Keep, Terminate, or Renegotiate? Bargaining Power and Bilateral Investment Treaties

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Abstract

The bounded rationality narrative has been used to explain why developing countries initially signed bilateral investment treaties, which have provided foreign investors extensive protections in the form of investor-state dispute settlement provisions. As arbitration cases have started to accumulate, states experience learning shocks that break the bounded rationality of old investment treaties, leading some states to renegotiate and terminate them. Yet, not all states take action following such learning shocks. Furthermore, some states result to unilaterally denounce while others renegotiate their bilateral investment treaties. What explains this variation in states' reform efforts? I argue that the role of bargaining power has been largely overlooked in explaining current developments in the investment treaty regime. Changes in the bargaining power of treaty partners can explain whether the dissatisfied state takes action regarding old treaties. Analysis of a new dataset on bilateral investment treaties with status information shows that investment dispute cases do not explain all the variation in BIT outcomes, while some measures of bargaining power predict unilateral denunciation and renegotiation.

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1 Introduction

Why do states sometimes terminate and renegotiate their international agreements? And what explains states' varying decisions to join some agreements, withdraw from others, and sometimes push for change through renegotiations? I address these larger questions central to the study of international relations by examining the international investment regime. The most prominent institutional architecture to regulate international investments today consists of a web of bilateral investment treaties (BITs) and the investor-state dispute settlement (ISDS) practice enabled by them, providing extraordinary powers granted to foreign investors over sovereign states.¹ From the very first investment treaty between Germany and Pakistan in 1959, investment treaties were meant to protect the interests of foreign investors abroad, and therefore enhance foreign direct investment (FDI) into states which otherwise may have been left without benefits of this specific form of economic cooperation.

BITs have however increasingly resulted in investor-state dispute settlement (ISDS) cases and multi-million lawsuits, and this provision included in most BITs has become increasingly controversial. While initially disputes were thought to mainly arise in situations of direct expropriation such as nationalization, modern ISDS mostly addresses so-called cases of "indirect appropriation". For example, Argentina became the target of a large number of ISDS-challenges due to its efforts to manage the financial crisis of early-2000s: currency devaluation and other emergency measures hit foreign investors with severe financial losses who responded through legal means.² Germany's efforts to transform towards renewable energy sources by banning nuclear energy likewise initiated

¹ Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

² Julia Calvert, 'Constructing Investor Rights? Why Some States (Fail to) Terminate Bilateral Investment Treaties', *Review of International Political Economy* 25, no. 1 (2 January 2018): 75–97, https://doi.org/10.1080/09692290.2017.1406391.

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ISDS cases with foreign investors into the energy sector, and Australia found itself in legal problems with Philipp Morris and other tobacco companies following its policy to enhance public health by only allowing plain cigarette packaging. ISDS is therefore increasingly employed not only when the host government is intentionally infringing the property rights of investors, but when damage is done to their investments as a byproduct of other regulatory efforts.³ There is an emerging consensus that BITs have granted investors extraordinary powers over sovereign states, and that the ISDS-practice is badly in need of reform.

There is, however, great variation to the extent that states have decided to keep, terminate, or renegotiate their BITs. A dominant explanation suggests that especially developing countries initially signed BITs out of bounded rationality: they were likely to suffer from cognitive biases in their investment treaty policy and were not fully aware of the risks of ISDS.⁴ As arbitration cases have accumulated, learning effects have emerged that have broken the bounded rationality of BITs, and resulted in increased instance of renegotiation.⁵ However, the explanation is insufficient in explaining the developments in the investment regime: why do some states keep BITs despite experiencing learning shocks? Why do some states terminate, and some renegotiate them?

³ It has also been suggested that investors do not only result to ISDS when facing legitimate grievances related to the host governments actions, but use the provision strategically to extract settlement payments, or to deter possible future policy-decisions by the host government which may be unfavourable to them. Krzysztof J. Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?', International Organization, July 2017, https://doi.org/10.1017/S0020818317000212.

⁴ Lauge N. Skovgaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (Cambridge University Press, 2015).

⁵ Yoram Z. Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration', *The Review of International Organizations* 13, no. 1 (1 March 2018): 25–48, https://doi.org/10.1007/s11558-017-9276-1.

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A largely overlooked factor of bargaining power can address the unexplained variation in the observed BIT outcomes. Following a learning shock, states only take action regarding their BITs if they are in a bargaining power position to do so: despite the high risks of continued exposure to ISDS, majority of dissatisfied states are not in a position to take action to reform their investment treaty commitments, but continue to be betteroff sticking with the status quo BITs. Furthermore, improvement in two key aspects of bargaining power, alternatives and expertise, can explain why some states take action to unilaterally terminate and renegotiate their old BITs.

This paper proceeds as follows. First, I employ a new dataset of BITs with treaty status information to explore variation in states decisions to keep, terminate, or renegotiate BITs, and illustrate that ISDS experience alone is not sufficient in explaining the observed reform efforts. Second, I outline a theoretical explanation of how bargaining power can account for why some states take action regarding BITs while others do not. Finally, I present results of a cross-section time series analysis of how measures of bargaining power correspond to increased likelihood of unilateral termination and renegotiation of BITs.

2 Reform efforts and ISDS in the BIT regime

In a rapidly accelerating pace, developing countries hoped to attract badly needed capital through signing BITs with major capital exporters through from 1980s and 1990s.⁶ While alternative institutional arrangements were proposed in international forums, such as the multilateral agreement on investment (MAI) and a system of investment insurance,

⁶ The beginning of global diffusion of BITs took place during the economic downturn in the late 1980s and early 1990s, which was also time of stagnant international bank lending. Beth A. Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment', *World Politics* 66, no. 1 (January 2014): 12–46, https://doi.org/10.1017/S0043887113000312.

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eventually BITs were adopted as the solution to address the concerns of investors.⁷ Their popularity has received a lot of attention from recent scholarship: explanations for why developing countries signed up to the regime range from the "grand bargain" theory to the race-to-the-bottom logic of competition for FDI⁸, and to rent-seeking motivations of authoritarian leaders.⁹ Despite alternative regulatory solutions being adopted to a lesser extent, such as state-investor contracts, private investment insurance, or efforts to include investment clauses into multilateral agreements, BITs continue to form the core of global governance of international investment.

The signing of new BITs has slowed down since the years of rapid accumulation, which peaked in 1996 when 217 BITs were signed in a single year (figure 1). While some new states that previously were not particularly active in the regime have stepped up their efforts to sign BITs with new partners¹⁰, accumulation has stopped partially due to saturation. However, in 2017, terminated BITs exceeded the new BITs signed for the first time. While the percentage of terminated BITs remains modest in comparison to the large stock of BITs signed since 1959, there is an increasing trend to terminate and renegotiate BITs.

⁷ Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford, New York: Oxford University Press, 2018).

⁸ Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1998), https://papers.ssrn.com/abstract=2176003.

⁹ Eric Arias, James R. Hollyer, and B. Peter Rosendorff, 'Cooperative Autocracies: Leader Survival, Creditworthiness, and Bilateral Investment Treaties^{*}', *American Journal of Political Science* 62, no. 4 (1 October 2018): 905–21, https://doi.org/10.1111/ajps.12383.

¹⁰ For example, the United Arab Emirates has signed 10 new BITs since 2018.

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Figure 1. BITs over time. White bars indicate signed BITs, black bars terminated BITs, and the line BIT terminations as a percentage of cumulative BITs signed. Includes BITs that have entered into force by 2019.

The accumulation of BITs has also recently resulted in increasing deployment of the ISDS-mechanism most of the treaties include. The declining number of new BITs and the simultaneously increasing number of ISDS cases has led many to conclude that ISDS practice is driving changes in the BIT regime (figure 2.) The observation has given rise to the powerful theoretical explanation of *bounded rationality of BITs*: many states were not fully aware of the true costs and benefits of BITs when first signing up to the regime.¹¹ Once governments become targets of ISDS lawsuits themselves, or observe instances of arbitration by others, they learn about the true costs and benefits of BITs.¹² States have been found to adjust, replace, or renegotiate investment treaties when they learn new information about the legal and political consequences of BITs, which is most

¹¹ Poulsen, Bounded Rationality and Economic Diplomacy.

¹² Lauge N. Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', *World Politics* 65, no. 2 (April 2013): 273–313, https://doi.org/10.1017/S0043887113000063

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effective when the government itself has become a target of an ISDS claim.¹³ This supposedly explains the lack of enthusiasm towards signing more investment treaties with ISDS clauses ever since the legal disputes have started to accumulate.



Figure 2. ISDS cases in red and BIT terminations in blue as a percentage of cumulative BITs signed over time.

However, the bounded rationality of BITs -narrative does not tell the full story about developments in the regime. The aggregated trends over-time ignore important variation in actions of different states, as well as their approaches used to reform BIT commitments. The bounded rationality explanation implies that as states face investorstate arbitration claims, they become aware of the negative consequences of BITs. This should therefore result in states' increased willingness to take action to reform BIT commitments. However, up to 2018, the association between how many ISDS cases a state has faced and how many BITs they have resulted to unilaterally terminate is not particularly strong (figure 3.) Most notably, states at various levels of ISDS-exposure have not terminated any BITs, while some states have terminated treaties despite none, or relatively little arbitration cases faced.

¹³ Haftel and Thompson, 'When Do States Renegotiate Investment Agreements?'

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Figure 3. States by number of ISDS cases they have been respondent states in, and unilaterally terminated BITs in 2018.

While states that have unilaterally terminated the most BITs have also faced large numbers of ISDS disputes – such as Indonesia, India, Ecuador, and Bolivia – many states have not taken action despite expansive experience with dispute settlement with investors. Argentina has faced the largest number of publicly known ISDS cases (60 as of 2019), and yet has not terminated any BITs. India alone has terminated 52 ratified BITs (38% of all ratified BITs that have been unilaterally denounced), and together with Ecuador, Indonesia, Italy, Bolivia, and South Africa, it accounts for over 90% of known unilaterally terminated investment treaties (Appendix A, figure 1.)

For most cases of BIT renegotiation, it is impossible to verify which party initiated the renegotiations. Based on the employed data from the UNCTAD Investment Treaty Database, it is however possible to see which states are parties to most BITs that have reportedly been replaced by a new treaty (Appendix A, figure 2.) Just like is the case with unilateral denunciations, ISDS-experience appears to be an unsatisfactory explanatory factor for renegotiations (figure 4.)

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Figure 4. States by number of ISDS cases they have been respondent states in, and the number of BITs replaced by another treaty they have been a party to in 2018.

From the perspective of the learning effects theory, it is remarkable that the majority of states that have faced ISDS have not terminated or renegotiated BITs. Many of them are states that should have been most likely to result to boundedly rational joining to the regime – small developing countries with a great need for foreign capital. As pointed out by previous scholarship, it is possible for states to experience learning shocks from ISDS-experience of others, without themselves becoming a respondent in a legal case. However, besides the aggregate correlations in over-time trends, the overall accumulation of ISDS-cases cannot explain the prevalence of majority of old BITs. It therefore seems puzzling why these states seem to *fail* to reform their BITs, if they truly learn about the costs of BITs when facing ISDS-lawsuits, and this learning is what is driving reform efforts in the regime.¹⁴

¹⁴ The opening anecdote on the Pakistani policy elite of Lauge Poulsen's influential book on bounded rationality of BITs indicates that Pakistan should be an obvious candidate for terminating or renegotiating BITs once learning through ISDS has occurred. Yet, Pakistan has not terminated any of its BITs. It has also only renegotiated two BITs, one of which was the 1995 treaty with Malaysia, which took place before it had been subjected to any ISDS disputes.

3 Bargaining Power and BIT-outcomes

I argue that while the learning shocks resulting from ISDS have been crucial for breaking the boundedly rational logic of BITs, bargaining power explains whether states can act upon the newly learned information. Only states that are in a strong bargaining position vis-à-vis their treaty partners will be able to take action regarding their BITs, which explains why the vast bulk of treaties remain unchanged despite the cumulating ISDSexperience.

3.1 Assumption of bargaining power in BITs

The key assumption underlying the theory is that BITs are inherently shaped by the bargaining power of the negotiating partners. Crucially, the party with stronger bargaining power in relation to the negotiating partner shapes the treaty to more closely resemble its preferences, while weaker party is largely a rule taker. Support for this assumption can be found from past research on the conditions under which BITs were initially formed. Most BITs that were formed before late 1990s were agreements between developing and developed countries, with the terms largely dictated by a handful of European states and the US.¹⁵ These industrialized countries were more economically developed, their investors more mobile, and therefore they had more options as possible places to invest in. On the other hand, for many developing countries, specific companies from partner states were the only source of significant capital flows.¹⁶ Because investors

¹⁵ In their analysis comparing the most common explanations for explaining investment treaty design, Allee and Peinhardt (2014) find that the power and preferences of home states predict the contents of investment treaties best. Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties', *World Politics* 66, no. 1 (January 2014): 47–87, https://doi.org/10.1017/S0043887113000324.

¹⁶ The beginning of global diffusion of BITs took place during the economic downturn in the late 1980s and early 1990s, which was also time of stagnant international bank lending. Simmons, 'Bargaining over BITs, Arbitrating Awards'. FDI also offered an alternative means of financing for developing countries during the 1990s era of Washington Consensus, which promoted privatisation and recruitment of foreign

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form powerful interest groups in democratic states, their governments are motivated to serve their interests. These states took the lead with their drafted model agreements, and the terms of investment governance were largely dictated by such countries and imposed on their treaty partners in the developing world.¹⁷

Several empirical studies also support the claim that more powerful parties include their favoured terms in negotiated agreements with higher certainty. In their analysis comparing the most common explanations for explaining investment treaty design, Allee and Peinhardt find that the power and preferences of home states predict the contents of investment treaties best.¹⁸ More recently, text analysis of BITs has found that "developed countries tend to be the rule-makers while developing countries are the rule-takers": comparison of countries' model BITs and actually signed BITs with partners shows that adopted BITs tend to resemble more closely templates of developed countries.¹⁹ The actual treaty texts therefore more closely correspond to preferences of developing countries, who were in a stronger position in comparison to developing countries at the time of treaty negotiations.

3.2 Bargaining power as alternatives and expertise

While developed countries therefore can be reasonably assumed to have shaped BITs according to their preferences initially, what exactly made them stronger than the developing country counter parts? I identify two components to bargaining power that are of vital importance in determining whether or not a state is likely to succeed at BIT

capital into utilities. Rachel L. Wellhausen, 'Recent Trends in Investor–State Dispute Settlement', *Journal of International Dispute Settlement* 7, no. 1 (1 March 2016): 123, https://doi.org/10.1093/jnlids/idv038..¹⁷ Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries', *The International Lawyer* 24, no. 3 (1990): 655–75.

¹⁸ Allee and Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties'.

¹⁹ Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', *Journal of International Economic Law* 19, no. 3 (1 September 2016): 561–88, https://doi.org/10.1093/jiel/jgw056.

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negotiations: alternatives and expertise. These two components determine not only how likely the negotiator is to do well in serving its interests at the negotiation table, but also how its situation would look like in the case of collapse of negotiations. This power to walk away from negotiations is important in determining the toughness of the bargaining position, and whether negotiations are worth undertaking in the first place.

Strong alternative + Expertise = BARGAINING POWER

In the first instance, bargaining power is conceptualised as being determined by alternatives to the negotiated agreement. The theory of best alternative to negotiated agreement, or BATNA, suggests that an actor is only as strong at bargaining as is their best outside option to the agreement under negotiation.²⁰ If a negotiator has a high no-agreement payoff, which can also be called a bottom line²¹ or resistance point²², the better the payoff from the negotiated agreement has to be in order to become preferable to the agreement at hand. Game-theoretically, bargaining power can be defined by the payoff for a player in case of a no-deal outcome. Therefore, the stronger one's alternatives to the agreement in question, the more leverage one has in negotiations.²³

In the context of BIT-negotiations, alternatives constitute a vital source of bargaining power. States improve their bargaining power in relation to investment treaties by becoming less dependent on the agreement with a specific partner state. The stronger the alternatives become, the better the terms of the agreement have to be in order to

²⁰ Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House, 1981).

²¹ David A. Lax and James K. Sebenius, 'The Power of Alternatives or the Limits to Negotiation', *Negotiation Journal* 1, no. 2 (1 April 1985): 163–79, https://doi.org/10.1007/BF00999256.

²² John S. Odell, Negotiating the World Economy (Cornell University Press, 2018), 26–28.

 $^{^{\}rm 23}$ Fisher and Ury, Getting to Yes.

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make it preferable to a no-agreement outcome.²⁴ Through stronger alternatives, states become less dependent on specific BITs, and hence make them more likely to respond to any possible learning effects. On the other hand, states who remain highly reliant on the BIT may not be in a position to initiate reform in the fear of losing the benefits provided by the treaty.

The second component of bargaining power in BIT negotiations is expertise. The role of expertise is inevitably present at any economic negotiation, and it is therefore best understood as a vital feature of bargaining power in the BIT regime. At the onset, international bureaucrats with privileged access to negotiating forums and drafting of proposals placed them in the position of expertise regarding policy developments on the issue. Because of their privileged informational position, these experts were able to influence the outcomes of consequential policy negotiations at the international fora.²⁵ If the key elites that were in a position of expertise in shaping the rules of the game on governance of international investment initially, such expertise likely continues to shape BIT negotiations today.

Expertise has in the past been understood to be distinct from bargaining power. Poulsen describes expertise as a feature that enables actors to overcome cognitive limitations that result in boundedly rational decision-making: developing countries' decision-making was constrained by cognitive biases, such as motivated reasoning, salience bias, and status-quo bias. On the contrary, developed countries are assumed to have been rational in their decision-making, largely because their expertise enabled them to avoid such

²⁴ Spatial bargaining models include relative bargaining power or "resolve" of the parties as a factor which can determine the possible range of bargaining outcomes before the no-agreement (or war) becomes preferable. T. Clifton Morgan, 'A Spatial Model of Crisis Bargaining', *International Studies Quarterly* 28, no. 4 (1984): 407–26, https://doi.org/10.2307/2600563.

²⁵ St. John, The Rise of Investor-State Arbitration.

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biases.²⁶ However, presuming that rationality of an actor increases with expertise opens the door to faulty deductions, such that less knowledgeable actors are not capable of rational decision-making. While actors make different decisions based on the information available to them, knowledgeable and less knowledgeable actors are both capable of falling into biases of bounded rationality. A legal expert with plenty of experience may for example fall into the status quo bias of respecting old treaties as a good template for new ones to a greater extent than a novice negotiator with no prior experience. Therefore, while expertise does not guarantee more rationality in decision-making, it increases the information available to an actor of the rules of the game, and hence makes it stronger at the negotiations.

I therefore treat expertise as a feature of bargaining power rather than of rationality: the legal expert may occasionally fall for biases of bounded rationality, but they will hold an advantage over the novice negotiating partner by being able to make proposals that serve their interests to an extent that the opponent cannot. They can draft model treaties and push for their interests more effectively than a negotiating partner with lower expertise. This "knowledge as power" -approach is in line with past treatments of power in economic relations.²⁷ Recent techniques have also found close association between attributes of expertise and bargaining success in relation to BITs.²⁸ There is therefore evidence that expertise forms a crucial yet often overlooked component of bargaining power in the investment treaty regime.

²⁶ Poulsen, Bounded Rationality and Economic Diplomacy, 26-28.

²⁷ For example, Susan Strange outlined knowledge as one of the factors constituting the definition of structural power: knowledge helps an actor to shape the rules of the game that is played by everyone, and which therefore shapes international outcomes. Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, 1996).

²⁸ Tarald Laudal Berge and Øyvind Stiansen, 'Negotiating BITs with Models. The Power of Expertise', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 12 October 2016), https://papers.ssrn.com/abstract=2851454.

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3.3 How bargaining power changes translate into BIT outcomes

Adopting the assumption of underlying bargaining power shaping BITs, and the conceptualization of bargaining power as alternatives and expertise, a stylized twodimensional bargaining diagram illustrated in Figure 5. can be used to illustrate the negotiating dynamic over a BIT.²⁹ Any point in the diagram represents a possible agreement: points to the north entail gains for Party 1, and points to the east for Party 2. B1 and B2 represent the bottom line for the parties respectively. As for any agreement, there is a limit to the extent to which a negotiated agreement can result in benefits for the parties, which is represented by a theoretical possibility frontier P. The negotiating parties may not know the position of P in practice. Any agreement northeast on the diagram implies absolute gains from the agreement, however, any point beyond P is unfeasible, perhaps for practical or technological reasons. A negotiated agreement must therefore lie in the space limited by each party's bottom line, and the possibility frontier.

CASE 1



Figure 5. Two-axis diagram with bottom lines of negotiating parties and the possibility frontier at two time points for perfectly rational states (Type I). BIT becomes unstable.

²⁹ Model originally applied in Odell, *Negotiating the World Economy*, 29–31.

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In case 1, party 2 is expected to be perfectly rational (Type I). Type I party 2 has joined the BIT under perfect rationality, negotiated its terms to the best of its knowledge and abilities, and it is therefore reflective of its bargaining power position at the time. At the first time point, t_1 , a negotiated BIT falls within the space limited by the bottom lines of both parties and the possibility frontier P. To reflect unequal bargaining power positions of the parties, the BIT at t_1 results in larger benefits for Party 1 than for Party 2, as the treaty lies relatively close to the bottom line of Party 2. As will become apparent, such unequal BITs are most likely to become unsustainable following bargaining power changes.

At t_2 , the bargaining power of Party 2 has improved, which is reflected by the shifting of B2 to east: improved bargaining power through one or both of its attributes, alternatives or expertise, results in increased demands for the BIT in order for it to be preferable to a no-agreement outcome. This is because better alternatives have increased the possibilities to do well without the status quo agreement or improved its noagreement payoff. Hence the minimum requirements for the BIT to be preferable to walking away from the agreement have to accommodate this new bottom line, resulting in stricter bargaining position.

Improvement of expertise likewise results in a change in what terms are acceptable from a BIT: expertise influences the process through which a party can effectively identify which treaty terms serve its interests, as well as communicate these interests to the negotiation partner. An improvement in expertise entails that if renegotiations were to take place, the party would be likely to do better than it did in a position with lower expertise. A party recognizing their improved expertise, as well as continued existence of cooperative benefits from the BIT, will have incentives to initiate renegotiations, as well as walk away from the agreement in the hopes of initiating renegotiations at a later

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stage. In the diagram, therefore, the improvement of one or both of the attributes of bargaining power has left the old BIT outside the space constrained by B1, B2, and P, making it unstable. Points a, b, and c represent new possible BITs that could be sustainable in light of the new B2, as well as the old B1 and P. a is the only possibility that would result in absolute gains for both Party 1 and Party 2, while agreements b and c would benefit Party 2 but make Party 1 worse-off. The shift in one of the parties' bottom line is what explains the deviations from old, status quo BITs in this first case, which in turn is dependent on their bargaining power.

This purely rationalist account follows the logic of traditional bargaining models, and clearly illustrates how bargaining power changes upset the status quo of negotiated agreements. In the context of BITs, where many states may have been boundedly rational in their decision-making, however, it is important to relax the assumption of rationality.

Figure 6 presents case 2, where party 2 joined the BIT under bounded rationality (Type II). It was not aware of its bottom line, i.e. the true costs and benefits of the BIT in relation to its bargaining power. The dashed line in figure 6 illustrates the bottom line of party 2 that it is not aware of at the time. Bounded rationality explains why some BITs were formed despite them being unacceptable with rationalist hindsight: the BIT is out-of-bounds from the perspective of party 2 at t_1 . The bounded rationality of Party 2 is however broken at t_2 due to a learning effect, and it becomes aware that the BIT is actually outside the space of mutually beneficial agreements. This is reflected with a solid B2 line, which has not moved in position, but Party 2 has rather become aware of its position.

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CASE 2



Figure 6. Two-axis diagram with bottom lines of parties, where Party 2 is not aware of its B2 due to bounded rationality at t_1 , but becomes aware of it in t_2 following a learning shock. BIT becomes unstable.

Comparison of Case 1 and Case 2 explains the two reasons why some states have signed BITs that seem to harm them: either they were simply the best they could get at the time of negotiations due to their weak bargaining power (Case 1), or they were boundedly rational and not fully aware of the deal offered by specific BITs (Case 2). The reasons why states deviate from status quo BITs at time 2 are therefore also twofold: either states improve their bargaining power and hence want to renegotiate BIT terms, or they learn about the true costs of the BIT and likewise make the old BIT unacceptable as it is. However, figure 7. illustrates a third possibility: here, Party 2 was also boundedly rational at the time of BIT signature, but unlike in Case 2, the BIT actually reflected its bargaining position. Because BIT is situated within the acceptable bounds for both states, and Party 2 has not improved its bargaining position, the experienced learning shock at t_2 has no effect on the sustainability of the BIT. Draft prepared for the PEIO 2020 Conference Please do not reference or circulate without the permission of the author

CASE 3



Figure 7. Diagrams where at t_1 Party 2 is not aware of its B2 due to bounded rationality, but it becomes aware if it at t_2 following learning shock. The BIT remains stable.

The interpretation of the dynamic is that *even if* Party 2 had been rational in signing BITs, it may still have gotten the best deal that was possible given its bargaining power at t_1 . As a result, even after breaking bounded rationality, the BIT remains sustainable as long as Party 2 has not improved its bargaining power to be better-off from deviating from the status quo. Such states that have experienced learning shocks are therefore stuck with BITs unless they have improved their bargaining power since the initial treaty signature. Table 1. summarises for which cases bargaining power and learning effects are necessary in order to observe a change in an old BIT.

Table 1.Summary table for when improvement of bargaining power and learning effect are
necessary to observe change in a status quo BIT

	Type I: Rational	Type II: Boundedly rational		
	CASE 1	CASE 2	CASE 3	
Improved bargaining	Necessary	Not necessary	Necessary	
Learning effect	Not necessary	Necessary	Necessary	

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3.4 Decision to terminate or renegotiate

What remains unexplained is the choice to unilaterally denounce or attempt renegotiation of the BIT after change has become desirable. The two components of bargaining power are of vital importance in determining this choice: stronger alternatives make unilateral termination the preferred course of action, while expertise lends itself to attempts of renegotiation. This is because each of the components of bargaining power make the associated costs of the specific type of deviation from status quo smaller (table 2).

	Status quo	Unilateral termination	Renegotiation
Benefits	Continued attraction of FDI	Dissolve ISDS-obligations for new	Strengthen
	Reputation from adherence	investors	cooperation
	to treaty commitments		Update treaty terms
	(not "defecting")		
Costs	Continued exposure to ISDS	Hostile signal to foreign investors	Effort
		Political costs of "reneging"	Time
		Negative signal to financial	
		institutions	
		$(Sunset clause)^{30}$	

 Table 2.
 Costs and benefits of keeping status quo BIT, unilateral termination, and renegotiation

If a state has improved its alternatives to the BIT, this makes the negative signalling costs of termination lower: for example, alternative international agreements lowers the costs of negative signalling to the partner state, as they can signal continued intention to cooperate via other economic agreements. Likewise, the ability to attract FDI despite the BIT lowers the costs of negative signalling to foreign investors. On the other hand, higher expertise lowers the costs associated with renegotiation. A state which has significantly improved its capacity and knowledge over economic negotiations would

 $^{^{30}}$ Sunset clause included in most BITs ensures that the terms of the BIT continue to apply to investments made prior to termination of the agreement often for another 10-15 years.

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rather attempt renegotiation than walk away from the BIT completely, as they will have a chance of improving the terms and continuing to enjoy cooperative benefits.

The dynamic described here naturally only concerns the reformist state in the dyad, who has become dissatisfied with the status quo BIT. Improvement of bargaining power though expertise therefore only results in increased desire to attempt renegotiation instead of unilaterally terminating by one partner state. However, it does not say much about the likelihood of successful renegotiation; or, how the partner state is likely to respond to the demands for renegotiation. The strategic interaction that follows is likewise dependent on the extent of improvement in bargaining power of the initiating state: the status quo partner is more likely to agree to the renegotiation attempt of their partner if in addition to improved expertise the partner has also improved their alternatives. When the initiating state has a credible exit threat, i.e. an attractive outside agreement payoff, the partner is likely to agree to renegotiate the BIT with concessions, rather than risk the collapse of the agreement. Figure 8. summarises a decision tree for a dissatisfied state, and therefore the expected BIT outcomes as a function of the two components of bargaining power.



Figure 8. Decision tree for a state that has become dissatisfied with its BIT

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4 Evidence from quantitative analysis

4.1 Data

The new base dataset employed consists of 3295 scraped BITs from the UNCTAD Investment Agreements Navigator, which updates treaties into the database as they are announced as signed, entered into force, or terminated in different government websites.³¹ This outcome information constitutes the dependent variable for the study. For the analysis, I convert a subsection of the data into a cross-section time series dataset, where years range from 1963 to 2018, when the first and the newest BIT entered into force respectively. I therefore exclude treaties that never entered into force. In order to isolate a subset of the data where the dynamic summarised in Figure 10 applies, I also only include BITs where at least one party has faced at least one ISDS-claim, as they can reasonably be assumed to be dissatisfied with the treaty.³² I also exclude BITs that have been reported as mutually terminated or expired by UNCTAD. While the study of these alternative outcomes may prove interesting for some special cases, they are a small subset and not addressed by the outlined theory (figure 9). As the status of each BIT may be updated any day, the dataset represents a snapshot of one point in time.³³

³¹ Haftel and Thompson (2018) in their recent paper on BIT renegotiations provides data from all mutually ratified BITs between 1962 and 2007, however, since a majority of the BIT terminations occur after 2007, the new dataset is necessary to include more recent developments, and it provides a vital contribution.

 $^{^{32}}$ In practice, criterion of ISDS-experience only excludes 61 BITs from the dataset, as great majority of state dyads have experienced at least one ISDS-claim by 2018.

³³ BITs and their statuses in the dataset are as reported in the UNCTAD Investment Agreements Navigator on the 18th July 2019, when the scraping was conducted.

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Terminated BITs

Figure 9. Terminated BITs by type of termination. Unilaterally denounced and renegotiated BITs account for over 90% of BIT terminations.³⁴

The unit of analysis is the individual treaty-year. Any treaty between a country-dyad that gets replaced at a later stage will have separate observations for both the old and the new BIT. For example, both the Indonesia-Netherlands (1968) and the Indonesia-Netherlands (1994) are included as separate treaties. The data structure has advantages for empirical testing, as individual observations for each unique treaty enables the use of fixed effects for each unique BIT. Only some basic characteristics of the BITs are obtained directly from the UNCTAD website: status, the parties, date of signature, date of entry into force, and date and type of termination (when applicable). Additional data is acquired from alternative sources: data on investment disputes is acquired from the UNCTAD Investment Dispute Navigator, and the rest of the covariates come from World Development Indicators, the Correlates of War dataset, the PRS Group's International Country Risk Guide, and the Varieties of Democracy (V-Dem) Project.

³⁴ UNCTAD describes their data collection and updating process on their website in greater detail: the data is continuously updated by UNCTAD staff and volunteers as a result of verification and comments from UN member states' governments on a voluntary basis. While UCTAD assumes no responsibility for the completeness or accuracy of the data, the Investment Agreements Navigator provides most comprehensive information on BITs currently available.

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The theory requires coding the two parties to the BIT in a way that identifies the initially stronger and initially weaker party in the bargaining relationship. The ordering of the two states therefore identifies their respective bargaining power positions at t_1 when the BIT was initially signed. Following the theoretical characterization of bargaining power as alternatives and expertise, the primary coding rule identifies *party* 1 as the party with larger volume of FDI exports in the year of BIT signature, while *party 2* is the country with smaller exports. The rule presents stronger FDI exporters as having stronger alternatives, as they are more likely to be attractive investment treaty partners with other states, and hence less dependent on the BIT under negotiation.³⁵ To account for expertise in the early bargaining dynamics, and to overcome some coding oddities, I follow an additional coding rule also adopted by Allee and Peinhardt: when one of the parties in a dyad is a member of the OECD on the year of BIT-signing while the other one is not, they are coded as party 1.³⁶ If a dyad cannot be ordered due to missing data, it is dropped. The remaining dataset includes 2130 unique BITs and 42,680 treaty-year observations.

4.2 Design

To test the hypotheses regarding the effects of bargaining power and learning shocks on BIT outcome, I estimate a fixed effects regression models in two steps. First, to separate the excess zeros of status quo treaties, I estimate a model for whether or not a BIT

³⁵ The coding rule is a compromise between data availability on the early BIT-years and theoretical accuracy. While dyadic FDI flow data could give a better indication of alternatives, it is not available for most years and most dyads. Alternative coding rule to identify a net capital exporter as party 1 and net importer as party 2 eliminates large amounts of treaties, because in many dyads both parties are either net capital importers or exporters. Additionally, such a rule results in some oddities such as the 1989 Congo-UK dyad, where Congo becomes party 1 by the virtue of being a net capital exporter in that year (while UK was a net capital importer) according to World Bank data.

³⁶Todd Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions', *International Studies Quarterly* 54, no. 1 (1 March 2010): 1–26, https://doi.org/10.1111/j.1468-2478.2009.00575.x. For the other coding rules used by Allee and Peinhardt, see their footnote 11.

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deviates from status quo. Second, when a BIT deviates, I estimate whether it gets renegotiated or unilaterally terminated. The two-step model is a way to deal with the zero-inflation of the status quo outcome, as well as a means to take into account different data generating processes between the initial deviation versus the terminationrenegotiation decision.³⁷

Employing fixed effects controls for any time invariant observable and unobservable factors that are specific to the treaty or the country dyad, as well as any year-specific trends. In the context of BITs, this addresses the problem of large amounts of data that would be otherwise required to control for factors such as unique treaty features (i.e. how strict the dispute settlement provisions are), colonial history, diplomatic or cultural factors, general trends in the world economy, and overall accumulation of ISDS-disputes.

The two-step model estimated can be written as follows

1.
$$Y_{it (deviation)} = \beta_0 + \beta_1 \Delta BP + S + \beta_2 X + \alpha_i + \delta_t + u_{it}$$

2. $Y_{it \ (termination \ vs} = \beta_0 + \beta_1 \Delta BP + S + \beta_2 X + \alpha_i + \delta_t + u_{it}$ renegotiation)

The dependent variable Y_{it} in the first equation is whether or not a treaty i on a year t deviates from status quo BIT. The outcome therefore captures whether or not the BIT gets terminated or renegotiated. ΔBP is the bargaining power change since the initial year of treaty signature, and S is the learning effect. I employ several measures of bargaining power change (section 4.3), but as per the theory, I would expect a change in the bargaining power dynamic between the two states to have a positive and

³⁷ The modelling strategy is similar to hurdle models, where the first process is specified for zero counts and the second process for positive counts. While the outcome of a BIT does not constitute a count, in the deviation from status quo can be thought of a "hurdle" to be cleared before the decision to terminate or renegotiate is taken.

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significant effect on the likelihood of deviation. X is a set of time-varying, observable control variables, and the β s are the coefficients to be estimated. α_i is the treaty fixed effect, δ_t is the year fixed effect, and u_{it} is the idiosyncratic error. In the second step, I use the subset of the data with BITs that deviated from status quo: the Y_{it} is now whether or not the treaty got unilaterally terminated as opposed to renegotiated.

Table 3: Dependent Variables

Statistic	Ν	Mean	St. Dev.	Min	Pctl(25)	Pctl(75)	Max
Deviation from BIT	42,680	0.005	0.068	0	0	0	1
Renegotiated	42,680	0.002	0.046	0	0	0	1
Unilaterally terminated	42,680	0.002	0.050	0	0	0	1

4.3 Variables and measurement

The conventional practice regarding operationalizing bargaining power in international economic negotiations considers countries with more economic power as being stronger at negotiations over international economic treaties. In the context of BITs, it is plausible that the economically more powerful state is likely to have stronger alternatives: larger amounts of investment are likely to flow into the less economically strong state than vice versa, and there are possibly a higher number of potential companies willing to invest abroad. The economically stronger party is therefore likely to have an overall stronger leverage over the negotiating partner. The first measure of bargaining power within the dyad therefore is *GDP gap change*: the difference between party 1's and party 2' GDPs compared to what it was in the year of BIT signature. The measure captures the change that has occurred between the parties over time. As an alternative measure, I also use *GDP change* measure, which captures the GDP change since the year of BIT signature for each party separately.

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To capture expertise, I employ two measures³⁸: first, the bureaucratic quality index from the International Country Risk Guide, where "high points are given to countries where the bureaucracy has the strength and expertise to govern without drastic changes in policy or interruptions in government services."³⁹ Strong bureaucracies are closely related to expertise in their ability to sustain international negotiations without political interruption and to build institutional knowledge over negotiations and BITs. Second, I use the Public sector corruption index from the Varieties of Democracy dataset, where the measure addresses "to what extent do public sector employees grant favors in exchange for bribes, kickbacks, or other material inducements..."⁴⁰ Public sector corruption is likely to capture expertise in the form of meritocratic hiring practices instead of public officials being appointed for private gain.

Unlike with the GDP measures, it is not possible to construct a relational and over-time measure with bureaucratic quality and corruption measures due to excess missingness in the years of BIT signature. Instead, I employ measures for *bureaucracy gap* and *corruption gap* to capture relational difference in bureaucratic quality and public sector corruption in partner states. As an additional measure, I also run models with *bureaucratic* and *corruption change*, which capture the change in bureaucratic quality and level of public sector corruption since the year of BIT signature for each party individually.

The learning effects variable is captured by *ISDS disputes*. Past research suggests that international arbitration has been the most powerful learning mechanism informing states of the true costs of BITs, and hence provides an "information shock". The variable

³⁸ The two measures are also employed in relation to BITs by Berge and Stiansen, 'Negotiating BITs with Models. The Power of Expertise'.

³⁹ PRS Group, "International Country Risk Guide Methodology", http://www.prsgroup.com/wp-content/uploads/2012/11/icrgmethodology.pdf.

⁴⁰ Varieties of Democracy, Codebook Version 9, 2019.

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is operationalized as the cumulative number of total initiated ISDS disputes against the partner states in the dyad. It is also possible that states learn from other countries ISDS experiences as well as their own, and this effect will be accounted for by time fixed effects.

Any effect which is time-varying but may affect the outcomes of BITs to different extents must be included in the model. Following the Haftel and Thompson (2018) study⁴¹, I control for **Democratization**, which is a binary variable taking the value 1 if at least one of the parties in the dyad has experienced an increase in their Polity IV score of 3 or more the past three years. Democratic transitions may make governments more sensitive to domestic pressures to regulate in favor of public issues such as health and the environment, which BITs have been accused of limiting due to the obligations owed to foreign investors. Governments may therefore be more likely to take action regarding their BITs following democratic transition.

Two EU-related variables are also controlled for: countries joining the European Union may be more likely to renew their BITs, if there are considered to be conflicts between BITs and European law. The variable *New EU Member* is coded 1 for country years for which at least one of the parties joined the EU from the joining year onwards. Furthermore, a recent ruling by the Court of Justice of the European Union on the Slovak Republic v. Achmea B.V. case concluded that the provisions in the Netherlands – Slovakia BIT (1991) had an adverse effect on the autonomy of EU law, and hence the treaty was to be considered not compatible with European legislation. Since many BITs include similar provisions, the implications for all intra-EU BITs may be severe. While the Achmea ruling is a recent development, it is possible that some of the latest terminations in the dataset may have been a result of this decision. *Intra-EU* is coded

⁴¹ Haftel and Thompson, 'When Do States Renegotiate Investment Agreements?'

1 if both of the parties are EU members in a year. Table 3. Presents summary statistics for the independent and control variables, lagged by three years.

Statistic	Ν	Mean	St. Dev.	Min	Pctl(25)	Pctl(75)	Max
GDP gap change	30,455	-0.160	0.413	-4.092	-0.325	0.035	2.099
Party 1 GDP change (log)	34,425	0.336	0.284	-0.841	0.141	0.455	2.756
Party 2 GDP change (log)	31,940	0.504	0.474	-1.290	0.198	0.694	4.659
Bureaucratic gap	30,408	1.256	1.157	-3.000	0.500	2.000	4.000
Party 1 Bureaucratic change	29,053	-0.045	0.402	-1.500	0.000	0.000	2.000
Party 2 Bureaucratic change	22,003	0.156	0.647	-3.000	0.000	0.170	3.000
Corruption Gap	35,630	-0.360	0.357	-0.965	-0.644	-0.114	0.870
Party 1 Corruption change	33,726	-0.007	0.059	-0.635	-0.005	0.000	0.375
Party 2 Corruption change	32,670	-0.009	0.142	-0.847	-0.051	0.028	0.736
Democratization	38,500	0.074	0.262	0.000	0.000	0.000	1.000
Intra-EU	36,328	0.011	0.106	0.000	0.000	0.000	1.000
New EU	36,328	0.012	0.111	0.000	0.000	0.000	1.000

Table 4: Independent and Control Variables

4.5 Preliminary results

I present two analyses related to deviation form status quo. Table 5. presents the results from the first fixed effects regression with *deviation from status quo BIT* as the dependent variable, using bargaining power measures that are relative between the treaty partners. In all the models, standard errors are clustered at the dyad-level. The measure of bargaining power as GDP gap change returns negative and statistically significant results in the first five models employing year fixed effects. The interpretation is that the smaller the GDP gap has become since the initial signing of the BIT in comparison to the year of signature, the more likely the treaty is to deviate from status quo. The result supports the theory, as when the initially weaker parties catch up with the stronger party, deviations either though unilateral termination or renegotiation become more likely. The statistical significance however disappears in the sixth model employing bit fixed effects. This is likely due to the fact that a large number of deviations from status quo BITs are accounted for by a few countries that have caught up with their partners.

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IT FEs
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124)
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"" p < 0.01, "" p < 0.05, " p < 0.1

Table 5: DV: Deviation from Status Quo, Relative Bargaining Power measures

Cumulative ISDS remains statistically significant and positive in all models, confirming that increased exposure to ISDS makes deviation from old BITs more likely. The result is in support of the claim that many states experience learning effects from ISDS, and hence were boundedly rational when initially joining the treaties. Intra-EU BITs are also less likely to deviate; however, the statistical significance may result from the fact that only one intra-EU BIT that has deviated is included in the sample. The relative measures of bargaining power as expertise measures do not predict deviation from status quo BIT; however, when bargaining power is measured as over-time change per treaty partner, the measures return more consistent results (Appendix B, table 1).⁴²

For the second step, I estimate models using only the subset of BITs that have deviated from status quo. Table 7. presents results predicting *unilateral termination* using relative bargaining power measures. GDP gap change has a consistent statistically significant and positive effect on unilateral termination, which implies that if the gap

⁴² Changes in the parties GDP since treaty signature are predictors of deviation from status quo BIT, and the association holds even when controlling for ISDS experience.

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between signatory parties has grown larger since BIT signature, the BIT is more likely to get unilaterally terminated than renegotiated. The result is intuitive, given that demanding renegotiation in an even weaker bargaining position than was the case earlier would be unlikely to be met with successful renegotiation demands by the partner. Cumulative ISDS does not have a statistically significant effect on determining whether or not the treaty gets unilaterally terminated or renegotiated. While the gap in bureaucratic quality of the states has no effect on unilateral termination, corruption gap does return a negative and significant result. Larger difference in the corruption levels in the partner countries therefore predicts less likely unilateral termination of the BIT as opposed to renegotiation.

	Year FE	Year+BIT FEs				
GDP gap change	0.01340^{***}	0.01306^{***}	0.01352^{***}	0.01407^{***}	0.01372^{***}	0.03058^{**}
	(0.00462)	(0.00460)	(0.00469)	(0.00482)	(0.00487)	(0.01404)
Cumulative ISDS		0.00028	0.00026	0.00025	0.00023	0.00120^{*}
		(0.00023)	(0.00023)	(0.00024)	(0.00023)	(0.00063)
Bureaucratic gap			-0.00269	-0.00351	-0.00296	-0.00116
			(0.00210)	(0.00272)	(0.00274)	(0.00467)
Corruption gap				-0.00422	-0.00225	-0.13953^{***}
				(0.00975)	(0.00980)	(0.03392)
Democratization					-0.00556	-0.01072
					(0.00600)	(0.00720)
Intra-EU					-0.05193^{***}	-0.05158^{***}
					(0.00431)	(0.00542)
New EU					-0.01230^{*}	0.01192
					(0.00631)	(0.00936)
Num. obs.	3422	3422	3135	3135	3090	3090
\mathbb{R}^2 (full model)	0.09315	0.09343	0.08958	0.08961	0.09090	0.11678
R ² (proj model)	0.00179	0.00210	0.00265	0.00268	0.00289	0.00577
Adj. R ² (full model)	0.08024	0.08026	0.07960	0.07932	0.07958	0.05760
Adj. R ² (proj model)	-0.01241	-0.01240	-0.00829	-0.00859	-0.00953	-0.06086

 $p^{***} p < 0.01, p^{**} p < 0.05, p^{*} p < 0.1$

Table 7: DV: Unilateral termination, Relative Bargaining Power measures

Finally, table 8. presents the results for models using *renegotiation* as the dependent variable. While GDP gap change has no impact on the likelihood of BIT-renegotiation, cumulative ISDS count has a positive and significant effect. Somewhat surprisingly, a larger bureaucratic gap predicts higher chance of renegotiation.

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	Year FE	Year+BIT FEs				
GDP gap change	-0.00636^{*}	-0.00650^{*}	-0.00611^{*}	-0.00630^{*}	-0.00686^{*}	-0.01269
	(0.00348)	(0.00349)	(0.00361)	(0.00372)	(0.00366)	(0.01055)
Cumulative ISDS		0.00011	0.00015	0.00015	0.00015	0.00092**
		(0.00015)	(0.00015)	(0.00015)	(0.00015)	(0.00039)
Bureaucratic gap			0.00387^{*}	0.00416	0.00446^{*}	0.01376^{**}
			(0.00210)	(0.00268)	(0.00269)	(0.00540)
Corruption gap				0.00149	0.00169	0.02410
				(0.00970)	(0.01000)	(0.03735)
Democratization					0.00969	0.01304
					(0.01394)	(0.01547)
Intra-EU					-0.02392^{***}	-0.01349
					(0.00626)	(0.00837)
New EU					0.07233	0.06118
					(0.05732)	(0.06011)
Num. obs.	3422	3422	3135	3135	3090	3090
\mathbb{R}^2 (full model)	0.01375	0.01383	0.01423	0.01424	0.01641	0.04825
R ² (proj model)	0.00063	0.00071	0.00159	0.00159	0.00399	0.00440
Adj. R ² (full model)	-0.00028	-0.00050	0.00342	0.00311	0.00416	-0.01553
Adj. R ² (proj model)	-0.01359	-0.01382	-0.00936	-0.00968	-0.00841	-0.06231

 $^{***}p < 0.01, \ ^{**}p < 0.05, \ ^*p < 0.1$

Table 9: DV: Renegotiation, Relative Bargaining Power measures

Overall, the preliminary results indicate some association between the proxy measures for bargaining power and BIT outcomes. In terms of capturing changes in "expertise gaps", the inability to measure relative bureaucratic quality and corruption over time is a major limitation for modelling. Furthermore, GDP changes remain a rough proxy measure for bargaining power as alternatives and may not capture the full dynamic at play.

Theoretically, initially weaker parties are expected to be the ones with initiating change in the BIT regime, while stronger parties are likely to still enjoy status quo as it was negotiated in a much stronger bargaining position. Empirically, the initially weaker parties have been largely developing countries, and therefore also more likely to have experienced improvement of expertise. Appendix B therefore includes models where the relative over-time measure of GDP gap change (as well as bureaucratic quality and corruption) are included for each party separately.

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Appendix A

Additional figures



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*Based on the employed data from the UNCTAD Investment Treaty Database, it is not possible to know which party to a BIT initiated renegotiation. It is, however, possible to see which states are parties to most BITs that have reportedly been replaced by a new treaty. While Egypt ranks third, it has actually not managed to renegotiate any BITs out of its own initiative for reform.⁴³ It is notable that the top rankings of states unilaterally terminating and renegotiating BITs look quite different: besides from China, the majority of top states with renegotiated BITs are European states. There are therefore clear differences in what courses of action are adopted among the states who seek reform.

⁴³ Mohammed Mossallam, 'Process Matters: South Africa's Experience Exiting Its BITs', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 January 2015), https://papers.ssrn.com/abstract=2562417.

Appendix B

Additional regression results using party-specific, over-time bargaining power measures

	Year FE	Year FE	Year FE	Year FE	Year FE	Year+BIT FEs
Party2 GDP change	0.00477^{***}	0.00509^{***}	0.00801^{***}	0.00810^{***}	0.00854^{***}	0.01913^{***}
	(0.00130)	(0.00130)	(0.00217)	(0.00218)	(0.00230)	(0.00525)
Party1 GDP change	0.00388^{*}	0.00319	0.00316	0.00253	0.00213	0.01216^{**}
	(0.00205)	(0.00202)	(0.00244)	(0.00239)	(0.00244)	(0.00589)
Cumulative ISDS		0.00017^{***}	0.00015^{***}	0.00016^{***}	0.00016^{***}	0.00033***
		(0.00004)	(0.00005)	(0.00005)	(0.00005)	(0.00010)
Party 2 bureaucratic change			-0.00141	-0.00147	-0.00149	-0.00215^{*}
			(0.00097)	(0.00097)	(0.00099)	(0.00115)
Party 1 bureaucratic change			-0.00241^{*}	-0.00255^{*}	-0.00270^{*}	-0.00594^{*}
			(0.00137)	(0.00137)	(0.00141)	(0.00344)
Party2 corruption change			` '	-0.01038^{***}	-0.01124^{***}	0.00322
				(0.00391)	(0.00400)	(0.00567)
Party1 corruption change				-0.01059	-0.01166	-0.01734
				(0.00857)	(0.00872)	(0.01353)
Democratization				(-0.00281^{*}	-0.00045
					(0.00149)	(0.00183)
Intra-EU					-0.01015^{***}	-0.00863***
					(0.00132)	(0.00155)
New EU					0.00196	0.00519
					(0.00468)	(0.00502)
Num, obs.	30455	30455	20160	20106	19056	19056
\mathbf{R}^2 (full model)	0.00515	0.00573	0.00823	0.00856	0.00929	0.06398
B ² (proj model)	0.00130	0.00189	0.00210	0.00239	0.00268	0.00169
Adi, B ² (full model)	0.00348	0.00403	0.00651	0.00673	0.00720	-0.00551
Adi. B ² (proj model)	-0.00038	0.00018	0.00036	0.00055	0.00058	-0.07243
**** < 0.01 *** < 0.05 ** < 0.1	0.00000	0.00010	0.00000	0.00000	0.00000	-0101210

 $^{***}p < 0.01, \ ^{**}p < 0.05, \ ^*p < 0.1$

Table 1: DV: Deviation from Status Quo, Party-specific bargaining power measures

Please do not reference or circulate without the permission of the author

	Year FE	Year FE	Year FE	Year FE	Year FE	Year+BIT FEs
Party2 GDP change	0.00477^{***}	0.00509***	0.00801***	0.00810***	0.00854^{***}	0.01913^{***}
	(0.00130)	(0.00130)	(0.00217)	(0.00218)	(0.00230)	(0.00525)
Party1 GDP change	0.00388^{*}	0.00319	0.00316	0.00253	0.00213	0.01216^{**}
	(0.00205)	(0.00202)	(0.00244)	(0.00239)	(0.00244)	(0.00589)
Cumulative ISDS		0.00017^{***}	0.00015^{***}	0.00016^{***}	0.00016^{***}	0.00033***
		(0.00004)	(0.00005)	(0.00005)	(0.00005)	(0.00010)
Party 2 bureaucratic change			-0.00141	-0.00147	-0.00149	-0.00215^{*}
			(0.00097)	(0.00097)	(0.00099)	(0.00115)
Party 1 bureaucratic change			-0.00241^{*}	-0.00255^{*}	-0.00270^{*}	-0.00594^{*}
			(0.00137)	(0.00137)	(0.00141)	(0.00344)
Party2 corruption change				-0.01038^{***}	-0.01124^{***}	0.00322
				(0.00391)	(0.00400)	(0.00567)
Party1 corruption change				-0.01059	-0.01166	-0.01734
				(0.00857)	(0.00872)	(0.01353)
Democratization					-0.00281^{*}	-0.00045
					(0.00149)	(0.00183)
Intra-EU					-0.01015^{***}	-0.00863^{***}
					(0.00132)	(0.00155)
New EU					0.00196	0.00519
					(0.00468)	(0.00502)
Num. obs.	30455	30455	20160	20106	19056	19056
R ² (full model)	0.00515	0.00573	0.00823	0.00856	0.00929	0.06398
R ² (proj model)	0.00130	0.00189	0.00210	0.00239	0.00268	0.00169
Adj. R ² (full model)	0.00348	0.00403	0.00651	0.00673	0.00720	-0.00551
Adj. R ² (proj model)	-0.00038	0.00018	0.00036	0.00055	0.00058	-0.07243

Adj. R^2 (proj model) ***p < 0.01, **p < 0.05, *p < 0.1

Table 2: DV: Unilateral termination, Party-specific bargaining power measures

Please do not reference or circulate without the permission of the author

	Year FE	Year FE	Year FE	Year FE	Year FE	Year+BIT FEs
Party2 GDP change	0.00477***	0.00509***	0.00801***	0.00810***	0.00854***	0.01913***
	(0.00130)	(0.00130)	(0.00217)	(0.00218)	(0.00230)	(0.00525)
Party1 GDP change	0.00388^{*}	0.00319	0.00316	0.00253	0.00213	0.01216**
	(0.00205)	(0.00202)	(0.00244)	(0.00239)	(0.00244)	(0.00589)
Cumulative ISDS	, ,	0.00017***	0.00015***	0.00016***	0.00016***	0.00033***
		(0.00004)	(0.00005)	(0.00005)	(0.00005)	(0.00010)
Party 2 bureaucratic change		· /	-0.00141	-0.00147	-0.00149	-0.00215^{*}
			(0.00097)	(0.00097)	(0.00099)	(0.00115)
Party 1 bureaucratic change			-0.00241^{*}	-0.00255^{*}	-0.00270^{*}	-0.00594^{*}
			(0.00137)	(0.00137)	(0.00141)	(0.00344)
Party2 corruption change			. ,	-0.01038^{***}	-0.01124^{***}	0.00322
7				(0.00391)	(0.00400)	(0.00567)
Party1 corruption change				-0.01059	-0.01166	-0.01734
				(0.00857)	(0.00872)	(0.01353)
Democratization					-0.00281^{*}	-0.00045
					(0.00149)	(0.00183)
Intra-EU					-0.01015^{***}	-0.00863***
					(0.00132)	(0.00155)
New EU					0.00196	0.00519
					(0.00468)	(0.00502)
Num. obs.	30455	30455	20160	20106	19056	19056
R ² (full model)	0.00515	0.00573	0.00823	0.00856	0.00929	0.06398
R ² (proj model)	0.00130	0.00189	0.00210	0.00239	0.00268	0.00169
Adj. R ² (full model)	0.00348	0.00403	0.00651	0.00673	0.00720	-0.00551
Adj. R ² (proj model)	-0.00038	0.00018	0.00036	0.00055	0.00058	-0.07243

 $^{***}p < 0.01, \, ^{**}p < 0.05, \, ^*p < 0.1$

Table 3: DV: Renegotiation, Party-specific bargaining power measures