have a subsidiary role in the governing law clause and apply in the case of lack of conformity between the principles of Libyan law and the principles of international law: but precisely the expression 'principles of international law' is of much wider scope than 'general principles of law', because the latter contribute with other elements (international custom and practice which is accepted by the law of nations) to constitute what is called the 'principles of international law'.

Id. at 27 ¶ 41.

209. *Id.* at 34 ¶ 51.

210. Libyan Am. Oil Co. v. Gov't of the Libyan Arab Republic, 20 I.L.M. 1 (Arb. Trib. 1981) [hereinafter *LIAMCO*].

211. *Id.* at 72. Like the agreement in *TOPCO*, the agreement in *LIAMCO* also had a choice of law provision calling for the application of Libyan law insofar as was consistent with the principles of international law. *Id.* at 64. The arbitrator found that Libyan law was in conformity with the "compendium of legal precepts and maxims, universally accepted in theory and practice . . . [including] inter alia, the principles of the sanctity of property and contracts . . . [and] the obligation of

fulfillment of international obligations.[212] Summing up the Libyan Trilogy, Yackee concludes, "*pacta sunt servanda* was quite alive and well even in the period immediately following the CERDS resolution."[213]

The 1982 arbitral award in *Aminoil*[214] further bolsters Yackee's conclusion. The tribunal flatly rejected Kuwait's contention that *jus cogens*[215] precluded a State from entering binding contracts regarding natural resources over which the State has permanent sovereignty, writing: "This contention lacks all foundation."[216]

The Tribunal attributed "full value to the fundamental principles of *pacta sunt servanda*"[217] and concluded that while Kuwait's nationalization was valid,[218] it still had to provide "appropriate compensation" to the private investor in accordance with Resolution 1803[219] and Kuwaiti law.[220] At the time, the case was regarded by at least one scholar as "the most significant arbitral contribution in recent years to the law of state contracts and state responsibility for these contracts."[221] More recently, Judge Rosalyn Higgins[222] has cited the Libyan Trilogy and the *Aminoil* awards to

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compensation in the case of expropriation . . . ." *Id.* at 72. *See also id.* at 105-13 (describing the principle of sanctity of contracts generally and within the Islamic and Libyan contexts).

212. *Id.* at 109-110.

213. Yackee, *supra* note 3, at 1591 (emphasis added).

214. Kuwait v. American Indep. Oil Co. (Aminoil), 21 I.L.M. 976 (Arb. Trib. 1982).

215. *Jus cogens* or a peremptory norm of international law is a "norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 128, at Art. 53.

216. *Aminoil*, 21 I.L.M. at 1021 ¶ 90; *see also* AGIP Company v. Popular Republic of the Congo, 21 I.L.M.
726, 72-89 (Arb. Trib. 1982) (acknowledging the "right . . .[of a]. . . State to nationalize" but finding that when a State violates contract provisions to which it voluntarily agreed, under international law, it must compensate the private investor "for the damage it suffered from the nationalization") [hereinafter AGIP].

217. *Aminoil*, 21 I.L.M. at 1023 ¶ 97.

218. *Id.* at 1024 ¶ 102; 1027 ¶ 114.

219. Permanent Sovereingty, *supra* note 32, at Art. 4 (providing that in the event of nationalization or expropriation the investor "shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures . . . and in accordance with international law.").

220. *Aminoil*, 21 I.L.M. at 1032-33 ¶ 143. Notably, the Tribunal—like the arbitrator in *TOPCO*—expressed a preference for Resolution 1803 given its broad-based majority support and expressed reservations about the applicability of CERDS given its narrower base of passage on "divergent interpretations." *Id.*; *see TOPCO*, 17 I.L.M. at 52-56 ¶¶ 83-86 (discussing the applicability and weight of authority of the various United Nations General Assembly Resolutions and finding it significant that Resolution 1803 had passed with a broad base of support from both developing and developed States).

221. Pierre-Yves Tschanz, *The Contributions of the Aminoil Award to the Law of State Contracts*, 18 INT'L L. 245, 246 (1984).

222. Renee Dopplick, *Judge Rosalyn Higgins on Her Term as President of the International Court of Justice*, INSIDE JUSTICE (Apr. 8, 2009), http://www.insidejustice.com/intl/2009/04/08/asil_icj_rosalyn_higgins/. Judge Rosalyn Higgins of the United Kingdom has served on the International Court of Justice from 1995 and served as its President 2006-2009. *Id.*

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support her conclusion that "[t]he concept of permanent sovereignty over natural resources does not leave a state free to ignore contracts it has voluntarily entered into."[223]

While Yackee cites numerous cases to support his proposition, Guzman cites none.[224] This dearth of authority supporting Guzman's position is understandable, Yackee writes, as he is aware of "no awards or other decisions by international tribunals supporting Guzman's theory that CERDS allowed developing countries to breach contracts with impunity."[225] In sum, Yackee concludes that an unbroken string of jurisprudence establish that agreements between private investors and States "are, and have long been, strongly presumptively enforceable, with a duty to meaningful compensate in the event of breach" under international law.[226] In short, a BIT is not required to ensure the credibility of the commitment.[227]

Ironically, although Yackee's argument is compelling, it is also largely irrelevant to LDCs seeking to attract FDI.[228] Regardless of the baseline of enforceability of private investor-State agreements, because of the competitive market for FDI, LDCs have an incentive to enter into BITs.[229] To elaborate, whether private investor-State agreements are enforceable under international law after the elimination of the Hull Rule and the passage of CERDS, a cartel-like situation among LDCs nevertheless exists.[230] Moreover, the incentive to defect from the cartel remains because entering a BIT gives LDCs a competitive advantage in attracting FDI.[231] Not only do BITs offer greater security to the foreign investor, it reduces transaction costs.[232] In a single agreement, a BIT covers a wide range of transactions and agreements, something that is not possible with single contracts between particular private investors and a State.[233] Thus, the BIT is ideal for Home States who want to help their investors make money because a single BIT reduces the investors' transactions costs—as the Home State has done the bargaining, each investor does not have to negotiate a separate contract with the Host State.[234] Crucially, a BIT commits the Host

223. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 142 (1994).
224. *See generally* Guzman, *supra* note 122; Yackee, *supra* note 3.
225. Yackee, *supra* note 3, at 1603.
226. *Id.* at 1604.
227. *Id.* at 1569.
228. *Id.* at 1551.
229. Guzman, *supra* note 122, at 666-67.
230. *Id.* at 678.
231. *Id.*
232. *Id.* at 681.
233. *Id.* at 658-59.
234. Guzman, *supra* note 122, at 655.

State to binding arbitration, a potentially contentious provision, requiring separate negotiation for each individual contract.[235] Indeed, the ability to get investor-State disputes before a neutral (arbitral) tribunal is a key caveat of Yackee's assertion that such agreements are presumptively enforceable and violations are compensable under international law.[236] Absent an *ex ante* agreement to submit to binding international arbitration, however, such arbitration is unlikely to happen *ex post*.[237]

Indeed, what Yackee's analysis overlooks is that while there is a long line of jurisprudence recognizing *pacta sunt servanda* thereby holding States to their promises to investors, not all investors have access to the (arbitral) tribunals propounding this principle.[238] An investor would first have to negotiate a contract with a binding dispute resolution provision calling for international arbitration—a sensitive issue requiring bargaining power that smaller investors lack.[239] Thus, it is unsurprising that the line of *pacta sunt servanda* jurisprudence in investor-State arbitration derives from cases involving investors who were major oil companies with the necessary leverage to procure this neutral forum.[240] Conversely, BITs advantage the smaller investors in two major ways. First, BITs reduce the transaction costs of negotiations.[241] Second, by employing the State's weight to secure the more favorable forum for binding dispute resolution which smaller investors would not otherwise have the leverage to do.[242]

Thus, one of the contributions this paper makes is that it does not matter if Guzman or Yackee is correct.[243] Whether the elimination of the Hull Rule resulted in a complete lack of protection for investors, as Guzman argues, or whether *pact sunt servanda* still survives to hold States accountable under contracts, as Yackee contends, makes absolutely no difference.[244] This is because either way BITs constitute a competitive advantage in the FDI market for LDCs who are willing to sign them.[245] Quite simply the baseline is irrelevant because BITs offer something better

235. Mosoti, *supra* note 13, at 121-22.

236. *See* Yackee, *supra* note 3, at 1551-52 ("Th[e] jurisprudence demonstrates that could an investor show to the satisfaction of a *neutral, authoritative decision-maker*—typically, an international arbitral tribunal—that a state had breached a promise to the investor, the investor would almost certainly be awarded meaningful compensation.") (emphasis added).

237. Mosoti, *supra* note 13, at 121-22.

238. *Id.* at 100.

239. *See id.* at 121-22.

240. Yackee, *supra* note 3, at 1585.

241. Guzman, *supra* note 122, at 658-59.

242. *Id.* at 655-56.

243. *See infra* Part IV.

244. Guzman, *supra* note 122, at 642-43; Yackee, *supra* note 3, at 1570-71.

245. Guzman, *supra* note 122, at 655-56, 658-59.

for investors and thus, Host States anticipate an advantage in attracting FDI by entering into them.[246]

IV. BITS AND INTERNATIONAL LAW

It is uncontested that BITs dominate the FDI legal landscape.[247] However, consensus fades when the discussion turns to the mark BITs have made on international law.[248] Indeed, it is one of the more contentious issues surrounding the BIT phenomenon—the role of BITs in shaping international law.[249] This part provides a brief overview as to why States have not embraced a comprehensive multilateral agreement on investment, the reasons for why BITs are preferable to such a multilateral agreement, and why BITs should be neither regarded as a *de facto* multilateral agreement on investment, nor reflective of customary international law.

A. Why Reject a Multilateral Agreement on Investment?

States—developed and developing—have consistently refused to create an international framework regulating foreign investment.[250] The irony, international legal scholar Victor Mosoti observes, is that the core BIT provisions are nearly uniform across all BITs.[251] This *de facto* international framework significantly undermines States' ability "to intelligently object to a multilateral framework that encapsulates the standards they have already accepted at the individual state level through BITs."[252] Given the virtual uniformity of BIT provisions, and given that 178 States and autonomous regions (e.g., Hong Kong), are parties to at least one BIT (as of June 1, 2009),[253] the consistent refusal of States to create a multilateral agreement on investment seems paradoxical.

Despite this ostensible, well-documented paradox, there is little indication that States are willing to even begin to negotiate a comprehensive multilateral framework for international investment.[254] This raises at least

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246. *Id.* at 678.

247. *See supra* Part III. Indeed, a facetious author might remark that there are quite a bit of BITs about. This paper, of course, would never inflict such a dreadful pun on you, dear reader.

248. *See supra* Part III.

249. *See generally* Bubb, *supra* note 74.

250. *See* Victor Mosoti, *supra* note 13, at 132-33.

251. Mosoti, *supra* note 13, at 132.

252. *Id.*

253. As of June 1, 2009, the United Kingdom was a party to 102 BITs, France was a party to 101 BITs, and the United States was a party to 47 BITs. *Country-Specific Lists of BITs*, UNCTAD, http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 (last visited June 1, 2009).

254. Ria Kemper, *Foreward* to THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS 3 (2004). While the Energy Charter Treaty is perhaps best known for its investment protection provisions, it includes both trade and investment and notably, is limited to a single discrete sector. *Id.* Indeed, the oil companies that dominate the energy sector were such big players with so much sway that historically

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two questions—what advantage is to be gained through discrete bilateral agreements versus a comprehensive multilateral agreement? And what harms are avoided? There are two likely reasons for a State's reluctance to sign a comprehensive multilateral agreement on investment. First, the State will have to incur the additional transaction costs of negotiating a comprehensive multilateral treaty, which is greater than the costs of negotiating a single BIT.[255] Second, there is a natural hesitancy to surrender a perceived competitive advantage.[256] LDCs that are parties to numerous BITs have (or to be more precise, perceive that they have) a decided advantage over latecomers or LDCs with fewer BITs.[257] While a large number of LDCs are parties to BITs, not all of them are.[258] Thus, the BIT regime is to some extent a barrier to entry in the FDI market for LDCs because they have to be willing to incur the costs of negotiating individual BITs.[259] If the standard BIT provisions were suddenly universally applicable through customary international law or accessible through signing onto a multilateral agreement, this would eliminate the barrier to entry, thus allowing even more LDCs to compete for FDI.[260] Similarly, many developed States also have an incentive to preserve the BIT framework, as a comprehensive agreement could also increase the supply of FDI.[261] That is, by reducing the costs of entry through customary international law or a multilateral agreement, the supply of FDI may actually increase as developed States that were not participating in FDI (as unlikely as this seems) enter the market.[262] Of course, this would come at the expense of developed States who are currently participating in FDI.[263] Likewise, setting a floor of international rights *could* slow LDCs' race to the bottom, further reducing the profitability of FDI for developed States but only if there were an effective mechanism to prevent defection. [264]

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they did not rely on home State involvement or BITs at all. *Id.* Thus, there is good reason to believe that the Energy Charter Treaty, while a promising development, is *sui generis*.

255. *See* Mosoti, *supra* note 13, at 103. It is likely that these prior negotiations would simply be regarded as sunk costs and thus, have only a marginal impact on the reluctance of a State with numerous existing BITs to sign onto a multilateral framework. *See id.*

256. Guzman, *supra* note 122, at 686.

257. *Id.* at 674.

258. *Id.* at 640, n. 3.

259. *See* Mosoti, *supra* note 13, at 98-99. Admittedly, the barrier is much lower to negotiate a bilateral agreement than a multilateral agreement, nevertheless, the transaction costs of concluding such an agreement and the arguable need for an agreement itself is a barrier to entry.

260. *See id.*

261. *See id.* at 113.

262. *See id.* at 98-99, 101, 104.

263. Guzman, *supra* note 122, at 670.

264. *See generally id.* For example, a provision rendering void any investment agreement by States Parties made outside of the multilateral framework. However, although effective, such a draconian provision would be unlikely to be accepted because developed States would want the

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Of course, States—developed and developing—who are not participating in FDI have an incentive to enter a multilateral treaty.[265] Nevertheless, a viable comprehensive treaty requires the assent of the majority of States including those most involved in FDI.[266] Because those States who are actively participate in FDI—the vast majority—have strong incentives not to enter such a treaty, a comprehensive multilateral agreement on FDI is unlikely.[267]

B. Why Prefer Bilateral Agreements Within the FDI Context?

Although LDCs ceded the vast majority of the national control of foreign investment, they had gained by the NIEO Declaration and CERDS by entering into BITs, LDCs were ostensibly reluctant to enter comprehensive multilateral treaties because this would entail ceding even more national control over foreign investment.[268] In short, bilateral treaties allow LDCs to retain a greater measure of control over their resources, circumscribing their sovereign powers for one State's investors, but retaining control as against the rest of the world.[269]

The primary attraction of multilateral investment agreements is their transaction costs.[270] From the perspective of a State, rather than having to negotiate individual BITs with numerous other States, a multilateral agreement would constitute the single agreement for all signatory States.[271] Thus, a multilateral investment agreement would ostensibly entail incurring only a one-time cost in negotiating and/or ratifying and implementing the agreement.[272] However, the likelihood that such an agreement would remain unrevised seems naïve. Given the dynamic nature of investment, especially on an international scale, any agreement must allow for revisions in order to remain relevant and viable.[273] While the agreement might mean that States incur fewer transaction costs as a cumulative matter in the long run; the agreement would have only one over-arching agreement, the up-front costs for each State in even negotiating, drafting, and finally

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opportunity to obtain a better deal, and LDCs want the ability to offer a better deal in order to gain a competitive advantage in attracting FDI inflows. *See id.*

265. *See generally* Mosoti, *supra* note 13.

266. *See id.* at 101.

267. *See* discussion *infra* Part IV.B.

268. SORNARAJAH, *supra* note 12, at 212.

269. *Id.* at 212-13.

270. *See* Axel Berger, *Do We Really Need a Multilateral Investment Agreement?*, GERMAN DEV.INST. (2013), *available at* http://www.die-gdi.de/uploads/media/BP_9.2013.pdf.

271. *See* Zdenek Drabek, *A Multilateral Agreement on Investment: Convincing the Sceptics* 5-6 (World Trade Org.: Econ. Research and Analysis Div., Working Staff Paper ERAD-98-05, 1998), *available at* http://www.wto.org/english/res_e/reser_e/pera9805.doc.

272. *See* Bubb, *supra* note 74, at 307.

273. *Contra id.* at 307 n. 38.

agreement to such an agreement would increase than for a single BIT.[274] Moreover, given the number of participants involved in a comprehensive multilateral agreement the transaction costs associated with revising or amending that agreement would be significantly greater than revisions to a BIT.[275] To state the obvious, the renegotiation process would be slower than under a bilateral situation.[276] Indeed, situations in which particular States, developed or developing, would want a change, that in turn would have an undesirable effect to other States.[277] In addition to genuine disagreement, such a situation can readily produce strategic holdout problems.[278] In addition, given the ever-changing and time-sensitive nature of FDI, such delays would prove particularly costly.[279] This could cut off the flow of investment for significant periods, an undesirable situation for both States and investors.[280] Furthermore, it is likely that the States, who would be most harmed by such disruption, would be those with the least bargaining power regarding the multilateral agreement.[281] Conversely, the leading developed and developing States (the "Leading States") would have many opportunities to hold out and rent seek, exacerbating the delay.[282] As a threshold matter, however, it is important to note that the status as a Leading State, rather than the status as developed or developing State, defines the interests and behavior of a State with respect to any agreement on FDI.[283]

Regarding the hold out problem, of course retention of the Leading States would be essential to the effectiveness of a multilateral agreement.[284] Aware of their importance, however, these States will have substantial power over the substance and fate of any proposed revisions, just as they likely had at the negotiation and drafting phase, which produced the initial multilateral agreement.[285] This does not suggest that making concessions to retain Leading States would be misguided—it is simply to recognize the

274. *See id.* at 309.
275. *See id.*
276. Drabek, *supra* note 271, at 9.
277. *See id.* (describing other problems associated with negotiations).
278. *See* Emily Jones, *Signing Away The Future: How Trade and Investment Agreements Between Rich and Poor Countries Undermine Development*, OXFAM INT'L 2, 5 (2007), *available at* http://www.oxfam.org/sites/www.oxfam.org/files/Signing%20Away%20the%20Future.pdf (describing situations at the World Trade Organization wher developing countries band together to hold out for more favorable rules).
279. *See* discussion *infra* notes 291-308.
280. *See* discussion *infra* notes 291-308.
281. *See* discussion *infra* notes 291-308.
282. *See* discussion *infra* notes 291-308.
283. *See* discussion *infra* notes 291-308.
284. *See* discussion *infra* notes 291-308.
285. *See* discussion *infra* notes 291-308.

reality of international relations.[286] Bluntly, a multilateral agreement on FDI, which did not have the Leading States as signatories would functionally exist as a dead letter.[287] Moreover, because the major players in FDI would not be playing by the multilateral agreement's rules, the agreement could not be asserted as an indication of customary international law.[288] Recognizing that their participation would be essential in order for a true multilateral agreement to develop one would constitute a codification of customary international law—Leading States could extract significant concessions or "rents" as the price of their assent.[289] Given the concessions sought by this, strategic behavior would likely to be antithetical to cornerstone provisions intended to constitute the *sine qua non* of the multilateral agreement, the very thing making it sufficiently distinct from the BIT regime to justify the costs of negotiations and implementation. As such, there simply would be little to no point for Non-Leading States to incur the costs to attempt a multilateral agreement.[290]

For example, as the State with the second most number of BITs,[291] China is a Leading State when it comes to FDI.[292] However, with respect to binding international dispute resolution—arguably a cornerstone provision of BITs—China's first generation of BITs strictly circumscribed dispute resolution only to expropriation and nationalization.[293] As the majority of investor-State claims are couched in terms of violations of fair and equitable

286. *See* discussion *infra* notes 291-308.

287. *See* discussion *infra* notes 291-308.

288. *See* Committee On Formation of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 20, 26, 47, *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/30. (stating that when deciding if State practice established a rule customary international law the practice "of States whose interests are specifically affected" is key and that "if important actors do *not* accept the practice, it cannot mature into a rule of general customary law.") (emphasis in original).

289. *Endowments, Power, and Democracy: Political Economy of Multilateral Commitments on Trade in Services* 13 (World Trade Org., Staff Working Paper, 2009), *available at* http://www.wto.org/english/res_e/reser_e/ersd200907_e.pdf.

290. *See* Dr. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 339-40 (2009).

291. United Nations Conference on Trade and Development, Geneva, 2008-June 2009, *Recent Developments in International Investment Agreements*, IIA Monitor No. 3 (2009), *available at* http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.

292. *See* Shaun E. Donnelly, *A Business Perspective on China—US Bilateral Investment Treaty*, 90 VALE COLUMBIA CENTER 1, 1 (2013), *available at* http://ccsi.columbia.edu/files/2014/01/FDI_90.pdf.

293. Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, 7 TRANSNATIONAL DISPUTE MGMT. 1, 3 (2010). Indeed, as permitted by the Article 25(4) of the ICSID Convention, China provided notice upon its accession to the Convention that it would only consent to the ICSID's jurisdiction over disputes arising from expropriation or nationalization. Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 90 (2007) (citing Freshfields Bruckhaus Deringer, *Resolving Disputes in China Through Arbitration* 53 (2006), *available at* http://www.freshfields.com/publications/pdfs/2006/14706.pdf).

treatment,[294] this limitation on international dispute resolution was not favorable to investors. Conversely, China's second generation of BITs provide for international dispute resolution for all claims arising under the BIT.[295] Currently, China is entering its third generation of BITs and other international investment agreements.[296] While these agreements still contain broad international dispute resolution mechanisms, they are more restrictive than previously as to who and what the agreement protects.[297]

China has entered into a multilateral investment treaty with ten members of the Association of Southeast Asian Nations[298] it is crucial to note that this is a regional agreement that contains the highly restrictive language characteristic of China's third generation of BITs.[299] Thus, while binding international arbitration can settle breaches of the agreement's protections,[300] just who and what is covered, when compared to the BIT practice of the majority of States this is arguably much more narrowly circumscribed.[301] Thus, with respect to a comprehensive multilateral investment agreement China would not likely amend to an uninhibited binding international dispute resolution mechanism covering all protections and at least the majority of investments—the only type of mechanism that would make such an agreement worthwhile.[302] Moreover, without China any such agreement would not exist.[303] Thus, at this point in time, pursuing a comprehensive multilateral investment agreement would not make sense, because China would either hold out until the language was sufficiently restrictive as to defining the protections, and/or the dispute resolution mechanism was sufficiently weak to render the agreement impotent, or

294. *See* Christoph H. Schreuer, *Fair and Equitable Treatment (FET): Interactions with Other Standards*, 4 TRANSNATIONAL DISPUTE MGMT. 1, 2 (2007) (stating that Fair and Equitable Treatment "is currently the most important and successful basis for claims in investor-State arbitrations.").

295. Schill, *supra* note 293, at 93-94. Notably, the first BITs to feature these broad dispute resolution provisions were South-South BITs concluded between China and States such as Botswana, Brunei, Jordan, and Tunis. *Id.* The first Chinese BIT featuring such a dispute resolution provision with a developed State was in 2001 with the Netherlands, which was followed two years later in the Chinese-Germany BIT. *Id.* This indicates that China wanted to ease itself into the concept of international dispute resolution by agreeing to it with States whose investors were unlikely to bring a claim. *Id.*

296. Dulac, *supra* note 293, at 1.

297. *Id.* at 3.

298 *Agreement on Comprehensive Economic Co-Operation Between the People's Republic of China and the Association of Southeast Asian Nations*, (Aug. 15, 2009), *available at* http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf [hereinafter China-ASEAN IIA].

299. Dulac, *supra* note 293, at 11-12.

300. China-ASEAN IIA, *supra* note 298, at Art. 14(4)(b), (d-e).

301. *See* Dulac, *supra* note 293, at 3.

302. *See id.* at 13-14.

303. *See* Donnelly, *supra* note 292, at 1.

China would simply not become a Party at all—also rendering the agreement impotent.[304]

As the China example demonstrates, conscious of their significance, Leading States know that their participation will make or break any attempt at a truly internationally relevant multilateral agreement.[305] Furthermore, this awareness influences their negotiating strategies. Admittedly, within the context of the BIT regime, Leading States also enjoy greater voice than their Non-Leading State counterparts.[306] Yet in a bilateral agreement, a non-Leading State has a bit more opportunity to discuss (if not dictate) terms.[307] Given this reality, it makes little sense for Non-Leading States to seek to enter into a multilateral agreement, the terms of which Leading States will dictate when under the BIT regime, Non-Leading States at least have more of a voice in the agreement.[308]

The primary attraction of BITs is their flexibility.[309] Given the overall similarity among BIT provisions, it is unlikely that a particular BIT's unique term is a mere random variation.[310] Rather, it likely represents a separately negotiated, perhaps a hard-fought, term.[311] Indeed, BITs are more akin to a conventional private contract, meaning they are able to reflect the parties' peculiar interests.[312] As many States have model BITs—essentially form contracts[313]—small variations in BITs likely represent a dickered term that has a certain significance for the negotiating parties.[314] Conversely, a comprehensive multilateral investment agreement is more comparable to a traditional treaty with broad general terms necessary to gain consensus.[315] The narrow tailoring possible in a BIT would of course be

304. *See* Dulac, *supra* note 293, at 3; *see also* Donnelly, *supra* note 292, at 2-3.

305. *See* discussion *supra* notes 302-04.

306. *See* Jones, *supra* note 278, at 5-6.

307. *See id.*

308. SORNARAJAH, *supra* note 12, at 211-12.

309. *Id.*

310. *See* Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379, 420-21 (2010); *see also* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law,* 14 NW. J. INT'L L. & BUS. 327, 333 (1994).

311. *See* Elkins, *supra* note 1, at 268.

312. *See* Kishoiyian, *supra* note 310, at 333.

313. NOVEL FEATURES IN RECENT OECD BILATERAL INVESTMENT TREATIES, INTERNATIONAL INVESTMENT PERSPECTIVES 144 (2006), *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/40072428.pdf. As BITs are negotiated between sovereigns, even though developed States arguably have more leverage in the process, there is arguably less concern about the take-it-or-leave-it potential of form contracts as compared to consumers confronted with such contracts offered by large corporations. *See id.*

314. *See* Elkins, *supra* note 1, at 278.

315. *See* Liz Brownsell Allen & Overy, *Bilateral and Regional Trade Agreements*, ADVOCATES FOR INT'L DEV.: LAWYERS ERADICATING POVERTY (2012), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fa4id.org%2Fsites%2Fdefault%2Ffiles%2Fuser%2FBilateral%2520and%

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impossible with a comprehensive multilateral agreement.[316] Yet it is necessary, as relations between States are enormously varied.[317] For example, agreements between developed States and LDCs that share a language or culture likely reflect those commonalities, which may manifest in different provisions, wordings, and a shared understanding of the intended interpretation of provisions that may differ from the interpretation given to the same or similar BIT provisions by other pairings of States. On the other hand, despite a shared language or culture, BITs between States formerly tied by colonialism may include added substantive protections, hortatory proclamations, or substantively superfluous but diplomatically necessary language carefully worded in response to continued sensitivities and concerns arising out of the colonial experience.

Entry into a BIT may also be just as symbolically important for foreign relations as it is for facilitating substantive economic investment. For example, the signing of the BIT between the United States and the Russian Federation on June 17, 1992,[318] in the early days after the collapse of the Soviet Union and the apparent end of the Cold War, had much more than mere economic significance.[319] Yet, the State-to-State relationship building potential of a BIT is lost in the anonymity of a multilateral treaty.[320] Even assuming that some (lesser) degree of intimacy and relationship building occurs between the negotiating States of a multilateral treaty, the development of these bonds is unavailable to States that sign after the making of a foundational agreement.[321] In effect, a multilateral agreement on FDI would act as a utilitarian tool to reach economic ends, whereas a BIT has greater potential to serve as a vehicle to reach other valuable, non-economic ends.[322]

As noted above, multilateral agreements encourage free riders.[323] While a multilateral agreement may reduce transaction costs, distribution of these

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2520Regional%2520Trade%2520Agreements.pdf&ei=hAMyVOCJHI2myATDnYHYBw&usg=AFQjCNErT-cEyQF4pG6A6NRy5lQ-41UqKg&sig2=tXeB-HY_xvTCHkNX7qD3YQ.

316. *See id.*

317. *See* Kishoiyian, *supra* note 310, at 333.

318. *See Full List of Bilateral Investment Treaties Concluded 1 June 2013*, U.N. CONFERENCE TRADE DEV., *available at* http://www.unctad.org/sections/ditepcbb/docs/bit us.pdf.

319. *See generally* Peter Charles Choharis, *The Cold War and How We Think About Private Property*, THE ATLANTIC (Dec. 24, 2011, 7:35 AM), http://www.theatlantic.com/international/archive/2011/12/the-cold-war-and-how-we-think-about-private-property/250464/. This is arguably true even though the BIT has still not yet entered into force. *List of Trade Agreements*, 2000 ANNUAL REPORT (2000), http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2001/2001_Trade_Policy_Agenda/asset_upload_file631_6499.pdf.

320. *See* Brownsell, *supra* note 315.

321. *See* Kishoiyian, *supra* note 310, at 333.

322. *See* SORNARAJAH, *supra* note 12, at 212.

323. *See* Brownsell, *supra* note 315.

transaction costs will be far less even with an agreement on FDI.[324] While negotiating and/or signing onto a multilateral agreement may entail lower long-term cost than having to enter into new BITs, or renegotiate existing ones, those States that are already active participants in the BIT regime will incur greater total costs by switching over to the multilateral regime than those States that were either not very active in, or simply never entered the BIT regime.[325] Indeed, to the extent that a multilateral agreement on FDI abrogates previously existing BITs between signatory States or phases them out, these States have incurred the costs of both entering the prior BITs as well as negotiating and/or becoming a signatory to the multilateral agreement.[326] On the other hand, States that were active under the BIT regime ostensibly reaped the purported benefits of having such agreements, most notably, increased FDI flows, which likely offset these initial up-front costs.[327] However, the fact remains that the multilateral regime creates a greater free-rider problem with States that were not participants in the BIT regime, only incurring the costs of the creation and implementation of the multilateral agreement on FDI and States, which, whether or not parties to the BIT regime, will free-ride on negotiations and only incur the costs of ratification and implementation.[328] While it seems likely that States would want to participate in negotiating the multilateral agreement in order to ensure their concerns are addressed and the provisions they desire are included, it is entirely possible that the Leading States will bear the majority of the costs at the negotiations stage with the majority of States (Non-Leading States) sitting on the sidelines, conserving their resources and incurring only the transaction costs of signing and ratifying whatever multilateral agreement is eventually hammered out.[329] These Non-Leading States may reason that their general interests are developing, or the Leading States will protect developed States as much as possible. Given the context of negotiations, the Leading States would dominate negotiations anyway, regardless of Non-Leading state participation.[330] Moreover, Non-Leading States may figure that if the Leading States are in support of a multilateral agreement on FDI, then the regime change is essentially a *fait accompli*—the details of which Non-Leading States are not in a position to alter.[331]

324. *See* Peter Nunnenkamp & Manoj Pant, Why the Case for a Multilateral Agreement on Investment is Weak 23 (Kieler Diskussuionbeiträge Working Paper, No. 400, 2003), *available at* http://www.econstor.eu/bitstream/10419/2931/1/kd400.pdf.

325. *See id.* at 17.

326. *See id.* at 17-18.

327. *See id.*

328. *See* discussion *supra* notes 325-26.

329. *See* discussion *supra* Part IV.B.

330. *See* discussion *supra* Part IV.B.

331. *See* discussion *supra* Part IV.B.

Thus, there is no rational basis for them to incur additional costs of negotiations.[332]

The dynamics of negotiating a multilateral agreement on FDI are somewhat unique given the international context.[333] Generally, the more players needed for an agreement, the more costly the decision making process becomes. However, the sense of legitimacy of the overall outcome is also likely to increase.[334] Congressional legislation in the United States is a traditional example of this concept.[335] The more legislators needed to pass the law, the higher the transaction costs.[336] However, the perceived legitimacy of the law is seemingly greater the more votes it receives since the decisions legislators reflect the will of the people.[337] Similarly, the external costs of the law are less when more votes are required to pass it.[338] This is because if only a few legislators are needed to vote in favor of the law in order for it to pass, the more likely it is that the law will have undesirable effects on the wider populous. As such, the support of such legislators was unnecessary in order to pass the law, the same legislators who bear the burden without the benefit.[339] However, international agreements are unlike the traditional situation in which those who do not agree with a particular piece of legislation are still bound by its terms, and thus incur external costs. With international agreements, States that do not agree, i.e., do not sign, are not bound and thus, do not bear the traditional external costs of the decision with which they do not agree.[340] However, within the context of FDI, if a multilateral agreement ultimately precludes a signatory State from entering into a BIT or other agreement on FDI outside the multilateral framework, then non-signatory States bear external costs of being unable to negotiate FDI agreements with otherwise willing States.[341] This represents a particularly onerous external cost if the Leading States, i.e., the most desirable FDI partners, are signatories to the multilateral agreement.[342] Even under a less absolute multilateral agreement, such as one that allows signatory States to enter into BITs or other agreements on FDI with a non-signatory State, so long as the signatory State affords the

332. *See* discussion *supra* Part IV.B.
333. *See* Andrew T. Guzman, *Against Consent*, 52 VA J. INT'L LAW 747, 753-54, 759 (2012).
334. *See id.* (describing the assumption of legitimacy from unanimity).
335. *See* John G. Matsusaka, *Direct Democracy*, forthcoming in ENCYCLOPEDIA OF PUBLIC CHOICE 2, *available at* http://www-bcf.usc.edu/~matsusak/Papers/Matsusaka_DD_PC_Encyclopedia.pdf.
336. *See Against Consent*, *supra* note 333, at 759.
337. *See id.* at 753-54.
338. *See* Matsusaka, *supra* note 335, at 2.
339. *See id.*
340. *See* Guzman, *supra* note 122, at 679 n. 113.
341. *See id.*
342. *See* Neumayer, *supra* note 91, at 1571.

non-signatory States the favorable protections and rights under the multilateral agreement. Even so, signatory States will unlikely be willing to sign these extraneous agreements with non-signatory States, since the signatory State will be obligated to afford the non-signatory State substantial rights and protections without reciprocity.[343] Thus, the prospects for a non-signatory State to secure a lucrative, independent agreement on FDI are not good under either regime, assuming that the Leading States are signatory States.[344] It seems likely that non-signatory States would essentially face a "Hobson's Choice" of either entering the multilateral agreement or attempting to secure FDI without any formal overarching agreement.[345] This latter prospect would seem less than ideal since private investors are likely to prefer to invest in States bound at the international level to abide by the terms of the investment contract.[346]

Why are States amenable to multilateralism when it comes to trade but are so vehemently opposed to it within the FDI context? Their reasons may be partly historical, given that the means of production, which were once viewed as specific to each State making investment immobile while the product itself, trade, was highly mobile.[347] Thus, unlike FDI, international trade became largely based on a multilateral regime of trade agreements—most notably those that form the basis of the World Trade Organization.[348] Arguably, however, the key distinction is that FDI is a much more personal transaction, involving undertakings and commitments that are more intimate.[349] While there are robust variations in trade protections, overall trade is far more amenable to off-the-rack rules because the transactions involved are generalized, less personalized, and particularized than those inherent in FDI.[350] Trade operates at a higher level of generality, consisting of impersonal or rather, fungible transactions.[351] Indeed, there is a vast difference between the distribution of Coca-Cola products and the investment by Coca-Cola in the development of a manufacturing plant or a particular foreign beverage company. While advertising may vary, Coca-

343. *See* Guzman, *supra* note 122, at 679.

344. *See* Neumayer, *supra* note 91, at 1571.

345. *See* Guzman, *supra* note 122, at 679.

346. *See* Neumayer, *supra* note 91, at 1571.

347. *See generally* RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMC ORDER 366 (1969); R.F. HARROD, THE LIFE OF JOHN MAYNARD KEYNES 351 (1951).

348. *See Understanding the WTO*, WORLD TRADE ORG. 9-10 (2008), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf. The most prominent of these being the Generalized Agreement on Tariffs and Trade (GATT) which addresses trade in goods, the General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property Rights (TRIPS). *See id.*

349. *See* Guzman, *supra* note 122, at 655.

350. *See Understanding the WTO*, *supra* note 248, at 23-24.

351. *Id.*

Cola distribution, i.e., trade, is nearly identical in all States because Coca-Cola wants to reach as many consumers as possible—an outcome facilitated by every State adhering to the same trade rules. Conversely, Coca-Cola is likely only interested in having a manufacturing plant in a few key States and then, only if based on particular terms specific to the individual undertaking. Similarly, while Coca-Cola may want to invest in foreign beverage companies in every State, the terms on which it does so will vary based on Coca-Cola's desire that these terms reflect the distinct political and social aspects of the particular State, as well as the nature and products of the beverage company; thus, creating the need for terms and rules unique to each investment. The Coca-Cola example demonstrates how trade rules arguably govern a more fungible activity or at least activities which involve more fungible undertakings such as the exchange of commodities or branded goods that do not differ significantly across markets.[352] Moreover, this highly fungible nature of trade is also reflected in the similar sunk costs and/or fixed assets associated with trade that are virtually identical across States and are likely to be much less per State than the sunk costs and/or fixed assets associated with an FDI undertaking.[353] Thus, not only will the sunk costs and/or fixed asset losses associated with cutting off trade likely be similar across States,[354] but such losses will be far less than those associated with the abrogation of an FDI project.[355] Given that trade operates at a much higher level of generality and can be regarded as much more fungible than FDI, it is not counterintuitive that trade would be amenable to more generalized, cookie-cutter rules that do not need to be as flexible or dynamic as those addressing unique and particularized projects of FDI.[356]

Indeed, the distinction between foreign investment (which is largely private) and trade, as regulated through the WTO (which is between States),[357] is arguably another reason States may want to keep BITs within the exclusive control of the contracting States. While it is true that the dispute resolution provisions are nearly identical across BITs, under current

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352. *Id.*

353. *See* Jonathan O'Brien & Timothy Folta, *Sunk Costs, Uncertainty and Market Exit: A Real Options Perspective*, INDUS. CORP. CHANGE 9-10 (2009), *available at* http://homepages.rpi.edu/~obriej8/Res/ICC09.pdf; Guzman, *supra* note 122, at 664-65.

354. *See* O'Brien, *supra* note 353, at 9-10. Of course, the stoppage of trade with a State that constitutes a large consumer and/or supplier market would likely entail particularly sizable costs with respect to loss of consumer base and particularly sizable losses with respect to the unavailability or increased price of desired goods. *See id.* However, the losses associated with sunk costs and/or fixed assets are likely to be nearly identical across States. *See id.*

355. *See* Guzman, *supra* note 122, at 664-65.

356. *See Understanding the WTO*, *supra* note 348, at 24.

357. *See supra* Part II.B.

practice States are free to reject this provision in favor of a different one.[358] While BITs may seem (and perhaps largely are) uniform, it may be empowering for States to know that they are not locked into a certain form.[359] This flexibility may be desirable, and arguably more appropriate, in setting the framework for what will essentially be relations between foreign private investors and a host State, whereas such flexibility is less desirable in establishing the arrangements and relations among States.[360]

Separate motivations indicate why trade is more amenable to multilateralism than FDI.[361] A central purpose of the WTO is to promote the free flow of trade, which requires the harmonization of trade rules across States.[362] Conversely, FDI is about establishing a set of rules as favorable as possible in contemplation of particularized projects meant primarily for the exclusive benefit of the parties.[363] In a way, trade rules are more concerned about facilitating quantity, whereas FDI rules focus more on achieving quality.[364] Another analogy would liken the creation of trade rules to mechanized mass production, whereas the creation of FDI rules requires handcrafting. Indeed, this analogy is furthered with respect to the distinct nature of FDI, which is particularized, involves a unique, substantial financial commitment, and can be likened to an intimate relationship premised on a long-term commitment by both parties.[365] Thus, while a mass-produced, off-the-rack dress may be appropriate for date night, it is appropriate and even preferable that a dress for a wedding, a special ceremonial occasion that marks the beginning of a long-term intimate commitment, be either designed specifically for, or at least individually tailored to, the bride's particular measurements and desires.

C. BITs as De Facto Multilateral Agreement

While repeated attempts at setting up negotiations to establish a multilateral investment agreement have failed,[366] BITs and free trade agreements with investment protections have proliferated, representing what Dr. Efraim Chalamish argues is a "de facto multilateral agreement."[367] Dr.

358. *See* Neumayer, *supra* note 91, at 1571.
359. *See id.*
360. *See id.* at 1568-71; *Understanding the WTO*, *supra* note 348, at 24.
361. *See* Neumayer & Spess, *supra* note 91, at 1568-71; *Understanding the WTO*, *supra* note 348, at 9-10.
362. *Understanding the WTO*, *supra* note 348, at 10.
363. *See* Neumayer, *supra* note 91, at 1568-71.
364. *See id.* at 1568-71; WORLD TRADE ORG., *Understanding the WTO*, *supra* note 348, at 9-10.
365. *See generally* Neumayer, *supra* note 91.
366. Chalamish, *supra* note 290, at 304-05, 310.
367. *Id.* at 305.

Chalamish's assertion that BITs constitute a de facto agreement is because BIT provisions are nearly identical, arguably reflecting a consensus on what the standards governing FDI should be.[368] Indeed, Dr. Chalamish avers that BITs can only offer a competitive advantage to the host State insofar as the provisions provide a greater level of protection to the home State and/or increase the level of enforcement.[369] For example, if one broadens the definitions of what constitutes an investment, tax treatment provided to investors could be more favorable, and the waiting time between an alleged violation and submission to arbitration reduced.[370] However, BIT provisions regarding the level of protection and enforcement are very similar with little meaningful variation.[371] This, Dr. Chalamish avers, demonstrates "that the substance of the treaties, along with their lack of differentiation and competitiveness, strengthens BITs' role as an investment regulatory regime on a multilateral, not just a bilateral level."[372]

The conception of BITs as a "de facto multilateral agreement" is dangerous insofar as it suggests that arbitrators should not look at each BIT as a distinct agreement with unique terms, but rather look to some general principles of BIT practice.[373] While this approach has its adherents,[374] as there is no *stare decisis* in international arbitration, and because as in domestic tribunals, contract disputes are decided by looking at the precise terms chosen by the parties, attempting to draw on general principles of BIT practice, is preposterous because there is no such body of law.[375] Arbitrators are charged with deciding the claim based on the unique set of

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368. *Id.* at 323-24.
369. *Id.* at 319.
370. *See id.* at 320-21.
371. Chalamish, *supra* note 290, at 319-20.
372. *Id.* at 321.
373. *Id.* at 341-42.
374. Judge and arbitrator Charles N. Brower argued this position, suggesting that strict construction of an investment treaty and staying within the four corners of the document "is not necessarily the answer to things" because drafters often did not know what they were doing, and many times were not even lawyers. *MFN Treatment – What Are Its Limits in the Investment Context?* 247, 256 *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (TJ Grierson Weiler, ed. 2008). Brower challenged the notion that arbitrators should not consider the impact of their decisions because there are limited corrective possibilities to counter outrageous decisions that might threaten the entire international arbitration system. *Id.* at 256. However, international law scholar Don Wallace argues that the system will survive under a restrictive or broader approach by arbitrators but asserts that

> [w]hen you decide a case, you look at the treaty in front of you and the language varies, and . . . that is the *alpha* and the *omega* of it . . . . The law will inevitably develop, but I don't think you should be there thinking that you are Solon of the law by creating a new rule of law.

Id. at 257-58.
375. *See* Chalamish, *supra* note 290, at 328.

facts and BIT provisions before them, rather than developing a common law of BIT practice.[376]

It is possible that Dr. Chalamish envisions FDI as a coordination game in which he believes the best outcome is achieved when all the participants are playing by the same rules.[377] However, FDI functions and has always functioned in the absence of a multilateral agreement coordinating the rules by which the participa nts play.[378] Indeed, for FDI to function there only needs to be coordination on the State-to-State or private investor-State bilateral level.[379] FDI will still occur even if not all the players are playing by the same rules, as long as the parties to any particular FDI activity are playing by the same rules.[380] Thus, even though BIT provisions are very similar, they do not have to be—FDI will not collapse if the BIT provisions between France and Chile are vastly different from the BIT provisions between Germany and Azerbaijan.

It is important to note that FDI is not a pure coordination game insofar as each party has a particular preference as to the rules by which the game is played.[381] However, both parties will maximize their value by coordinating between themselves.[382] One can reject a multilateral agreement on investment, because there is no need for coordination at the international level, as coordination at the bilateral level produces the best outcome as between those two players.[383] Indeed, it is very possible that requiring coordination on a multilateral level will actually decrease the benefit each player derives from any particular FDI transaction, and/or decrease the overall benefit gained from any particular FDI transaction.[384] While BIT provisions are admittedly similar, they are by no means perfectly identical and these small variations arguably have value to at least one of the parties.[385] Indeed, as Sornarajah notes, BITs are not homogenous.[386] There are a diversity of applicable standards and a wide variety of content which may be attributable to the "relative [bargaining] strengths and mutual dependence" of the parties.[387] Moreover, whereas in a bilateral arrangement the players can more easily negotiate and change the rules as the need arises, such negotiations and changes on a multilateral level are much more

376. *See id.* at 342.
377. *See id.*
378. *Id.* at 306-07.
379. *See id.*
380. *See* Chalamish, *supra* note 290, at 352.
381. *See id.* at 307-08.
382. *See* Guzman, *supra* note 122, at 655.
383. *See id.*
384. *See id.* at 679.
385. *See* discussion *supra* Part IV.B.
386. SORNARAJAH, *supra* note 12, at 215.
387. *Id.* at 215-16.

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difficult and slow; meaning that FDI transactions between particular players can be significantly harmed by the inability to amicably and quickly change the applicable rules.[388] Finally, as Bubb and Rose-Ackerman contend, the pervasiveness of the BIT regime itself lowers the utility of a multilateral agreement since anything that could hope to be achieved by such an agreement has already been achieved at the bilateral level.[389] Given that the establishment of such a multilateral agreement would entail significant costs and the fact that "the surplus achievable" by a multilateral agreement is small, the BIT regime makes the realization of a multilateral agreement very unlikely. Particularly since States will be unwilling to bear the sizable transaction costs, which dwarf the miniscule benefit of such a multilateral agreement.[390] Nevertheless, Dr. Chalamish argues that overall economic trends have moved toward greater harmonization based "upon the assumption that different standards . . . impede economic integration."[391]

While Dr. Chalamish does not explain why economic integration is desirable the assumption is that such integration is wealth and/or welfare maximizing.[392] However, as discussed above, such harmonization may not be wealth maximizing for any particular pair of States engaged in FDI.[393] Dr. Chalamish points out that harmonization of FDI rules can thwart the feared race to the bottom in which host States eager to attract FDI increasingly lower their regulatory standards resulting in the "degradation of labor, environmental, and human rights standards."[394] Interestingly, Dr. Chalamish seems to ignore that if, as he asserts, the nearly identical BIT provisions results in little to no competition between host States,[395] then there was no race to the bottom to begin with but rather the supposedly desirous harmonization of BIT provisions set the standards there.

According to Dr. Chalamish, another reason for regarding BITs as representing a multilateral agreement is the role that international institutions such as the United Nations Conference on Trade and Development (UNCTAD) and the World Bank have had in spearheading and monitoring BITs between various States.[396]

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388. *See* Chalamish, *supra* note 290, at 339-40. While this is not to suggest that changing the terms of a BIT is quick and easy, it is as compared to changing a multilateral agreement. *See id.* Indeed, it is easier to garner the political will to rapidly change an agreement between two parties than it is to garner that political will for twenty parties. *See* Brownsell, *supra* note 315.

389. Bubb, *supra* note 74, at 310.

390. *Id.* at 309.

391. Chalamish, *supra* note 290, at 317.

392. *See generally id.*

393. *See* discussion *supra* notes 381-91.

394. Chalamish, *supra* note 290, 318-20.

395. *Id.* at 319-20.

396. *Id.* at 322.

However, these BITs, which are nearly all between LDCs,[397] are not truly economically based. Indeed, they are nearly devoid of economic value and were ostensibly signed for diplomatic purposes, i.e., building cohesion between neighboring LDCs.[398] The only economic value they might have is in the event that such an agreement may be advantageous many years down the road, and/or as a signaling device that the LDC is now open for business in the FDI market.[399] Thus, the fact that BITs facilitated by UNCTAD and the World Bank are not made in contemplation of, and do not further the traditional *sine qua non* of BITs, viewing these institutions and the BITs produced under them as authoritative for, or the standard-bearer of a multilateral consensus, seems hugely inappropriate as suggested by Dr. Chalamish.[400]

Dr. Chalamish argues that Most Favored Nation (MFN) provisions in most BITs provide another route for the establishment of a multilateral agreement.[401] Under MFN provisions, an investor is entitled to an equal level of treatment with regard to certain aspects of the investment relationship as other home States with which the host State has signed a BIT.[402] Pointing to the 2000 ICSID decision of *Maffezini v. Kingdom of Spain*,[403] in which a MFN provision was interpreted very broadly to include procedural as well as substantive rights,[404] Dr. Chalamish contends that this demonstrates that "[b]y forcing different countries to converge on similar standards in international investment protection, the MFN clause, if widely applied, can increase the level of law-harmonization in the FDI realm."[405] However, as discussed previously FDI only requires coordination at a State-to-State bilateral level.[406] Moreover, the MFN provision itself requires only coordination within the host State in that the host State can make sure provisions are consistent across BITs.[407] Moreover, States can always limit

397. Press Release, UNCTAD Hosts Bilateral Investment Treaty Negotiations by Group of 15 Countries, U.N. Press Release TAD/1864 (Jan. 14,1999).

398. Elkins, *supra* note 1, at 301.

399. *Id.* at 300.

400. *See* Chalamish, *supra* note 290, at 322.

401. *Id.* at 324-29.

402. *See, e.g.*, UNITED STATES MODEL BILATERAL INVESTMENT TREATY, *supra* note 52, at Art. 4(1) ("Each party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.").

403. Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/97 Decision on Jurisdiction (Jan. 25, 2000), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163.

404. Chalamish, *supra* note 290, at 327 (citing *Maffezini*, ICSID Case No. ARB/97/97 at 64).

405. *Id.* at 328-29.

406. *See* discussion *supra* notes 381-91.

407. *See* discussion *supra* notes 381-91.

or eliminate MFN clause in any particular BIT.[408] Indeed, that is exactly what the United States did in the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) in which it specifically limited the reach of the MFN clause.[409] The United States action in CAFTA-DR clearly demonstrates resistance to and indeed, rejection of, attempts at formal harmonization or the establishment of permanent standardization of BIT provisions.[410] Flexibility is desirable and rather than serving as a "law-harmonizing tool"[411] it can actually serve as a point of competition between hosts to the extent that MFN provisions cover more substantive and/or procedural rights.[412] Indeed, Dr. Chalamish himself seems to acknowledge the possibility that the arguable overreaching by the *Maffezini* tribunal could result in more precise tailoring of MFN provisions, openly wondering "whether future BITs will offer a variety of investment protection models, thereby increasing the competitiveness of the BIT as an international legal instrument."[413] Ironically, if Dr. Chalamish's view of a de facto multilateral agreement prevails, this potential development will have absolutely no chance of being realized.[414] Finally, despite the value, Dr. Chalamish assigns to the *Maffezini* decision; other tribunals have rejected its broad reasoning.[415] Indeed, one tribunal specifically admitted that it "fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision" given that this would result in investors cherry-picking such provisions leading to "a chaotic situation—actually counterproductive to harmonization."[416] Moreover, the tribunal concluded an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[417]

This decision recognizes the flexibility that States have in negotiating BIT provisions and the refusal by the tribunal to artificially impose a construction not contemplated by the parties.[418] While Dr. Chalamish's argument that similar BIT provisions are evidence of some sort of harmonization, it seems quite evident that States are not willing to

408. *See* discussion *supra* notes 381-91.
409. Chalamish, *supra* note 290, at 330.
410. *See id.*
411. *Id.* at 328.
412. *See id.* at 327.
413. *Id.* at 331.
414. *See* discussion *supra* notes 381-91.
415. Chalamish, *supra* note 290, at 333 (citing Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, (Feb. 8, 2005)).
416. *Id.*
417. *Id.*
418. *Id.*

permanently and formally commit to these provisions even assuming that they do represent some sort of consensus as to FDI standards.[419] While it could be argued that formalization of this apparent harmonization of BIT provisions is desired but not achieved due to a collective action problem, this is a weak argument given that fora exist for collective international decision -making and the specific issue of a multilateral agreement on FDI has been repeatedly raise d and consistently rejected.[420]

The rejection of even negotiating the possibility of a multilateral agreement on FDI is indicative of a strong desire for flexibility.[421] While it may be efficient or even expedient for all BIT provisions to reflect the same standard, the fact remains that each BIT is its own separate and unique contract—*lex specialis*—and the parties' intentions for that agreement should be discerned and honored.[422]

D. BITs as Customary International Law

When the World Bank promulgated the ICSID Convention in 1965, many developing States and all of the Latin American States simply refused to join.[423] However, binding arbitration, usually under the auspices of ICSID, is now a central part of BITs that Latin American States are eager to sign.[424] Distinguished international law professor Andreas F. Lowenfeld is not persuaded by the common explanations, including that of Andrew T. Guzman, of why States that had been ardent supporters of CERDS in 1974 would within a relatively short time ostensibly embrace wholeheartedly an investment philosophy they had previously rejected with great vehemence.[425] While not addressing whether this change represents a real philosophical conversion or is simply economic pragmatism, Lowenfeld cautions that "it is misleading to speak of the developing world as if it were a monolith."[426] Regardless of reasons for this change, the crux of Lowenfeld's argument is that the broad-based BIT phenomenon and the near uniformity of BIT provisions "constitutes international legislation."[427] Such a conception of BITs is warranted and necessary Lowenfeld argues

419. Bubb, *supra* note 74, at 297-98; Chalamish, *supra* note 290, at 304-05.
420. Bubb, *supra* note 74, at 297-98; Chalamish, *supra* note 290, at 304-05.
421. Andrei Belyi, *Energy Charter Treaty: Attempting Multilateralism in Energy*, (Jul. 2, 2013), http://www.e-ir.info/2013/07/02/energy-charter-treaty-attempting-multilateralism-in-energy-2/. Although the Energy Charter Treaty is a multilateral agreement it includes both trade and investment and moreover, is limited to a discrete sector. *See id.*
422. *See* discussion *supra* notes 381-91.
423. Lowenfeld, *supra* note 6, at 124-25.
424. *Id.* at 125.
425. *Id.* at 126-27.
426. *Id.* at 127.
427. *Id.* at 128.

because "so many of the recent treaties are so much alike, it is proper in a BIT case for arbitrators who are called upon to construe terms such as 'fair and equitable treatment,' 'adequate compensation,' or 'equal access' to draw on the awards in similar disputes under similar treaties."[428]

However, regarding BITs as tantamount to international legislation is not necessary in order for like cases to be treated similarly.[429] Although the role of past awards is not on par with *stare decisis*, such awards arguably serve as "persuasive precedent" because there is a "*de facto* tendency for an international arbitrator to accept what has been consistently decided in a significant number of past arbitral decisions."[430]

Nevertheless, Lowenfeld's argument goes beyond the concept of arbitral precedent because he contends that as international legislation, BITs provide Article 42 of the ICSID Convention with substance.[431] Article 42(1) of the ICSID Convention provides that a dispute will be settled according to the rules of law agreed to by the parties, but if there is no such agreement, the tribunal will apply the law of the State where the agreement was entered into "and such rules of international law as may be applicable."[432] In short, under Lowenfeld's conception, the uniformity and universality of BIT provisions constitute the applicable rules of international law referenced, but left undefined, by Article 42(1).[433] The very reason that the applicable provisions of international law of Article 42(1) were left undefined was due to lack of agreement as to what those principles would be.[434] However, Lowenfeld regards the nearly identical formulation of BITs as representing an agreement among States regarding what the principles of international law are, and thus, it is appropriate that they should inform Article 42(1).[435] In support of his proposition, Lowenfeld includes a footnote to the jurisdictional decision of an ICSID tribunal in *CMS Gas*

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428. Lowenfeld, *supra* note 6, at 128.

429. *Id.*

430. Alexis Mourre, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions. . .*, KLUWER ARBITRATION BLOG (May 28, 2009), http://kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions%E2%80%A6/; *see also* Chalamish, *supra* note 290, at 328 ("While international arbitrators are not bound by previous decisions made by other international tribunals, arbitral tribunals respect these decisions and integrate their reasoning into their own judgments and awards."); Ryan, *supra* note 42, at 86 ("[T]here is no stare decisis within the investment arbitration system" because tribunals are not bound to follow prior awards "and are free to decide each case on its own merits.").

431. Lowenfeld, *supra* note 6, at 129.

432. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 1286, 575 U.N.T.S. 159, 186 (entered into force Oct. 14, 1966).

433. Lowenfeld, *supra* note 6, at 128.

434. *Id.* at 125.

435. *Id.* at 130.

Transmission Co. v. Argentina,[436] in which the tribunal allowed shareholders of a company, rather than the company itself, to bring a claim against the host State because there was no bar to such a suit under international law.[437] Specifically,

> [t]he Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. As argued by the Republic of Argentina, it is true that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed. The fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, and certainly in respect of foreign investments and international claims and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach—a proposition that is open to debate—then that approach is considered the exception.[438]

It is doubtful that this passage supports Lowenfeld's argument.[439] First, the tribunal regards BITs as *lex specialis*, not customary international law.[440] Indeed, the last sentence of the paragraph clearly demonstrates that customary international law is treated as a distinct and separate concept.[441] Second, to the extent that the tribunal regards BITs as creating a general rule it is only within the *lex specialis* context.[442] Once again, the last sentence is critical because it juxtaposes whatever general rule may exist within *lex specialis* with that of customary international law—the two are not the same.[443] This distinction was emphasized and maintained in the annulment decision in the same case in which the annulment tribunal cited the jurisdictional decision's determination that general international law does not prohibit BITs which allows shareholders to bring claims but that each BIT must be applied as *lex specialis*.[444]

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436. CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Dec. of the Tribunal on Objections to Jurisdiction (July 17, 2003) 7 ICSID Rep. 494 (2005).
437. Lowenfeld, *supra* note 6, at 130 n. 24.
438. *CMS Gas*, ICSID Case No. ARB/01/8, Dec. on Objections to Jurisdiction, ¶ 48.
439. *See* Lowenfeld, *supra* note 6, at 128-29.
440. *See CMS Gas*, ICSID Case No. ARB-01-8, Dec. on Objections to Jurisdiction, ¶ 48.
441. *See id.*
442. *See id.*
443. *See id.*
444. *CMS Gas Transmission Co. v. Republic of Arg.*,ICSID Case No. ARB/01/8, Dec. of the *ad hoc* Comm. on the Application for Annulment of the Argentine Republic ¶ 69 (Sept. 25, 2007).

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Thus, on its face, Lowenfeld's argument suffers from two arguably fatal defects. First, a condition precedent for a practice becoming part of customary international law is that the States consistently follow this through a "sense of legal obligation."[445] While BITs may happen to be uniform, each BIT is still a contract freely negotiated between the parties who can dicker over the terms; they are not legally obligated to adopt certain terms.[446] Second, international agreements only bind the parties subject to them and such agreements "may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."[447] However, Lowenfeld acknowledges that his contention is "inconsistent with the traditional definition of customary law," but argues that this "traditional definition of customary law is wrong, or at least in this area, incomplete."[448] Nevertheless, it is under this traditional definition that States are operating, and it is this traditional definition that informs States of the consequences of their actions.[449] As early as the 1960s and continuing into the present, developed and developing States have rejected attempts to create a comprehensive multilateral agreement on foreign investment, even one that is based on standard BIT provisions.[450] This is strongly indicative of the desire for flexibility—even if in practice this flexibility is only theoretical given that most BITs are nearly identical—in their FDI dealings.[451] Thus, it seems highly implausible that States would regard BITs as creating, or even having the potential to create, customary international law, let alone *intend* for them to do so, since customary international law would limit contractual flexibility.[452]

> Moreover, as noted in the Jurisdictional Decision of 17 July 2003, nothing in general international law prohibits the conclusion of treaties allowing 'claims by shareholders independently from those of the corporation concerned. . . even if those shareholders are minority or non-controlling shareholders.' Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.

Id.

445. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

446. *See generally* José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 24 (2009) ("It is certainly not the case that every state that has entered into a BIT has signed onto the same set of obligations.").

447. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(3) (emphasis added).

448. Lowenfeld, *supra* note 6, at 129-30.

449. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)-(3); § 102 cmt. f.

450. *See* Lowenfeld, *supra* note 6, at 123-24.

451. *See id.* at 123-26.

452. *See generally* Guzman, *supra* note 122, at 687 ("BITs, therefore, do not reflect a sense of legal obligation but are rather the result of countries using the international tools at their disposal to pursue their economic interests.").

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V. CONCLUSION

It is important to reiterate that this paper does not, and is not intended to, render a normative judgment as to the propriety of any particular FDI regime as regards the welfare of host States.[453] However, what this paper is intended to show is that: (1) LDCs had strong reasons for entering into BITs that are not inconsistent with what they perceived and continue to perceive to be their best interests; (2) regardless of which States are driving the BIT phenomenon it continues to be the primary vehicle for FDI and there is no evidence that the BITs will lose their primacy anytime soon; and (3) consistent rejection by developing and developed States of a multilateral agreement on FDI is strong evidence that BIT provisions, regardless of their apparent similarity, are not regarded by States as representing a consensus, or at least not one they intend to enshrine through a formal international legal instrument or customary international law.[454] Quite simply, there was good reason for the adoption of the BIT regime and there is good reason for States to prefer continued adherence to it beyond any argument about an entrenched system.[455]

The BIT regime is the status quo and changing it will be difficult.[456] States run the risk that the multilateral agreement will not provide them with the provisions they desire most.[457] Indeed, concessions that a State may be able to procure in a one-on-one negotiation may be impossible to achieve in the face of collective bargaining units or blocs of States that are likely to develop in the process of negotiating a multilateral agreement on FDI.[458] Another crucial consideration is the applicability or effect of the multilateral agreement. For example, would the multilateral agreement abrogate all existing BITs between States who are both signatory parties? What about BITs between States where only one State is a party to the multilateralagreement? To the extent that such BITs are still enforceable, would the signatory State be bound to abide by the terms of the multilateral agreement if those provisions were more favorable to the non-signatory State than the terms of the BIT? Could a State that is a signatory to the multilateral agreement still enter into BITs? These are just a few of the critical questions that will have to be answered in considering whether a multilateral agreement is a viable or, more importantly, advantageous, option.

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453. *See generally supra* notes 2-6 and accompanying text. It is just fact that BIT's have now become the superior legal instrument governing FDI. *See generally supra* notes 2-6.

454. *See supra* Parts III.A-E, IV.A-D.

455. *See supra* Parts III.A-E.

456. *See supra* Parts II, III.A-E.

457. *See supra* Part IV.B.

458. *See supra* Part IV.B.

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Notably, it is within the context of these crucial questions that the Prisoners' Dilemma rears its head in the context of a multilateral agreement.[459] Absent a mandatory provision precluding signatory States from entering into agreements on FDI with other States outside the multilateral framework or at least requiring signatory States to afford non-signatory States the benefits and protections of the multilateral agreement within the context of any independent agreement, the risk of defection from the multilateral regime is high and enough defection would abrogate the multilateral agreement.[460] Indeed, a multilateral agreement without such restrictive mechanisms dis-incentivizing independent agreements is tantamount to the cartel-like situation described by Guzman whereby LDCs attempted to have a tacit multilateral agreement not to have an agreement after the elimination of the Hull Rule.[461] In both situations, the problem comes down to enforcement.[462] Ultimately, what matters most is that the BIT regime is fulfilling its purpose, i.e., facilitating FDI, and the potential flexibility bilateral agreements, as opposed to a multilateral agreement, provide is invaluable, not only to the bilateral parties, but also because it allows for a quicker and more fluid response in incorporating overall trends and ideological changes that will inevitably develop in the FDI world in the future.[463]

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459. *See supra* Part III.D.
460. *See supra* Part III.D.
461. *See supra* Part III.D.
462. *See supra* Part III.D.
463. *See supra* Parts II, III.A-C, IV.A-B.

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