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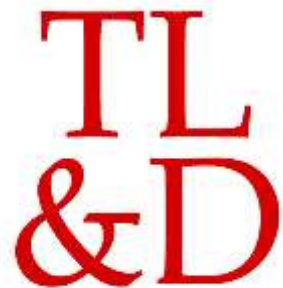
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CHINA'S INVESTMENT TREATIES WITH LATIN AMERICA
AND IMPLICATIONS FOR SOUTH-SOUTH COOPERATION:
EVIDENCE FROM FIRM-LEVEL DATA

JESSE LISS*

Policymakers and analysts frame China's growing investment in Latin America and the Caribbean as new forms of South-South cooperation. This study situates China's investment treaties with Latin America in the context of South-South cooperation and measures their relative effects on China's foreign direct investment (FDI) in the region. Macro-level econometric studies on the relationship between investment treaties and FDI are inconclusive due to methodological limitations, notably, studies must account for qualitative distinctions between political and economic conditions, bilateral relations, the strength of investor rights, and the sector of FDI flows. Based on China's unique institutional characteristics, I use firm-level data and separate econometric models for public and private firms to measure the effect of China's investment treaties on China's Outward Foreign Direct Investment (OFDI). I find that China's investment treaties with Latin America do not promote China's OFDI to the region. I conclude that for China-Latin America investment treaties to become instruments of South-South cooperation they must include commitments to bilateral and regional investment institutions. Keywords in this article include investment treaties, investment and development, South-South Cooperation, bilateral investment treaties, international political economy, trade and industrial policy.

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I. INTRODUCTION

China has become a primary driver of globalisation. China became the world's second largest investor in 2016 (U.S. being the first), although dropping to third in 2017.¹In the last decade, Latin America and the Caribbean (LAC) has been consistently the second or third largest destination for China's OFDI.² China's OFDI flows to LAC peaked in 2011 (US \$193.6 billion), while in 2016 and 2017 they reached \$142.1 billion and nearly \$150 billion.³As these trends are new, there is a growing body of literature on China's OFDI to LAC and the growing interdependence of the two regions. Policymakers and analysts frame this investment in terms of South-South cooperation, in which China's OFDI opens up scope for mutual industrial development and in turn growing political alliances. However, there is little empirical evidence on the policy tools of China's economic diplomacy in Latin America and their effects on Chinese OFDI, and there are no empirical studies on the impacts of China's investment treaties with Latin America. This paper is a preliminary approach aimed at filling that gap.

International investment law is the legal underpinning to FDI and cross-border capital flows. Investment treaties include bilateral investment treaties (BITs) and

¹UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, U.N. Sales No. E.18.IID.4 (2018).

²TAOTAO CHEN & MIGUEL PÉREZ LUDEÑA, CHINESE FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN, 8 (2014), https://repositorio.cepal.org/bitstream/handle/11362/35908/1/S2014011_en.pdf [hereinafter Chen].

³ Enrique Dussel Peters, *Monitor of Chinese OFDI in Latin America and the Caribbean 2018*, RED ALC CHINA, 2 (Mar. 21, 2018), http://www.redalc-china.org/monitor/images/pdfs/menuprincipal/DusselPeters_MonitorOFDI_2018_Eng.pdf. [hereinafter Dussel-*Monitor*].

the investment chapters of free trade agreements (FTAs). Most BITs state that their purpose is to 'promote' (or 'encourage') and 'protect' reciprocal investment flows between contracting countries. Economists and legal scholars typically assume that developing countries sign BITs to promote FDI and capital inflows while developed countries are motivated to protect outbound FDI and capital.⁴ The focus of this study is to determine whether or not China's international investment agreements with Latin America promote China's OFDI to the region. As investment treaties are political decisions, China-Latin America investment agreements must be situated within the context of South-South cooperation.

Part II reviews the literature on the relationship between investment treaties and FDI, including a summary of recent studies on China's BIT program. Part III presents literature on the determinants of China's OFDI to Latin America and the evolution of China's BIT program. In Part IV, I use an econometric model with firm-level data to determine if China's investment treaties are a significant predictor of China's OFDI to Latin America. Part V concludes by situating the effectiveness of China-Latin America investment treaties within the context of South-South cooperation.

II. EMPIRICAL STUDIES ON THE RELATIONSHIP BETWEEN BITs AND FDI

A. The Purpose of BITs

1. Relative Uniformity of International Investment Agreements

There are over 2,200 international investment treaties in force worldwide.⁵ Within the investment treaty universe, there are significant differences in the substantive rights that are afforded to foreign investors. Some BITs oblige greater substantive protections for multinational investors while other BITs defer greater policy space to domestic state regulators. For example, the U.S. BIT approach is more restrictive upon state regulators than European BITs, which are both more

⁴ See Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1962-2000*, U. ILL. L. REV. 265, 305 (2008); Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 688, 693 (1998); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46(1) HARV. INT'L L. J. 67, 130 (2005); UNCTAD, THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, ¶1-2 U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (Sept. 5, 2009).

⁵ Investment Policy Hub, *International Investment Agreements Navigator*, UNCTAD (Nov. 18, 2019), <https://investmentpolicy.unctad.org/international-investment-agreements>.

inhibitive than BITs between developing countries.⁶ However, most BITs share many of the same standards for investor rights, including, restricting expropriations, granting foreign firms the same rights and benefits as local firms (national treatment) or third-country firms (most-favoured-nation treatment), obliging the free movement of capital (transfers), and requiring governments to give ‘fair and equitable treatment’ to foreign firms (minimum standard of treatment).⁷ In the event that a state has violated an investor right, many investment agreements (over one thousand) provide Investor-State Dispute Settlement (ISDS), which are a set of legal procedures that direct investment disputes away from the domestic courts of host states and towards third party arbitrators at the World Bank.⁸ Two key examples of investment treaties enforceable by ISDS are the investment chapter of the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty. ISDS tribunals can mandate states to pay monetary awards to foreign investors, although tribunals cannot change a state’s laws.

Investment law scholars find a relative uniformity in the structure and content of investment treaties. For investment law expert Salacuse, the standardised language of BITs constitutes a ‘global regime’ for investment protection characterised by shared principles, legal norms, and decision-making processes.⁹ Legal scholars Dolzer and Schreuer identified common principles of international investment law among disparate BITs.¹⁰ Investment law experts Alschner and Skougarevskiy used a “text-as-data” algorithm to measure the uniformity of over 2,100 international investment agreements.¹¹ They found a relative convergence of the texts of most international investment law, and they attributed it to three trends— *first*, that developed countries are the rule-makers of investment agreements and developing countries are the rule-takers, *second*, policy convergence, and *third*, copying of treaty design.¹² For example, China’s BIT program has evolved from being highly

⁶ Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe*, 17(3) J. WORLD INV. & TRADE 339 (2016).

⁷ Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19(3) J. INT’L ECON. L. 561 (2016) [hereinafter Alschner & Skougarevskiy].

⁸ In 1965, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) at the World Bank was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).

⁹ Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51(2) HARV. INT’L L. J. 428, 431 (2010).

¹⁰ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed. 2012).

¹¹ Alschner & Skougarevskiy, *supra* note 7, at 565.

¹²*Id.*

restrictive to FDI to resembling those of countries like the U.S. and Europe, which some commentators have described as the “NAFTA-isation” of China’s BITs.¹³ However, despite the relative uniformity in the legal content of international investment agreements, North-South BITs emerged in different political contexts than South-South BITs.

2. Does Political Context Matter for BITs?

Basic sociological insight holds that words themselves are not meaning making, but they are endowed with meaning by their contexts. Most investment treaties share a similar legal language, yet each investment treaty has a distinct political context. While North-South BITs and South-South BITs may have strong similarities in their legal content, they have qualitatively different political contexts. This suggests that North-South BITs may serve different purposes than South-South BITs, an issue that is only beginning to be explored.

Specifically, while North-South BITs emerged in the context of conflict between developed and developing countries during the Cold War, South-South BITs emerged in the context of new forms of South-South cooperation, largely after the Cold War. Considering the juxtaposition between the U.S. and China’s BIT programs, while the texts of their respective BITs have more similarities than differences, they have completely different institutional motivations.

The U.S. BIT program emerged from Cold War conflicts between developed and developing countries. By 1965, in response to the increasing amount of capital and investment disputes with developing countries, the U.S. and Europe established an investment dispute settlement court at the World Bank. The global powers crafted their respective BIT programs to ensure standardised investor protections enforceable by ISDS, which would direct investment disputes away from local courts in host states and to World Bank tribunals. The United States Trade Representative (USTR), the government agency that coordinates U.S. trade policy and negotiations, explained the origins of ISDS:

“Military interventions in the early years of U.S. history – gunboat diplomacy – were often in defence of private American commercial interests. As recently as 1974, a United Nations report found that in the previous decade and a half there had been 875 takings of the private property of foreigners by governments in 62

¹³ Axel Berger, *Investment Rules in Chinese PTAs: A Partial 'NAFTA-ization; The Rise of Preferential Trade Agreements: Bridging The Gap?*, in PREFERENTIAL TRADE AND INVESTMENT AGREEMENTS 297 (Hoffman et al. eds. 2013).

countries for which there was no international legal remedy. Though diplomatic solutions were possible, they were often ineffective and political in character, rather than judicial. ISDS represented a better way.”¹⁴

While developing countries signed BITs with the U.S. to attract U.S. FDI and capital, U.S. BIT negotiators frankly admitted to their counterparties that there was no correlation between U.S. BITs and U.S. FDI.¹⁵ According to Kenneth J. Vandeveld, one of the original drafters of the U.S. Model BIT, the original purpose of the U.S. BIT Program was to protect existing capital stocks in developing countries, establish a ‘free market’ regulatory regime for FDI, and shift investment disputes away from domestic courts and to third-party arbitrators at the World Bank.¹⁶ To those ends, according to the U.S. Department of State, the U.S. BIT program has three basic aims —*first*, protecting investment, *second*, encouraging “market-oriented domestic policies”, and *third*, supporting international legal norms consistent with the first and second objectives.¹⁷ The U.S. BIT program does not have the promotion of FDI as a ‘basic aim’ as U.S. never intended nor pretended that its BIT program would actually promote FDI flows.¹⁸ In this context, it is debatable that FDI flows are even the appropriate measure of the performance of U.S. BITs.

3. South-South BITs and South-South Cooperation

¹⁴ USTR, *ISDS: Important Questions and Answers*, THE UNITED STATE TRADE REPRESENTATIVE (Mar. 2015), <https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers>.

¹⁵ Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L. J. 201, 212 (1988).

¹⁶ See Kenneth J. Vandeveld, *The BIT Program: A Fifteen-year Appraisal*, 86 PROC. AM. SOC’Y INT’L L. 534 (2017); See also Jeffrey Lang, *Keynote Address*, 31 CORNELL INT’L L. J. 455, 457 (1998).

¹⁷ *Bilateral Investment Treaties and Related Agreements*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/> (last visited Feb. 13, 2020).

¹⁸ President Clinton wrote in two different letters to the Senate for the ratification of BITs with Ecuador and Mozambique, “It is the U.S. policy...to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increase in private U.S. investment flows.” See President William J. Clinton, *Letter of Submittal from U.S. President Clinton to U.S. Senate regarding Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment*, CONGRESS.GOV, <https://www.congress.gov/treaty-document/106th-congress/31/document-text?s=1&r=4&overview=closed> (last visited Feb. 13, 2020).

In contrast, China's BIT program emerged in the context of new forms of South-South cooperation in the early twenty-first century. South-South Cooperation is a term born of the South Commission which was established by the Non-Alignment Movement in 1986.¹⁹ The original motivation for the South Commission was to use it as a forum to evaluate the common challenges and experiences of the Global South to draw lessons for development strategies.²⁰ South-South cooperation refers to institutional arrangements among developing countries to establish and implement multilateral economic and political goals.²¹

In practice, South-South cooperation has mostly taken the form of accelerating Chinese economic and political relations with Africa, Asia, and Latin America, although there have also been diplomatic initiatives to shift the legal boundaries of relations with the Global North.²² China has prioritised industrial development in South-South cooperation strategies, with South-South FDI central to the vision. Wu Jia-Huang, one of China's top WTO officials, addressed the United Nations Industrial Organization in 2005, stating that, "In recent years, a good number of Chinese enterprises are prepared to invest their money overseas. They are looking for suitable sectors in suitable countries. There are many opportunities for South-South cooperation in the field of industrial development."²³ This vision of FDI as South-South cooperation became codified in China's various domestic and international policy documents, including the "Go Out" strategy and China's official policy papers towards LAC and Africa, such as the official Cooperation Plans between China and LAC.²⁴

¹⁹ THE REPORT OF THE SOUTH COMMISSION, THE CHALLENGE TO THE SOUTH: THE REPORT OF THE SOUTH COMMISSION 239 (1990) https://www.southcentre.int/wp-content/uploads/2013/02/The-Challenge-to-the-South_EN.pdf [hereinafter South Commission Report].

²⁰*Id.*, at 206-10.

²¹*Id.*

²²See VIJAY PRASHAD, THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH (2012).

²³ Wu Jia-Huang, *Speech by Mr. Wu Jia-Huang at Industrial Development Forum for UNIDO 11th General Conference*, INDUSTRIAL DEVELOPMENT OFFICE OF THE PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANISATIONS IN VIENNA (Dec. 03, 2005), <http://vienna2.mofcom.gov.cn/article/bilateralvisits/200512/20051200943464.shtml>.

²⁴ Warmerdam Ward & Arjan De Haan, *South-South Cooperation with Chinese Characteristics, in INNOVATING SOUTH-SOUTH COOPERATION: POLICIES, CHALLENGES AND PROSPECTS* 141, (Besada et al. ed. 2019); *China-Latin America and Caribbean Countries Cooperation Plan (2015-2019)*, CHINA-CELAC FORUM, (Jan. 23, 2015), http://www.chinacelacforum.org/eng/zywj_3/t1230944.htm.

China issued its first policy paper on LAC in 2008.²⁵ The report announced that China sought a comprehensive and cooperative partnership with the region based on ideas of peaceful coexistence between countries, deepening cooperation and mutual benefits, increased exchange, and the one-China principle.²⁶ In economic cooperation, the paper highlighted trade, investment, finance, agriculture, industry, infrastructure, resources and energy, and technical assistance.²⁷ Since then, leaders in China and LAC have taken a number of institutional steps to specify, focus and deepen these goals, including, the ‘1+3+6’ framework for bilateral economic cooperation in 2014,²⁸ and the China-Latin American and Caribbean Countries Cooperation Plan (2015-2019) in 2015.²⁹ China’s OFDI to Latin America and the Caribbean has a central role in each of these visions. In these contexts, China has signed a number of investment treaties with countries in Latin America and the Caribbean.

While the U.S. BIT program emerged out of political conflicts with developing countries in the twentieth century, the Chinese BIT program emerged out of new forms of cooperation with developing countries in the early twenty-first century. This is not to deny that there are grave tensions threatening the China-LAC relationship, including, public debates over China’s role in the ‘de-industrialisation’ and ‘re-primarisation’ of Latin America and growing anti-China resentment in the region.³⁰ However, the tensions in China-LAC relations are qualitatively different than North-South gunboat diplomacy from which North-South BITs emerged. This suggests that China’s investment treaties with LAC may serve different purposes than U.S. investment treaties. As China has only recently emerged as a major capital-exporter, researchers have only begun to study China’s OFDI, and there is even less attention to the effects of China’s international investment law on China’s OFDI.

²⁵ *China Policy Paper on Latin America and the Caribbean*, USC-ANNENBURG (Apr. 20, 2009), <http://www.coha.org/china%E2%80%99s-policy-paper-on-latin-america-and-the-caribbean/>.

²⁶*Id.*

²⁷*Id.*

²⁸ *Xi Jinping Attends China-Latin America and the Caribbean Summit and Delivers Keynote Speech, Comprehensively Expounding China's Policies and Propositions Toward Latin America, Announcing Establishment of China-Latin America Comprehensive Cooperative Partnership of Equality, Mutual Benefit and Common Development, and Establishment of China-CELAC Forum*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (July 18, 2014), https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpxcxjzgjldrdlchwdxbxagtwnrlgbjxg sfwbxzxllrdhw/t1176650.shtml.

²⁹ South Commission Report, *supra* note 20.

³⁰ ENRIQUE DUSSEL PETERS ET AL., *BEYOND RAW MATERIALS: WHO ARE THE ACTORS IN THE LATIN AMERICA AND CARIBBEAN-CHINA RELATIONSHIP?* 7 (2015) [hereinafter Dussel].

B. Do BITs Promote FDI?

The effects of BITs on capital and FDI flows have been studied and debated since the inception of BITs, and the results are highly mixed. There is a clear correlation between the growth of North-South BITs beginning in the 1980s and North-to-South FDI flows, suggesting that BITs are a highly significant predictor of FDI.³¹ More recent studies corroborate the general correlation between increasing BITs and FDI flows, globally.³² However, multivariate studies disaggregating the effects of BITs from other motivating factors to FDI have demonstrated that BITs are an inconsistent predictor of FDI. Some studies find that BITs are associated with higher FDI flows,³³ other studies find there are no correlations,³⁴ and others report a mix of both.³⁵

The inconclusiveness of the relationship between BITs and FDI is further challenged by critical limitations to data and methods. Economist Aisbett recognised that many studies share common errors in distinguishing between correlation and causation. She argued that increased FDI flows can increase the probability that countries sign investment agreements, in which case the BIT is motivated by FDI and not the reverse.³⁶ Aisbett also pointed to the problem of omitted variables acting upon the relationship between BITs and FDI, making the relationship spurious, including those improvements to a host country's investment conditions could lead to both increased FDI and BIT signings.³⁷ Moreover, FDI data suffers from numerous limitations and inconsistencies,

³¹ Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51(2) VA. J. INT'L L. 406, 415 (2010).

³² UNCTAD, *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014*, U.N. DOC. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2014) [hereinafter UNCTAD].

³³ Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005) [hereinafter Neumayer & Spess].

³⁴ Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC'Y REV. 805, 821 (2008) [hereinafter Yackee].

³⁵ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005).

³⁶ Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation* (Univ. Library of Munich, Germany, Working Paper No. 2255, 2007), https://econpapers.repec.org/scripts/redir.pf?u=https%3A%2F%2Fmpra.ub.uni-muenchen.de%2F2255%2F1%2FMPRA_paper_2255.pdf;h=repec:pra:mprapa:2255. [hereinafter Aisbett].

³⁷*Id.* at 13-17.

particularly data on developing countries. Indeed, the lack of FDI data limits researchers' ability to measure whether the effects of BITs on investment decisions are sector-specific. The problem of missing and unreliable data also explains the lack of studies on the effects of China BITs.

Existing studies have failed to consistently demonstrate that international investment agreements are correlated with increased FDI. A frequently cited UNCTAD survey of empirical studies from 1998-2014 asserted,

“...prominent counterfactuals (i.e. investment relationships that exist without being covered by [international investment agreements]) suggest that legal instruments' influence on economic matters are limited and the other determinants, in particular the economic ones, are more important. Still, the question of whether an [international investment agreement] would improve such an investment relationship remains open.”³⁸

This is not to say that BITs do not work. Rather, findings are highly sensitive to modelling choices and data availability. The impact of international investment agreements on FDI is conditioned and mediated by a range of other factors. Therefore, any analysis of the relationship between BITs and FDI must be done on a case-by-case basis that allows for qualitative distinctions between country characteristics, political conditions, the strength of BITs, and the sector of FDI flows. In the case of China, it quantitatively and qualitatively differs from the rest of the world's major capital exporters in motivations for signing BITs and sending FDI to developing countries. Therefore, any study of China's BITs and OFDI must account for China's unique institutional characteristics.

C. Do China's BITs Promote China's OFDI?

As China's experience as a major capital-exporter is still relatively new, the relationship between China's BIT program and China's OFDI is only beginning to be studied. An early study on the relationships between OFDI strategies of China's state-owned enterprises (SOE) and international market institutions found that China's SOEs preferred to invest in OECD countries that have fewer BITs, thus leading to the conclusion that BITs do little to attract OFDI from China's large SOEs.³⁹ In 2014, law professor Hadley found that China's BITs have not increased

³⁸ UNCTAD, *supra* note 32, at 6.

³⁹ Peter J. Buckley et al., *Explaining China's Outward FDI: An Institutional Perspective*, in KARL P. SAUVANT, *THE RISE OF TRANSNATIONAL CORPORATIONS FROM EMERGING MARKETS. THREAT OR OPPORTUNITY?* 107 (2008).

China's OFDI flows to China's developing country treaty partners⁴⁰ by using a time-series model of China's OFDI to 126 developing countries from 2003-10 to determine changes in China's OFDI after China signed or ratified a BIT, holding other explanatory variables constant (market size, trade openness, and political instability).

In a 2015 study, economists Chen, Li, and Whalley utilised two common econometric models of FDI, the gravity model and the knowledge-capital model.⁴¹ The standard gravity model of trade analysis has been extended to the study of FDI flows and it assumes that FDI flows depend positively on the market size of FDI sending and receiving countries and negatively on the transportation costs between them. The knowledge-capital model is grounded in formal theories of multinational corporations (MNCs) and it allows for horizontal FDI based on market-seeking and vertical FDI based on a countries' relative endowments of skilled and unskilled labour. Chen, Li, and Whalley used a dataset of China's bilateral FDI flow from the Census and Economic Information Centre during 1985-2010, and neither their gravity model nor their knowledge-capital model showed a statistically significant relationship between China's BITs and OFDI.⁴²

The existing quantitative studies have two major pitfalls, *first*, the datasets do not include the post-2010 years in which China became the world's second largest investor, and *second*, that the econometric models assume that China's firms operate on the same commercial basis as Western firms. Researchers Cotula, Weng, Ma and Ren offered some qualitative evidence confirming that China's OFDI is not motivated by China's BITs.⁴³ They interviewed 55 Chinese firms operating in sub-Saharan Africa's natural resource and infrastructure sectors, and with industry experts. Based on these interviews, the researchers concluded, "...Chinese business takes little account of BITs when making investment decisions."⁴⁴ Specifically, the study found that China's BITs were largely irrelevant to the investment decisions of China's large SOEs operating in Africa, while China's privately owned small to medium sized businesses lacked awareness of BITs.⁴⁵

⁴⁰ Kate Hadley, *Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO. J. INT'L L. 255, 309 (2014) [hereinafter Hadley].

⁴¹ Hejing Chen et al., *The Impact of BITs and DTTs on FDI Inflow and Outflow: Evidence from China*, 75 in THE ECONOMIES OF INDIA AND CHINA (Manmohan Agarwal et al. eds. 2017) [hereinafter Chen et al.]

⁴²*Id.*

⁴³ LORENZO COTULA ET AL., CHINA-AFRICA INVESTMENT TREATIES: DO THEY WORK? 49 (2015) [hereinafter Cotula-China].

⁴⁴*Id.* at 8.

⁴⁵*Id.* at 9.

However, the report was not comprehensive of China's OFDI to Africa and it was merely an exploratory study.

Legal scholar Eliasson observed China's SOEs do not take investment treaties into account when analysing political risk in a host country and asserted that, "Chinese companies generally do not appear to structure investments in a way that strengthens the investment treaty protection of their overseas investments."⁴⁶ Moreover, he added that BITs do not matter to China's large SOEs in their investment decision-making process because in developing countries they tend to make government contracts through diplomatic relations rather than bidding, especially for natural resources FDI.⁴⁷

III. DETERMINANTS OF CHINA'S OFDI

To understand the role of China's BITs in motivating China's OFDI, I identify the determinants of China's OFDI, focusing on China's OFDI to LAC. In this part, I review China's regulatory framework for OFDI, China's BIT program, and the characteristics of China's OFDI to LAC. In the data analysis part, I weigh the significance of China's BITs relative to these other determinants of China's OFDI.

A. China's OFDI Regulatory Framework

A growing body of literature suggests that China's regulatory framework for OFDI is the determinant of the country's rising FDI. Scholars on China's economic integration with the world trace China's OFDI strategy to a series of policy documents, with the most important being the formalisation of China's 'go out' strategy in 2001 during the 10th Five-Year Plan on Economic and Social Development.⁴⁸ The 'go out' strategy emphasised OFDI as a means of competitive and technological upgrading by investing and operating abroad. The 'go out' strategy is embedded within a larger development strategy that relies on industrial upgrading and multilateral cooperation. China determined that OFDI would play a key role in this strategy, and the National People's Congress announced that their plan was "...to encourage OFDI into areas where China has competitive advantages, and to expand the scope, channels, and modes of international

⁴⁶ Nils Eliasson, *The Chinese Investment Treaty Programme, Jurisdictional Challenges and Investment Planning: The example of Chinese Outbound Investments in the Natural Resources Sector*, in WENHUA SHAN, CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP 253-59 (2015) [hereinafter *Eliasson-Investment*].

⁴⁷*Id.*

⁴⁸ Karl P. Sauvart & Victor Zitian, *China's Regulatory Framework for Outward Foreign Direct Investment*, 7(1) CHINA ECON. J. 141 (2014) [hereinafter *Sauvart & Zitian*].

economic and technological cooperation.”⁴⁹ Chinese policymakers modified and elaborated these goals in a number of policy documents throughout the 2000s. They determined two overall objectives for the OFDI policy.

The first objective was to enhance the global competitiveness of Chinese multinational enterprises. This objective is motivated by both Chinese government officials and business leaders. The Chinese Communist Party actively promotes China's MNCs in acquiring foreign assets, markets, and natural resources, which in turn becomes a source of competitiveness.⁵⁰ On the other hand, Chinese firms pressure the Chinese government to support their internationalisation as a response to increasing competition in both domestic and international markets.⁵¹ As China opened to inward FDI, Chinese firms faced increased competitive pressures and many turned to internationalisation as a response.⁵² Large Chinese SOEs developed internationalisation strategies as a means to obtain new technology, know-how, brand names, markets, and economies of scale to compete more effectively in world markets. For these reasons, Chinese business leaders called upon the Chinese Communist Party for more reform and policy innovation to provide greater institutional support for their globalisation strategies (e.g. financing, technology, subsidies, and human development).⁵³

The second objective is to contribute directly to China's development by obtaining natural resources, promoting exports, and strengthening the technological base. China achieves these goals by selectively supporting FDI in certain industries and activities. China uses OFDI to obtain access to strategic resources and assets, including raw materials, natural resources, technology, and intellectual property. In addition, FDI is a means to industrial upgrading because it provides for climbing the value-chain by upgrading and enhancing capital allocation efficiency by reducing relative costs of inputs in production.⁵⁴ To these ends, China has developed coherent and focused strategies to support and promote specific types of OFDI.

China has a group of institutional filters that organise OFDI.⁵⁵ The National Development and Reform Commission, the Ministry of Commerce, and the State

⁴⁹ 10th Five-Year Plan on Economic and Social Development, NATIONAL PEOPLE'S CONGRESS <http://www.china.org.cn/english/8449.htm>.

⁵⁰ Sauvant & Zitlan, *supra* note 48.

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 3.

⁵⁵ Enrique Dussel Peters, *The Omnipresent Role of China's Public Sector in its Relationship with Latin America and the Caribbean*, in BEYOND RAW MATERIALS: WHO ARE THE ACTORS IN

Administration of Foreign Exchange are the principal political institutions that design and implement OFDI policies and regulations. In 2006, they grouped industries into three categories in which OFDI is prohibited, permitted, and encouraged, and each institution evaluates proposed OFDI projects according to these criteria, at both the central and local levels.⁵⁶ For example, while high technology and strategic commodity industries are encouraged, OFDI is restricted in various entertainment industries, technologically “outdated” sectors, and to countries with politically sensitive diplomatic relations. It is also restricted in military technology and some related industries.⁵⁷ The Ministry of Finance provides special funds for supporting OFDI and taxation policies. The State Administration of Taxation, The People’s Bank of China, The Export-Import (EXIM) Bank of China, the Credit Insurance Company, SASAC, and the State Administration of Foreign Exchange are additional institutional filters in the implementation of general and national development strategies.⁵⁸

Given China’s sophisticated regulatory institutions for OFDI, the Chinese government has a range of options for directly participating in OFDI, including through direct ownership and massive incentives. In these contexts, the vast majority of China’s OFDI comes from the public sector. Out of the top 25 countries that are sources of OFDI, public sector OFDI accounts for no more than 5% of total OFDI, while China’s public sector OFDI is 86.89% of China’s total OFDI.⁵⁹ Congruent with China’s stated OFDI objectives, a growing body of literature observes that China’s public sector OFDI does not operate on a commercial basis but in accordance with the China’s long-term national development goals.⁶⁰ China’s robust BIT program serves to help protect China’s quickly growing OFDI stocks.

B. China’s BIT Program

China has signed more BITs than any country in the world except Germany (China signed 145; Germany signed 155).⁶¹ This has prompted multiple scholarly probes

THE LATIN AMERICAN AND CARIBBEAN-CHINA RELATIONSHIP? 50 (2015)[hereinafter *Dussel-Omnipresent Role*]; Dussel, *supra* note 30, at 52-63.

⁵⁶*Id.*

⁵⁷ *Opinions on Further Guiding and Regulating Outbound Investment*, PAUL WEISS https://www.paulweiss.com/media/3977255/ruletranslation_082217.pdf (last visited Feb. 13, 2020).

⁵⁸ *Dussel-Omnipresent Role*, *supra* note 56, at 67.

⁵⁹*Id.*

⁶⁰Dussel, *supra* note 30, at 52-63.

⁶¹International Investment Agreements Navigator, UNCTAD INVESTMENT POLICY HUB <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy#iiaInnerMenu> (last visited Feb. 13, 2020).

into China's motivations. China's approach to international law remains 'sovereignty-centred',⁶² yet BITs impinge on sovereignty to regulate MNCs, so China's robust BIT program is surprising. In contrast to the other larger capital-importing developing countries, Brazil and South Africa have avoided or terminated their investment treaties, while India's Model BIT offers only weak investor protections. Policymakers in both Brazil and South Africa have concluded that BITs impinge too far upon domestic regulatory space, and they prefer alternative legal protections for foreign investors.⁶³ In this context, legal scholar Endicott asks, "Why then has China entered into such an active treaty-making program and significantly broadened the scope of its investor-state provisions since the late 1990s?"⁶⁴

1. The Evolution of China's BIT Program

China has a long tradition of suspicion towards international law as an instrument of western imperialism.⁶⁵ It consistently rejected international investment law until the 1980s, when it signed its first BIT with Sweden. This was among the first steps of China's reform process that began in 1978, turning the page on its isolationist orientations. Investment law scholar Axel Berger⁶⁶ systematically examined China's investment agreements and grouped them into three generations ranging from the early 1980s to 2013, when the U.S. and China reached a milestone in BIT negotiations.⁶⁷ In this time period, China's BIT program evolved from having heavy emphasis on state sovereignty to being a regulatory model that relies on U.S. and European practice. Berger identified the first generation as beginning in the early 1980s and ending in 1998.⁶⁸ China signed many BITs during this time,

⁶² Zhaojie Li, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT'L & COMP. L. 314 (2001).

⁶³ Martin Endicott, *China and International Investment Law: An Evolving Relationship*, in CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP 215 (Wenhua Shan ed. 2015) [hereinafter Endicott].

⁶⁴ *Id.*

⁶⁵ Jacques Delisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267, 275 (2000).

⁶⁶ Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?* (German Development Institute, Discussion Paper 7/2013), https://www.die-gdi.de/uploads/media/DP_7.2013.pdf [hereinafter Berger].

⁶⁷ China had accepted the 2012 U.S. Model BIT provisions that would cover all stages of investment and sectors. See, Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, Treasury Notes, U.S. DEPT. OF TREASURY. (July 15, 2013), <https://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx>.

⁶⁸ Berger, *supra* note 66.

however, most did not contain national treatment and ISDS only applied to the amount of compensation in the event of expropriation.⁶⁹ Therefore, China's first-generation BITs afforded nearly omnipotent sovereignty to regulate multinational investors.

Berger identified the second-generation BITs as beginning in 1998, prior to China's WTO accession, and continuing to the present as China has a number of these second-generation BITs still in force.⁷⁰ In 1998, China signed a BIT with Barbados that expanded the scope of ISDS to all investment protections, and the rest of China's BITs followed this model. In addition, most of these second-generation BITs include national treatment although it is conditioned on national law for BITs with developing countries and with general exceptions to national treatment for BITs with developed countries.⁷¹ In many of China's second-generation BITs with developed countries, the national treatment provisions permit China to maintain laws that discriminate against foreign investors, but China agreed to a 'standstill' in implementing new regulations. In doing so, China was able to secure national treatment for its OFDI but still discriminates against inward FDI.

Berger contends that while China's second-generation BITs largely follow the European BIT approach (in terms of substantive rights), after 2008 China began to adopt language from U.S. BITs, a trend he described as the "NAFTA-isation" of China's BITs. Berger identified these post-2008 agreements as China's third generation of BITs.⁷² While China's BITs retain significantly more policy space for state regulators than U.S. BITs, China's post-2008 BITs adopted references to customary international law, bringing China's BIT program closer to U.S. standards. In light of these revisions, China renegotiated many of its first-generation BITs to the standards of second and third-generation BITs.⁷³

While BITs are increasingly complicated documents, there are three key differences in the substantive investor rights included in China's three generations of BITs. Those differences are —*first*, national treatment (the right for foreign investors to be treated the same as domestic investors), *second*, pre-establishment (the right for foreign investors to have investor rights before establishing an investment in a host state), and *third*, the scope of ISDS coverage. China's first-generation BITs rejected all three categories of investor rights (with a very specific exception to allow for

⁶⁹*Id.* at 6.

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³ Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43(3) INT'L LAW. 1301, 1310 (2009).

ISDS arbitrations of the amount of compensation for expropriation); the second-generation BITs largely embraced national treatment and a full application of ISDS; the third-generation BITs expanded the second-generation BITs by including certain pre-establishment conditions, thereby being the most investor-friendly generation of China's BITs.⁷⁴

2. China's Motivations for BIT Revisions

Throughout the Cold War, most developing countries categorically rejected customary international investment law, and China was no exception. Developing countries outlined their position on foreign capital and investments in the United Nations Charter of Economic Rights and Duties of States,⁷⁵ which was adopted by the UN General Assembly in 1974. Article 2 addressed foreign investment, which provided that each State has the right: "to regulate and exercise authority over foreign investment within its national jurisdiction",⁷⁶ "to regulate and supervise the activities of Transnational corporations within its national jurisdiction",⁷⁷ "to nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures."⁷⁸ China was a signatory to the Charter and had a tradition of rejecting U.S. proposals to codify international investment law in multilateral fora.⁷⁹ Indeed, even China's first-generation BITs were highly restrictive of multinational investor rights and continued to reject customary international investment law. China signed the first-generation BITs as part of China's reform process and development strategy, which relied on inward FDI and the discriminatory treatment of foreign investors, such as requirements for joint ventures and technology transfers.

China's second and third-generation BITs include a conditional acceptance of customary international investment law, a sea change in China's approach.⁸⁰ China's

⁷⁴ Berger, *supra* note 66.

⁷⁵ G.A. Res.3281 (XXIX), at 48 (Dec. 12, 1974).

⁷⁶ *Id.* at art. 2(A).

⁷⁷ *Id.* at art. 2(B).

⁷⁸ *Id.* at art. 2(C).

⁷⁹ For instance, the U.S. attempted to codify international investment law in the League of Nations in 1930. The representative from China rejected customary international law in arguing that a foreign investor must be prepared for "...all local conditions, political and physical, as he is the weather." See Edwin Borchard, *Minimum Standard of the Treatment of Aliens*, 38(4) MICH. L. REV. (1940).

⁸⁰ See references to the Minimum Standard of Treatment in China's third generation BITs (e.g. China-Seychelles BIT (2007), China-Costa Rica BIT (2007), China-New Zealand PTIA (2008), China-Mexico BIT (2008), China-Colombia BIT (2008), China-Peru PTIA (2009), China, Japan and Korea BIT (2012), China-Canada BIT (2012)).

second-generation BITs coincided with China's 'go out' strategy and China's rise as a capital-exporter. China's cautious adoption of the European approach to BITs reflected China's new concerns about promoting domestic reforms while protecting increasing OFDI. Endicott posited that China's second and third-generation BITs furthered the stabilisation of China's domestic legal environment and China's case for market-economy status at the WTO.⁸¹ Economists Hoekman and Newfarmer observed that international investment agreements serve to lock-in domestic reforms and support universal legal norms in developing countries.⁸² The primary concern of multinational businesses investing and operating in China in the 1980s and 90s was that China's management of inward FDI was 'indeterminant' and 'inconsistent'.⁸³ In response, Chinese policymakers focused on synchronising the rule of law with international standards to improve China's investment climate, which helps to explain China's new commitment to norms in international investment law. Endicott suggested that these reforms were also motivated by China's desire for market-economy status in the WTO.⁸⁴

While China's second and third-generation BITs may have helped facilitate domestic reforms, Sauvant and Nolan maintain that China's central motivation was to protect increasing OFDI stocks in the context of increasingly uneasy receptions of China's investments.⁸⁵ In 2011, Premier Wen Jiabao urged "protection of China's overseas rights," promising to "...strengthen macro guidance over overseas investments, improve the mechanisms for stimulating and protecting them, and guard against investment risk."⁸⁶ Premier was referring to the rising scepticism of China's OFDI. Sauvant and Nolan identified general concerns about China's investments in host states by stating that:

"...the leading role of SOEs in the country's outward FDI (and the associated concern that it could serve non-commercial purposes); the negative effects that can be associated with FDI (such as the transfer of research and development facilities from newly acquired firms to parent firms); the fear, especially regarding natural resource projects, that host countries do not get a fair deal in the distribution of benefits from such

⁸¹ Endicott, *supra* note 63.

⁸² Bernard Hoekman & Richard Newfarmer, *Preferential Trade Agreements, Investment Disciplines and Investment Flows*, 25 J. WORLD TRADE 949, 973 (2005).

⁸³ Endicott, *supra* note 63, at 231-32.

⁸⁴ *Id.* at 233.

⁸⁵ Karl P. Sauvant & Michael D. Nolan, *China's Outward Foreign Direct Investment and International Investment Law*, 18 J. INT'L ECON. L. 901-42 (2015) [hereinafter Sauvant & Nolan].

⁸⁶ Premier Wen Jiabao, *Report on the Work of the Government*, XINHUANET (Mar. 15, 2011), http://online.wsj.com/public/resources/documents/WenWorkReport_Eng_2013.pdf.

projects (including when these projects employ primarily Chinese workers); perceived unfair competition, especially in the case of SOEs (based on, e.g., the suspicion of subsidised financing); the negative image of the home country in some host countries (related also to the fact that members of the Chinese Communist Party are often in leading positions in Chinese MNEs); and the fear that China's outward FDI might compromise national security (especially regarding such investment in critical industries and infrastructure) while supporting the country's emergence as a global strategic competitor.⁸⁷

In the contexts of highly mixed perceptions and receptions of China's OFDI, Chinese policymakers have sought to strengthen investor protections in China's BITs as a means to mitigate political risks to the country's OFDI while helping to secure market access.

IV. DO CHINA'S BITs PROMOTE CHINA'S OFDI TO LATIN AMERICA?

A. Variables and Data

1. China's OFDI and Firm Ownership

In this section, I use an econometric model to determine if China's investment treaties promote China's OFDI to the region relative to other determinants. The dependent variable is China's firm-level OFDI in Latin America from 2008 to 2015. The firm-level data came from the Monitor of China's OFDI in Latin America and the Caribbean.⁸⁸ This data is a compilation of various sources, including FDI Markets, Thomson-Reuters, Bloomberg, Capital IQ, China Global Investment Tracker (CGIT) and investment announcements reported by the trade press. The Monitor was compiled by a team of researchers who tracked news from the specialised press, company reports, and reports from various public and private institutions in LAC, investment announcements, among others, to confirm that projects were realised. The final result was a database of 309 firm-level transactions. Based on the criteria outlined in Peters (2015),⁸⁹ firms were determined to be either public or private.

⁸⁷ Sauvart & Nolan, *supra* note 85, at 9.

⁸⁸ Enrique Dussel Peters & Samuel Ortiz Velásquez, *Monitor of China's OFDI in Latin America and the Caribbean (2001-2016)*, RED LAC CHINA NETWORK, (June 8, 2017) http://www.redalc-china.org/monitor/images/pdfs/menuprincipal/DusselPeters_OrtizVelasquez_2017_MonitorOFDIchinaALC_English.pdf [hereinafter Peters & Velásquez].

⁸⁹ Dussel-*Omnipresent Role*, *supra* note 55.

However, this database is not free from limitations. The overwhelming part of China's OFDI is concentrated in financial and tax havens in the Cayman Islands and the British Virgin Islands, although these countries and FDI flows are not included in the Monitor. The problem is that there is no reliable information on the ultimate destination of these funds, although experts believe that most of it return to China as 'round-tripping' investment.⁹⁰ Similarly, China's investment that comes from other countries, such as the U.S., gets officially recorded as FDI from that third country. Lastly, the Monitor is an incomplete dataset as there are an unknown amount of investment projects that are not included.⁹¹

I use separate econometric models for public and private firms because a growing body of literature points to crucial distinctions between China's publicly-owned and private-owned OFDI, particularly in Latin America and the Caribbean. Using firm-level data, economists Dussel and Ortiz reported that from 2001 to 2016, China's state-owned enterprises (SOEs) made 146 investments in the region while China's private-owned enterprises (POEs) recorded 157 investments.⁹² However, China's state owned OFDI stock in LAC represents 76.68% of China's total OFDI in the region (US \$87.155 billion).⁹³ China is a strong contrast to the world's other top twenty five capital-exporting countries, in which public sector OFDI accounts for no more than 5% of the total.⁹⁴ Moreover, China's SOEs and POEs are categorically different investors by their sets of motivations and appetites for risk.⁹⁵

Studies that use disaggregated FDI data find that sectoral differences in China's OFDI patterns are accounted for by firm ownership.⁹⁶ That is, China's SOEs invest in LAC primarily for purposes of securing access to natural resources while China's POEs are market-seeking. Economist Lin illustrated the difference by

⁹⁰Geng Xiao, *People's Republic of China's Round-Tripping FDI: Scale, Causes and Implications*, (ADB Inst. Discussion Paper No. 7, 2004), <https://think-asia.org/bitstream/handle/11540/3595/2004.06.dp7.foreign.direct.investment.people.rep.china.implications.pdf?sequence=1>.

⁹¹ The Author was on the research team that updated the 2017-8 data on Monitor of China's OFDI in Latin America and the Caribbean.

⁹² Peters & Velásquez, *supra* note 89.

⁹³ Dussel-*Omnipresent Role*, *supra* note 56.

⁹⁴*Id.*

⁹⁵ Yue Lin, *Firm Heterogeneity and Location Choice of Chinese firms in Latin America and the Caribbean: Corporate Ownership, Strategic Motives and Host Country Institutions*, CHINA ECON. REV. 274, 285 (2015) [hereinafter Lin-Firm Heterogeneity]; Peter Buckley et al., *The Determinants of Chinese Outward Foreign Direct Investment*, 38(4) J. INT'L BUS. STUD. 499, 509 (2007); Yue Lin, *Inversion Extranjera Directa de China en America Latina*, in EDP AMERICA LATINA Y EL CARIBE: CHINA ECONOMIA, COMERCIO Y INVERSIONES 203 (2013).

⁹⁶ Lin-Firm Heterogeneity, *supra* note 95.

finding a significant and positive relationship between China's natural resource imports from LAC and China's SOE investments in natural resources in the region. Lin concluded that this "...demonstrates the intention of Chinese SOEs to secure the source of oil and mineral resources in LAC."⁹⁷ A number of commentators concluded that China's SOEs do not have commercial motivations for investing in LAC but rather they seek to implement China's long-term development strategy.⁹⁸

a. China's Investment Treaties with Latin America

The variable of interest is China's second-generation investment agreements in force. China has second-generation bilateral investment treaties with Chile⁹⁹, Mexico¹⁰⁰, and Colombia,¹⁰¹ and free trade agreements with Chile¹⁰² and Peru¹⁰³ that include investment chapters (the China-Peru FTA came into force in 2010 and China-Chile signed the investment supplement¹⁰⁴ of the FTA in 2012). Further, it also has investment treaties with Costa Rica¹⁰⁵ and Trinidad and Tobago¹⁰⁶ but they are not included in the analysis due to the low frequency of China's OFDI to those countries.

⁹⁷*Id.* at 11.

⁹⁸Dussel, *supra* note 30.

⁹⁹ Agreement between concerning the Encouragement and the Reciprocal Protection of Investment, Chile-China, Mar. 23, 2004, TRT/CL-CN1/001.

¹⁰⁰ Agreement concerning the Encouragement and the Reciprocal Protection of Investment, China-Mex, Jul. 11, 2008, IC-BT 1153 (2008).

¹⁰¹ Agreement concerning the Encouragement and the Reciprocal Protection of Investment, China-Colom, Nov. 22, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/720/download>.

¹⁰² Free Trade Agreement, Chile-China, Nov. 18, 2005, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2712/download>.

¹⁰³ Free Trade Agreement, China-Peru, Apr. 28, 2008, http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf.

¹⁰⁴ The Agreement on Revising China-Chile Free Trade Agreement and Supplementary Agreement on Trade in Services of the Free Trade Agreement, Chile-China, Apr. 13, 2008, http://fta.mofcom.gov.cn/chile/xieyi/bcyds_en.pdf.

¹⁰⁵ Agreement concerning the Encouragement and the Reciprocal Protection of Investment, China-Costa Rica, Oct. 24, 2007, https://arbitration.org/sites/default/files/bit/china_costa_rica_spanish.pdf.

¹⁰⁶ Agreement concerning the Encouragement and the Reciprocal Protection of Investment China-Trin. & Tobago, Nov. 2, 2010, <http://tfs.mofcom.gov.cn/article/h/bk/201002/20100206785132.shtml>.

Country	Year Came into Force
Chile	2011
Colombia	2013
Mexico	2009
Peru	2010
Costa Rica	2012
Trinidad and Tobago	2004

b. Natural Resources

While China has made roughly the same number of investments in raw materials, manufacturing, and services, the large majority of China's OFDI to LAC goes to the raw materials sector (65.13%), followed by services (25.8%) and manufacturing (8.97%).¹⁰⁷ Commentators point out that China has a relative shortage of raw materials and must import them; China has become the world's leading consumer of iron ore, steel, coal, zinc, lead, tin, nickel, copper and aluminium.¹⁰⁸ The literature on China's OFDI places a high degree of emphasis on China's large investments in raw materials and natural resources as a reflection of China's strategic goals in the "go out" plan.¹⁰⁹

Therefore, the second variable is natural resources and it addresses the well documented motive of Chinese firms seeking fuels and metals in Latin America and the Caribbean.¹¹⁰ The data was from the World Bank and the variable is GDP of natural resources rents, and it was constructed by multiplying total natural resources rents as a percent of GDP by the country's GDP, and then it was logged. There were two missing cases due to missing data for Venezuela's natural resource rents in 2014 and 2015.

c. Gross Domestic Product

China's services and manufacturing FDI is market-seeking, and it targets growing local markets that cannot be accessed via exports due to tariff and non-tariff trade barriers and local content requirements.¹¹¹ Throughout the 2000s, China's

¹⁰⁷ Peters & Velásquez, *supra* note 88.

¹⁰⁸ Dussel, *supra* note 30.

¹⁰⁹ *Id.*

¹¹⁰ Dussel, *supra* note 30; Ruben Gonzalez-Vicente, *Mapping Chinese Mining Investment in Latin America: Politics or Market?*, 209 CHINA Q. 3, 38-40 (2012).

¹¹¹ Enrique Dussel Peters, *Características de la Inversión Extranjera Directa China en América Latina (2000-2011)*, in EDP AMERICA LATINA Y EL CARIBE: CHINA ECONOMIA, COMERCIO Y INVERSIONES 171-202 (2013); Chen, *supra* note 2.

merchandise exports to LAC grew by 2.6 times, which suggests that Chinese businesses view LAC as an increasingly important export market.¹¹² Economists Zhang and Roelfsema found that China's OFDI follows China's exports.¹¹³ Similar to Western services firms, Chinese services firms use FDI to reach local markets in LAC, such as banking and telecommunications.¹¹⁴ The third independent variable is Gross Domestic Product (GDP) at constant 2010 U.S. dollars. GDP is a standard predictor of FDI, and it is included in the model to capture the market-seeking motive of Chinese firms, notably in manufacturing and services. The data is from the World Bank and GDP was logged to capture its elasticity.

d. China's Loans to Latin America

The fourth variable is China's loans to countries in the region. This data is from The China-Latin America Finance Database collected by The Inter-American Dialogue.¹¹⁵ The database catalogues loans from the China Development Bank and China Export-Import Bank to Latin America by country, lender, sector and year. Since 2005, Chinese policy banks have provided more than US\$141 billion in loan to countries and state-owned firms in the region, which surpassed the combined lending from the World Bank and the Inter-American Development Bank. The variable is a binary variable that indicates whether or not China had given a country a loan in the same year of FDI project. This variable acts as a proxy for bilateral political relations between China and the FDI host state, that is, a loan from China indicates a strong diplomatic relationship and therefore an increased likelihood of China's OFDI to that country.

Variable	Description	Source
China's OFDI	Frequency count of China's foreign direct investment in the country	The Monitor of China's OFDI in Latin America and the Caribbean
Investment Agreement	Binary variable that indicates whether or not there was a bilateral investment agreement in	Bilateral Investment Treaties and Free Trade Agreements

¹¹² Gaston Fornes & Alan Butt Philip, *Chinese MNEs and Latin America: A Review* 6 INT'L J. EMERGING MKTS. 98 (2011).

¹¹³ Yi Zhang & Hein Roelfsema, *Unravelling the Complex Motivations Behind China's Outward FDI*, 19 J. ASIA PAC. ECON. 89, 97 (2013).

¹¹⁴ Dussel, *supra* note 30.

¹¹⁵ The China-Latin America Finance Database is a product of collaboration between the Inter-American Dialogue and the Global China Initiative at Boston University's Global Development Policy Center.

	force in the year of the investment	
Gross Domestic Product	Logged constant 2010 prices	World Bank
Natural Resources	Logged GDP of total natural resources rent	World Bank
China's Loans	Binary variable that indicates whether or not China gave the country a loan in the year of investment	The China-Latin America Finance Database

B. Methods

My model uses panel data from 2008-2015 and I only include countries with Chinese investments in most years of the time horizon, including Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, and Venezuela (8 groups). Panel data accounts for individual heterogeneity by controlling for unobserved or unmeasured variables within each country. As demonstrated by economist Peters (2015), China's OFDI is distinct from Western OFDI due to the omnipresence of China's public sector.¹¹⁶ Therefore, I do not use a gravity model of China's OFDI because China's OFDI has distinct characteristics from Western OFDI. The dependent variable is the frequency count of China's firm investments, as standard linear models are not appropriate methods.¹¹⁷ In addition, linear regression can be biased when unaccounted country-specific characteristics affect an outcome variable. Econometrics uses random-effects and fixed-effects estimators as two competing methods that address these problems, although each requires different assumptions. To decide between fixed or random effects, I ran a Hausman test where the null hypothesis is that the preferred model is random effects (the alternative hypothesis is the fixed effects).¹¹⁸ The Hausman test (0.0218) indicated that a random effects model is the most appropriate. The random effects model had first-order autocorrelation, and this was corrected by employing an autoregressive (AR) process, panel data model. The model reveals whether, holding other things constant, the frequency of China's OFDI to a partner country changes after an investment agreement comes into force.

C. Results and Discussion

¹¹⁶ Dussel-Omnipresent Role, *supra* note 56.

¹¹⁷ A.C CAMERON ET AL., REGRESSION ANALYSIS OF COUNT Data 67 (2nd ed. 2013).

¹¹⁸ Hausman test determines whether the unique errors (ui) are correlated with the regressors, the null hypothesis is that they are not. See WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 80 (6th ed. 2008).

China's investment agreements are not statistically significant in any of the three models, indicating that they are not predictors of China's OFDI. Considering that Brazil and Venezuela received about half of the frequency of China's OFDI (49%) but neither country has an investment agreement with China, it is logical that none of the models demonstrate a relationship between China's investment agreements and China's OFDI.

Table 3: Predictors of China's OFDI to Latin America	
Public and Private Firms	
GDP	1.983*
Natural Resource Rents	0.566
Investment Agreement	-0.682
Loans	-0.657
R-squared	0.370 (between 0.06 and 0.65)
Public Firms	
GDP	1.706**
Natural Resource Rents	-0.055
Investment Agreement	-0.403
Loans	-1.55
R-squared	0.311 (between 0.046 – 0.686)
Private Firms	
GDP	-0.775
Natural Resource Rents	-0.205
Investment Agreement	-0.0445
Loans	-0.909*
R-squared	0.293 (between 0.132 – 0.443)
* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$	

Curiously, GDP is a statistically significant ($p < .01$) positive predictor of OFDI from China's public firms but not private firms. However, GDP was a significant variable in the model that considered both public and private firms. There is no clear explanation for this other than the appearance that Peru and Venezuela received high frequencies of private investment relative to their GDPs.

Natural resource rents were not significant in any of the models. Nonetheless, the data on the Monitor reveals that commodity-oriented FDI transaction accounted for 65.14% of China accumulated OFDI stock, demonstrating the strong bias in

natural resources as a share of China's total OFDI to the region.¹¹⁹ There are three possible explanations for the discrepancies between my models and the data on the Monitor. First, natural resource-seeking behaviour is not indicated by the frequencies of investment in the selected countries in the selected time horizon of the model. Second, while China's expansive loan programs to Latin America and the Caribbean are mostly for natural resources (energy accounted for 70.82% of total \$141.2 billion in loans), China's natural resources OFDI has been declining as a share of total OFDI to the region.¹²⁰ Third, there are some discrepancies between firm-level projects studied in previous literature and the firm-level data available on the Monitor indicating that the data in the Monitor is incomplete.¹²¹

China's loans were only significant in the model with private firms, and there was an inverse relationship between China's loans to a country and China's private sector investment in that country. This presents that China's loans to Latin American countries are an unreliable predictor of China's OFDI location choices, while private firms tend to not invest in the same country and year as China's loans. As further demonstrated in Table 4, there is little continuity between a country's share of China's loans to the region and the country's share of China's public sector OFDI. The only exception is Argentina which has received roughly 10-13% of the value of both China's total loans and public sector investment. This points to the fact that China's loans and FDI to Latin America have qualitatively different motivations. While China's loans have political motivations, China's public sector OFDI does not. China's OFDI certainly has political parameters within China's FDI regulatory bodies, but China's public sector OFDI has economic and not political motivations. This analysis does not include infrastructure projects because infrastructure does not come under FDI.

Table 4: China's Loans and China's Public Sector OFDI by Top Four Loan Recipients in Latin America

	Percent Share of Total Loans (77 Total)	Percent Share of Total Public Sector FDI Transactions (148 Total)	Percent Share of Total Stock Loans (\$141.2 billion)	Percent Share of Total Stock of Public Sector FDI (\$81.316 billion)
Argentina	10.38	20.00	10.83	12.86
Brazil	12.98	33.78	26.06	58.51

¹¹⁹ Peters & Velásquez, *supra* note 88.

¹²⁰ *Id.*

¹²¹ The data for this study preceded the 2018 update to the Monitor of China's OFDI in Latin America and the Caribbean.

Ecuador	16.88	8.10	12.32	3.71
Venezuela	22.07	8.10	44.05	1.74
Sources: The China-Latin America Finance Database; The Monitor of China's OFDI in Latin America and the Caribbean.				

VI. CONCLUSION

A. China's Investment Agreements Do Not Promote China's OFDI to Latin America

This preliminary evidence suggests that China's investment treaties with Latin America do not motivate China's OFDI to the region. This finding complements previous studies that found that China's BIT program plays no role in China's OFDI.¹²² In addition, from 2008 to 2017 three of the four South American countries with investment treaties with China received greater shares of China's OFDI to the region *before* the investment treaties came into force (Tables 5 & 6). That is, Chile and Peru received greater shares of China's OFDI to LAC prior to their investment treaties coming into force (as did Mexico but there is only one year in the dataset that Mexico's treaty was not in force). For Colombia there was only a 2% difference in its share of China's OFDI to the region. These datapoints support the claim that China-LAC investment treaties have no association with China's OFDI to the region.

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Argentina	0.00	0.00	596.70	330.00	0.00	391.870	523.00	0.00	214.80	1283.00
	0.00	0.00	0.28	0.09	0.00	0.41	0.05	0.00	0.01	0.12
Bolivia	0.00	0.00	0.00	0.00	0.00	42.00	0.00	0.00	452.00	0.00
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.03	0.00
Brazil	60.00	425.00	1286.689	291.860	323.150	901.50	1747.24	531.877	1390.283	2901.75
	0.02	0.10	0.65	0.82	0.81	0.09	0.17	0.57	0.90	0.26
Chile	39.00	245.00	18.00	11.00	226.70	45.10	35.90	286.00	215.20	2764.18

¹²² Hadley, *supra* note 40; Chen et al, *supra* note 41; Cotula-*China*, *supra* note 43; Eliasson-*Investment*, *supra* note 46.

	0.01	0.59	0.00	0.00	0.06	0.00	0.00	0.03	0.01	0.25
Colombia	0.00	0.00	192.00	3.00	0.00	776.00	7.00	0.00	24.00	0.00
	0.00	0.00	0.01	0.00	0.00	0.08	0.00	0.00	0.00	0.00
Ecuador	63.00	652.00	630.00	11.00	0.00	3.00	0.00	0.00	31.00	0.00
	0.02	0.16	0.03	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Guyana	100.00	0.00	0.00	19.00	420.00	0.00	0.00	0.00	0.00	0.00
	0.26	0.00	0.00	0.01	0.11	0.00	0.00	0.00	0.00	0.00
Mexico	274.00	40.00	84.10	39.26	70.00	8.00	1139.70	100.130	81.30	2497.90
	0.07	0.01	0.00	0.01	0.02	0.00	0.11	0.11	0.01	0.22
Peru	226.210	360.00	296.00	26.00	37.00	393.590	5181.80	250.00	0.00	1634.70
	0.59	0.09	0.01	0.01	0.01	0.41	0.50	0.27	0.00	0.15
Uruguay	0.00	0.00	0.00	0.00	12.00	0.00	0.00	0.00	33.00	33.00
	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Venezuela	132.00	220.00	126.40	200.00	1.00	0.00	1670.31	278.00	549.00	0.00
	0.03	0.05	0.01	0.06	0.00	0.00	0.16	0.03	0.04	0.00
Regional Annual Total	383.010	414.700	1981.09	355.786	399.820	963.020	1030.495	938.407	1550.313	1111.453
Author's Calculations from The Monitor of China's OFDI in Latin America and the Caribbean (2017)										

Table 6: Average Share of Regional OFDI Before and After Investment Treaty

	Before	After
Chile	0.20	0.05
Colombia	0.00	0.02
Mexico	0.07	0.05
Peru	0.34	0.17
Author's Calculations from The Monitor of China's OFDI in Latin		

America and the Caribbean (2017)

As international investment law serves to mitigate political risk, China has institutional mechanisms that serve that purpose. China collects data and publishes annual reports on political and country risks, including, the Report on the Trade and Investment Environment in Different Countries and the Obstacle Report Rules on the Investment to Different Countries.¹²³ The China Council for International Investment Promotion and China Research Centre for Foreign Direct Investment assist firms in making FDI decisions and mitigating social and political risks. Moreover, previous studies that included interviews with Chinese managers reveal that China's BITs play no role in their FDI location choice.¹²⁴

Given that China has progressively strengthened its BIT program in tandem with China's growth in OFDI, and that there is no evidence that China's BIT program is a determinant of China's OFDI, China's BIT program serves only diplomatic purposes. Law professor Hadley concluded that China's BIT program could be motivated by political considerations, including persuading other countries to not recognise Taiwan, secure access to resources, and facilitate durable political ties.¹²⁵ The BIT programs of other major capital exporters also seem to serve primarily political ends rather than investment promotion purposes, including the U.S.¹²⁶ Comparative negotiating histories of China's investment agreements would confirm these stipulations. Going beyond Hadley's analysis, I propose that China has two motivations for its robust BIT program —*first* protecting investment and depoliticising investment disputes, and *second*, improving market access and reshaping investment governance norms.

1. Protecting Investment and Depoliticising Investment Disputes

Given diverse hostilities and animosities towards China's OFDI and the highly unique role of China's public sector in OFDI, it appears that the Chinese Communist Party is motivated to use BITs as an instrument to mitigate any long-term diplomatic risks that may arise from China's OFDI. Beginning with the Opium Wars (1839-42), China has a long history of commercial and investment disputes with capital-exporting countries.¹²⁷ This motivated China's historical stance in rejecting customary international investment law as Chinese policymakers emphasised sovereignty and development goals. China finally accepted customary

¹²³ CRAIG C. JULIAN ET AL., RESEARCH HANDBOOK ON THE GLOBALIZATION OF CHINESE FIRMS 111 (2014).

¹²⁴ Cotula-*China*, *supra* note 43.

¹²⁵ Hadley, *supra* note 40, at 273.

¹²⁶ Detailed in Section II.A.2.

¹²⁷ Endicott, *supra* note 63.

international investment law with the drafting of China's second-generation BITs in 1998, which coincided with China's 'go out' strategy.¹²⁸ By 2015, China became the world's second-largest source of FDI. As China's OFDI to the world has grown at a rapid pace, Chinese investors have faced a range of uneasy receptions.¹²⁹

In the Latin American context, China's investments in commodities and natural resources have drawn a range of international scrutiny for labour, environmental, and sustainable development issues.¹³⁰ Many of these disputes have become diplomatic matters because the investor is the Chinese government itself, and not any private firm. On the other hand, some failed investments and a range of failed infrastructure projects have led to soured political relations.¹³¹ In these contexts, China's BIT program serves as a layer of political protection against any long-run diplomatic risks associated with China's growing capital and investment presence in the world.

As investment agreements shift capital and investment disputes away from diplomatic arenas and to third party arbitrators, China's BIT program serves to obviate the CPC from any of these disputes. In doing so, China's BIT program is a tool to contain capital and investment disputes from damaging China's important bilateral political relations. China has been highly cautious in implementing that tool, as demonstrated by China's limited use of investor-state dispute settlement, which suggests that China favours alternatives to implementing its BIT program.

2. Improve market access and reshape investment governance norms

As China's firms have faced various barriers to entry around the world, Chinese policymakers see investment agreements as a means to improve market access by establishing codified legal norms.¹³² Although, many of China's investment agreements with developing countries do not provide market access to other large markets, they do establish a body of legal precedents for China to negotiate investment agreements with large economies. Second, China seeks to secure legal

¹²⁸ Berger, *supra* note 67.

¹²⁹ Sauvart & Nolan, *supra* note 86.

¹³⁰ See generally Rebecca Ray et al., *China in Latin America: Lessons for South-South Cooperation and Sustainable Development*, GLOB. ECON. GOVERNANCE INITIATIVE, B.U. (April, 2015), <https://www.bu.edu/gdp/files/2015/04/China-in-Latin-America-Lessons-for-South-South-Cooperation-Sustainable-Development.pdf> [hereinafter Rebecca].

¹³¹ Margaret Myers, *The Reasons for China's Cooling Interest in Latin America*, AMERICAS QUARTERLY, April 23, 2019, <https://www.americasquarterly.org/content/how-beijing-sees-it> (last visited Oct 11, 2019).

¹³² Fan He & Bijun Wang, *Chinese Interests in the Global Investment Regime*, 7(1) CHINA ECON. J. 4 (2014).

recognition for its unique identity and the importance of state ownership in Chinese firms. China's public sector accounts for 40-50% of its GDP and it is the main source of the country's OFDI.¹³³ In Latin America, during 2001-2016, Chinese public companies invested \$87.155 million, accounting for 76.68% of the total amount.¹³⁴ China's BIT program serves to secure international legal recognition for its unique institutional characteristics and development strategy.

B. Implications for South-South Cooperation

Constant investment announcements between China and Latin America are celebrated by media on both sides of the Pacific as South-South cooperation, but are investment agreements an instrument to further those ends? This study says no and supports other preliminary studies¹³⁵ that have found that China's investment agreements do not promote China's OFDI. Rather, China's BIT program appears to mainly serve to protect China's OFDI stocks and help facilitate market access for China's firms in markets with large political barriers to entry. In an analysis of China-Africa BITs, legal expert Ofodile concluded that, "Despite the rhetoric of mutual benefit, win-win outcome and solidarity that pervade South-South discourse, Africa-China BITs appear to mirror Africa-North BITs and do not deviate from the standard model that have developed over time to any significant degree."¹³⁶

To those ends, China's BITs with developing countries do not include investment promotion provisions, labour, and environmental standards, or sustainable development goals. Investment promotion provisions signal state commitment to promoting FDI flows. Labour and environmental language in investment agreements can be used to channel FDI to meet sustainable development goals, as certain Chinese projects with labour and environmental conflicts have been a lightning rod for critics who charge that China's OFDI to Latin America undermines sustainable development.¹³⁷ Although there is no legal precedent, investment agreements can also support institutional capacities and consequently promote links between foreign firms and local suppliers. However, China's BITs merely replicate U.S. and European practice. While China envisions its OFDI as promoting Southern industrial development and scopes for South-South

¹³³ Dussel-*Omnipresent Role*, *supra* note 56.

¹³⁴ Peters & Velásquez, *supra* note 89.

¹³⁵ Hadley, *supra* note 40; Chen et al., *supra* note 41; Cotula-*China*, *supra* note 43; Eliasson-*Investment*, *supra* note 47.

¹³⁶ Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties : A Critique*, 35(1) MICH. J. INT'L.L. 131 (2013).

¹³⁷ Rebecca, *supra* note 130.

cooperation, there are no creative legal approaches to imagine China's BITs as tools of South-South cooperation.

Beyond the inconsistency between China's BIT program and South-South cooperation, the central issue is that many Latin American countries and regional political blocs lack the public, private, and academic institutions that can meaningfully engage with China's short-, medium, and long-term strategies. For example, in Mexico, economist Peters observed, "...a dearth of such institutions has hindered the growth of Chinese OFDI in Mexico and spurred negative reactions against it, further dampening Chinese investments."¹³⁸ Mexico has an investment treaty with China (in force since 2009), but that treaty does not address the lack of bilateral investment institutions between Mexico and China. More recently, in 2017 Mexico was the largest destination for China's OFDI to LAC, but there is no evidence that this development is at all related to the China-Mexico BIT.¹³⁹ Moreover, Mexico only accounted for 5.51% of total Chinese OFDI in LAC.¹⁴⁰ Conversely, Brazil receives the lion's share of China's OFDI to Latin America¹⁴¹ but there is no China-Brazil investment treaty. However, there are bilateral China-Brazil investment institutions such as the China-Brazil Cooperation Fund for the Expansion of Productive Capacity. For China-LAC investment agreements to become instruments of South-South cooperation they must be paired with bilateral and regional investment institutions.

¹³⁸ Enrique Dussel Peters, *Chinese Investment in Mexico: The Contemporary Context and Challenges*, 40 *ASIAN PERSP.* 627, 627-52 (2016).

¹³⁹ Dussel-Monitor, *supra* note 3, at 6.

¹⁴⁰ *Id.*

¹⁴¹ Peters & Velásquez, *supra* note 88.