



Research article

# Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries

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## Abstract

Through the lens of state-of-the-art text-as-data techniques, this article examines the bilateral investment treaty (BIT) practice of the member states of the Gulf Cooperation Council (GCC). The analysis unveils two critical trends. First, GCC states are global champions of investment protection. In terms of protective features, their agreements are at par with the United States or Canada. In contrast to the latter, however, GCC states typically do not accompany their protective commitments with flexibility carve-outs. This has major implications for their investment policy. While GCC investors abroad enjoy unrivaled protection, the GCC states are also more exposed to investment claims than any other region. Second, notwithstanding similarities in their investment policy and partial convergence in treaty design, GCC states have yet to cultivate a uniform practice when it comes to investment treaty-making to speak with one voice in future negotiations with the European Union or the United States.

*Keywords:* investment law, gulf cooperation council, text as data analysis, computational analysis of law

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## I. Introduction

For a long time, our understanding of the structures and diverging content of international investment agreements (IIAs) was limited. The sheer number of the over 3000 bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters prevented comprehensive hand-coding efforts. Studies focused instead on the more manageable body of model agreements<sup>1</sup> or limited their purview to selected treaty features of interest.<sup>2</sup> The IIA universe's size also created challenges for practitioners. As the United Nations Conference on Trade and Development (UNCTAD) put it in a recent report “[w]ith thousands of treaties, many ongoing negotiations and multiple dispute-settlement mechanisms, today's IIA regime has come close to a point where it is too big and complex to handle for governments and investors alike.”<sup>3</sup>

The emerging field of computational analysis of international law purports to change that. Computers can process vast amounts of information and are therefore ideally placed to solve international investment law's big data challenges. By harnessing the tools and techniques developed in computer science and applying them to the realm of law we can reveal the hidden structures of the IIA universe and reduce its complexity for the benefit of researchers, states, and investors. In this contribution, we will introduce recent advances in the computational analysis of investment law and apply the tools we have developed to empirically investigate the BIT practices of the member states of the Gulf Cooperation Council (GCC): Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE).

The focus of our analysis is a comparison on two levels. The first is global: How have GCC countries fared in their investment practices from a global perspective? Are members of the GCC trendsetters or followers when it comes to investment rule-making? Is there perhaps a distinct GCC handwriting that sets its agreements apart from the BITs of other states? Our analysis reveals that GCC countries are global champions of investment protection. Their agreements contain extensive investment protection obligations that are only rarely accompanied by qualifications or exceptions. While this policy makes sense for capital exporting purposes, it could come back to haunt GCC countries in their capacity as capital importers.

Second, turning from the global to the regional level: How does investment treaty practice differ among GCC countries? Do we see areas of convergence when countries employ similarly worded provisions? Policy convergence becomes increasingly important as investment law-making moves from the bilateral to the regional level.<sup>4</sup> Our analysis reveals that currently, GCC countries do not seem to speak with one voice. While we do see converging practice, especially among BITs of Kuwait and the UAE, more consolidation is needed to build a joint template for future BITs and inter-regional deals.

This article is structured as follows. We begin by introducing the field of computational analysis of international investment treaties and summarizing some of the most important insights it has already generated. We then deploy the tools of computational legal analysis to investigate the BITs of GCC countries. After a brief review of the investment policies of the six states, we empirically situate their practice in the global context, highlighting the GCC countries' role as champions of investment protection.

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<sup>1</sup>CHESTER BROWN & DEVASHISH KRISHAN, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (2013).

<sup>2</sup>J. Chaisse & C. Bellak, *Navigating the Expanding Universe of International Treaties on Foreign Investment: Creation and Use of a Critical Index*, 18 J. INT'L ECON. L. 1, 14–17 (2015).

<sup>3</sup>U.N. Conference on Trade and Development [hereinafter UNCTAD], *World Investment Report, 2011: Non-Equity Modes of International Production and Development*, xvi, UNCTAD/WIR/2011 (Mar. 12, 2012).

<sup>4</sup>See Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?*, 17 J. INT'L ECON. L. 271 (2014).

We then turn to comparing the GCC BITs among themselves, highlighting areas of policy convergence. Finally, we conclude with some lessons learnt from this empirical analysis.

## II. Computational analysis of investment treaties

Traditional means of legal content analysis are increasingly ill-equipped to deal with the growth of legal information. It has become virtually impossible for a person to read and make sense of the more than 3000 investment treaties and the ever-rising number of investment awards. As a result, we need to find novel means to digest and analyze international investment law materials.

Computational analysis of international investment law promises such a new approach. Not only do computers not grow tired when reading through thousands of documents, but they also find patterns in data that humans would not be able to spot. To be sure, robot lawyers are not going to replace human researchers any time soon – nor should they. But the interaction between computers crunching numbers and scholars interpreting results does provide new opportunities to tackle international investment law's big data problems.

### A. Using textual similarity to uncover the hidden structures of the IIA universe

In a recent contribution, some of us have introduced a new toolkit for the analysis of international investment treaties that is designed to empirically detect hitherto unknown or only anecdotally presumed aspects of the IIA universe.<sup>5</sup> The simple, yet powerful, text-as-data procedure we developed compares the textual similarity of treaties or articles using a simple metric. We first split every document into its textual sub-components of five-character length. Terms like “shall not be” thus become “shall”, “hall\_”, “all\_n”, “ll\_no”, “l\_not”, “\_not\_”, “not\_b” and “not\_be”. Then we calculate the similarity between two documents based on the textual components that overlap between them. The two phrases “shall be permitted” and “shall not be permitted,” for instance, have a textual similarity of 52% (or a textual distance of 48%) due to the word “not.” While such a percentage is of little value by itself, the comparison of textual similarity across treaties and articles yields several new and surprising insights.<sup>6</sup>

First of all, our metric reveals a stark asymmetry in investment treaty-making. While rich countries achieve highly consistent treaty networks whose design closely corresponds to the model templates they employ, poorer states are party to patchworks of textually-diverse treaties. A computational assessment of textual similarity thus allows us to empirically show in a systematic, objective and replicable manner that developed countries tend to be the system's rule-makers while developing countries are its rule-takers.<sup>7</sup>

Second, the same metric also allows us to trace consistency and innovation in national investment treaty programs. Some countries, such as the United Kingdom (UK), have only made cosmetic changes to their investment agreements over time. The UK's network of 110 BITs concluded from 1975 to 2009 is thus the most consistent of the world. Other states have continuously updated their investment treaties. Our metric enabled us to detect major changes in treaty design, such as when the United States revamped its treaty design in 2004. Less well-known innovations, such as the Finish shift to a pre-establishment treaty

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<sup>5</sup>Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. INT'L ECON. L. 561, 564–65 (2016) [hereinafter Alschner & Skougarevskiy, *Mapping*].

<sup>6</sup>Further explanations and results can be interactively explored on our website: <http://mappinginvestmenttreaties.com>

<sup>7</sup>Alschner & Skougarevskiy, *Mapping*, *supra* note 5, at 576.

model that combines investment protection with capital liberalization, are also made visible. Our metric thus provides a means to inductively investigate the evolution of national treaty programs.<sup>8</sup>

Third, our approach makes it possible to trace treaty design diffusion.<sup>9</sup> We observed, *inter alia*, that some countries copied and pasted almost entire treaties from third states. Israel, for instance, heavily drew from British BITs when devising its own BIT program. Hungary, the Czech Republic, and Slovakia, in turn, used the BITs they concluded with each other in January 1993 as templates for their subsequent treaty negotiations, resulting in strikingly similar agreements. Diffusion also happens on the clause level. We discovered that the language of a public policy exception that first appeared in Article 11 of the 1985 BIT between Singapore and China later diffused to India, Mauritius, and half a dozen African countries.<sup>10</sup> What makes the clause special is that it was conceived and is exclusively being used by developing countries, making it one of the rare treaty design innovations in investment law that is indigenous to the South.

Fourth, the approach we developed allows us to assess the novelty of newly-concluded agreements. The Transpacific Partnership (TPP), for instance, was initially heralded as a “new and high standards agreement.”<sup>11</sup> Our metric revealed how new it actually is and how high the standards are that it sets. We found that 81% of the text of the TPP investment chapter is taken verbatim from the 2006 U.S.-Colombia FTA. The remaining 19% is mostly used to clarify and further refine already existing standards. Hence, while it is true that the TPP investment chapter sets higher standards as compared to some of the earlier BITs with which it overlaps, it is very much a continuation of existing U.S. practice rather than an IIA 2.0.

Textual distance metrics thus provide an efficient and effective way to investigate the hidden structures of the international investment law universe. Yet, they form only a small part of what computational analysis of international investment law has to offer. We therefore turn to another equally promising technique: machine coding.

## **B. Machine coding of treaty content**

While textual distance measures can reveal latent structures in large amounts of data, they are less well suited to trace specific features that are couched in varying language. To give an example, the terms “expropriation,” “nationalization,” or “taking” are linguistically different, but they all relate to the same underlying concept. To capture such concepts in a treaty, researchers and international organizations have resorted to hand coding in the past.<sup>12</sup> Although useful, such hand-coding procedures are lengthy, costly to implement, and difficult to expand or amend. Rule-based machine coding offers an efficient alternative that takes advantage of the formulaic nature of treaty language to trace the inclusion or absence of treaty features.

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<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>Wolfgang Alschner & Dmitriy Skougarevskiy, *Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice* (Transnat'l Disp. Mgmt Special Issue on Int'l Arb. Involving Com. & Inv. Disps. in Africa, June 7, 2016), <http://papers.ssrn.com/abstract=2791474> (last visited Jul 27, 2016).

<sup>11</sup>Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe*, 17 J. WORLD INV. TRADE 339, 340 (2016).

<sup>12</sup>See Chaisse & Bellak, *supra* note 2; see also the UNCTAD Mapping Project, available at <http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD%20IIA%20MAPPING%20PROJECT%202013-2014.pdf>

In another contribution, one of us developed a machine-coding scheme to investigate the impact of investment arbitration on rule-making in IIAs through the lens of 55 treaty design features.<sup>13</sup> The results of the study were surprising. First of all, the study revealed that the inclusion or omission of an investor-state arbitration clause does not change treaty design more generally. While states may have an interest in counterbalancing stricter enforcement through private investors by adding new policy exceptions or procedural safeguards, this does not occur in practice. Instead, investor-state arbitration clauses are mere add-ons that are included in or omitted from a treaty without affecting other treaty elements.<sup>14</sup>

Second, the study also found that, in contrast to conventional wisdom, investment arbitration claims only had a very limited impact on rule-making. While developing states often resort to unilateral measures once they are hit by investment claims, halting their treaty program (like Argentina), or denouncing their BITs (like Venezuela),<sup>15</sup> developed states, as rule makers, could be expected to change the rules of the game in response to being exposed to claims. That is not what we see, however. In fact, most substantive and procedural treaty design innovations since the 1990s actually occurred prior to the rise of investment claims in NAFTA. After being sued, the United States and Canada actually became further entrenched in NAFTA treaty design. Other countries, such as Germany, did not react to investment claims at all.<sup>16</sup> A machine coding of treaty features can thus debunk popular myths.

Finally, the mapping also showed that the biggest impact of investment arbitration on rule-making occurs not through clauses or claims, but through case law. States have reacted to jurisprudential developments in investment arbitration by endorsing or rejecting arbitral interpretations in their subsequent treaty-making. The study thus illustrates that machine coding offers a promising new avenue for empirically tracing the changing content of investment treaties and to investigate its causes and consequences.<sup>17</sup>

### ***C. Towards an empirical assessment of GCC BITs***

In this article, we build on these computational analysis tools and apply our textual similarity measures and a machine-coding procedure to the BITs signed by GCC countries. In particular, we are interested in two questions. First, how do the BITs of GCC countries compare to the global average? Are they trendsetters or followers; do they champion investment protection or advocate for greater host state policy space? Second, how do the BITs of GCC countries differ amongst themselves? Do we see any evidence of a converging practice? By answering both questions, we can determine whether GCC BITs display a distinct handwriting that sets them apart from treaties concluded in other regions. Before engaging in the empirical analysis, however, this article will first introduce the investment policies of the GCC states to provide the essential background for the subsequent interpretation of our empirical findings.

## **III. Background: The international investment policies of GCC countries**

Our empirical investigation of GCC BITs begins by introducing the context in which these agreements are concluded. The GCC member states pursue an international investment policy that is marked by both

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<sup>13</sup>Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality*, 42 *YALE J. INT'L L.* 1, 3–4 (2017) [hereinafter Alschner, *Myth vs. Reality*].

<sup>14</sup>*Id.* at 23–27.

<sup>15</sup>See also Lauge Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 *WORLD POL.* 273, 283 (2013).

<sup>16</sup>Alschner, *Myth vs. Reality*, *supra* note 13, at 44–47.

<sup>17</sup>*Id.* at 3–4.

capital importer and capital exporter interests. On the capital importing side, GCC states seek to attract foreign direct investment (FDI) to facilitate economic diversification away from hydrocarbons. On the capital exporting side, GCC states invest abroad to diversify their income streams, particularly through their sovereign wealth funds. GCC states employ a wide variety of instruments to pursue this dual capital objective.

### **A. Capital exporting and importing objectives of GCC states**

By acting as both capital importer and exporter, GCC members seek to use economic diversification to reduce their dependence on income from hydrocarbons. Their dual roles as source and destination countries for foreign capital form the backdrop against which we will subsequently evaluate the GCC investment policies and investment treaties.

#### *1. Inward FDI interests*

The macroeconomic policy objective of diversifying away from oil and gas revenues has been a political priority for all GCC Members.<sup>18</sup> Economic diversification entails vertical, horizontal, and spatial aspects.<sup>19</sup> Attracting foreign direct investment that brings in expertise, technology, and experience in non-hydrocarbon sectors is an essential pillar of this transition.<sup>20</sup> As part of Bahrain's 2014 WTO trade policy review, for instance, financial services, professional and industrial services, education and training, logistics, information and communications technology, manufacturing, consultancy, real estate, construction, chemicals and plastics, aluminum, water, and healthcare were identified as target sectors for its FDI promotion.<sup>21</sup> Likewise, Saudi Arabia, in its bid to diversify its economy, designated several areas as priority sectors for foreign investment, including energy, transport and logistics, information and communication technologies, health, life sciences, education, and tourism.<sup>22</sup>

#### *2. Outward FDI interests*

Economic diversification not only takes place at home but also through investment abroad. Indeed, the GCC members are among the world's largest investors abroad.<sup>23</sup> To look at only two, as of 2014, the UAE and Saudi Arabia each held, respectively, \$66.3 billion and \$44.7 billion of FDI stocks abroad.<sup>24</sup> There are two primary targets of overseas investment: (1) acquiring assets and real estate and (2) purchasing shares in high quality financial and industrial firms.<sup>25</sup>

<sup>18</sup>See, e.g., The World Bank, *Economic Integration in the GCC*, (Oct. 2010), <http://siteresources.worldbank.org/INTMENA/Resources/GCCStudyweb.pdf/> (last visited Sep 30, 2016); Martin Hvidt, *Economic diversification in GCC countries: Past record and future trends*, 8 (2013), <http://eprints.lse.ac.uk/55252/> (last visited Sep 30, 2016).

<sup>19</sup>WTO Secretariat Report, *Trade Policy Review of the Kingdom of Saudi Arabia*, WT/TPR/S/333 (Feb. 29, 2016).

<sup>20</sup>Hvidt, *supra* note 18, at 26, 29, 32.

<sup>21</sup>WTO Secretariat Report, *Trade Policy Review of the Kingdom of Bahrain*, WT/TPR/S/294 (Mar. 18, 2014).

<sup>22</sup>WTO, *Saudi Arabia*, *supra* note 19.

<sup>23</sup>Oxford Business Group, *Kuwait Expands Investment with Prudent Fiscal Management*, <https://www.oxfordbusinessgroup.com/overview/strong-foundations-prudent-fiscal-management-has-helped-country-expand-its-investment-horizons/> (last visited Sep 30, 2016).

<sup>24</sup>*Id.*

<sup>25</sup>See Nimrod Raphaeli & Bianca Gersten, *Sovereign Wealth Funds: Investment Vehicles for the Persian Gulf Countries*, 15 MIDDLE EAST Q. 45 (2008), <http://www.meforum.org/1863/sovereign-wealth-funds-investment-vehicles-for> (last visited Sep 30, 2016).

Sovereign wealth funds (SWF) are an important vehicle for such investments abroad.<sup>26</sup> According to UNCTAD, FDI stock held by SWFs doubled in 2014, marking their increased importance as global FDI players.<sup>27</sup> But given SWFs' government links, policy makers, particularly in developed countries, have been skeptical about SWFs' expansion and concerned about their ownership stakes in strategic assets invoking national security concerns.<sup>28</sup> As a result, GCC countries find it increasingly important to ensure that their investments enjoy market access and protection abroad.

## **B. Implementation of investment policy objectives**

Three complementary pillars – international, regional, and domestic initiatives – work in concert to further these policy objectives of the GCC members.

### *1. International instruments*

The GCC member states have integrated themselves into the most significant planks of the international investment governance architecture. First, GCC states are members of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).<sup>29</sup> Accession to these conventions marked a significant departure from prior practice under which some GCC members' domestic courts reviewed the merits of arbitral decisions.<sup>30</sup> Today, investment arbitration hearings can even be conducted at the ICSID Convention Gulf Cooperation Council Commercial Arbitration Centre in Bahrain.<sup>31</sup>

Second, in contrast to many other countries of the Arab world, GCC states are all signatories to the World Trade Organization (WTO) agreements. While the WTO agreements primarily discipline international trade, several agreements also touch on investment matters. The Agreement on Trade-Related Investment Measures (TRIMs) prohibits TRIMs inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the General Agreement on Tariffs and Trade (GATT). The General Agreement for Trade in Services (GATS) liberalizes and protects FDI in services through "commercial presence" (mode 3), securing most-favoured-nation treatment and, to the extent of the GCC states' schedules, market access and national treatment. Finally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ensures domestic protection and enforcement of intellectual property, which are typically also covered investments under IIAs.

Third, GCC states have also subscribed to a variety of other multilateral investment instruments including the United Nation's (UN) Code of Conduct on Transnational Corporations, the UN Guiding Principles on Business and Human Rights, the International Labor Organization's (ILO) Tripartite

<sup>26</sup>Farouk El-Kharouf, Sulayman Al-Qudsi & Shifa Obeid, *The Gulf Corporation Council Sovereign Wealth Funds: Are They Instruments for Economic Diversification or Political Tools?*, 9 *ASIAN ECON. PAPERS* 124, 125 (2010).

<sup>27</sup>UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 15 (2015).

<sup>28</sup>U.N. Conference on Trade and Development, *The Protection of National Security in IIAs* 18–24 (UNCTAD Series on Int'l Inv. Polys for Dev. 2009).

<sup>29</sup>See the UNCTAD website listing of International Investment Agreements (IIAs) signed by GCC countries, <http://investmentpolicyhub.unctad.org/IIA/IIAsByCountry#iialnnerMenu> (last visited Jan. 27, 2017).

<sup>30</sup>Charles N. Brower & Jeremy K. Sharpe, Note, *International Arbitration and the Islamic World: The Third Phase*, 97 *AM. J. INT'L L.* 643, 648 (2003).

<sup>31</sup>See the ICSID website listing of Services, which includes information about facilities, <https://icsid.worldbank.org/en/Pages/services/Other-Facilities.aspx> (last visited Jan. 23, 2017).

**Table 1:** Investment treaties concluded by GCC countries (Source: UNCTAD, [www.investmentpolicyhub.unctad.org](http://www.investmentpolicyhub.unctad.org)).

GCC Member	Bilateral Investment Treaties	Other treaties with investment provisions
Bahrain	30 (23 in force)	14 (9 in force)
Kuwait	75 (59 in force)	13 (7 in force)
Oman	35 (25 in force)	13 (8 in force)
Qatar	52 (22 in force)	13 (7 in force)
Saudi Arabia	23 (17 in force)	13 (8 in force)
UAE	50 (34 in force)	13 (7 in force)

**Table 2:** Investor-state disputes involving GCC members (Source: UNCTAD, [www.investmentpolicyhub.unctad.org](http://www.investmentpolicyhub.unctad.org)).

GCC Member	Cases as Respondent State	Cases as Home State of Claimant
Bahrain	0	0
Kuwait	0	5
Oman	3	2
Qatar	0	2
Saudi Arabia	1	1
UAE	2	3

Declaration on Multinational Enterprises, the World Bank Investment Guidelines, and the Convention establishing the Multilateral Investment Guarantee Agency (MIGA).<sup>32</sup>

Last but not least, GCC states have actively negotiated and concluded international investment agreements, either in the form of BITs or as FTAs with investment provisions (Table 1). Bahrain and Oman, for instance, have signed FTAs with the United States. However, only the one with Oman contains specific investment protection provisions and a mechanism for investor-state dispute settlement.

In spite of their prolific involvement in IIAs, GCC states have thus far largely been spared from the rise of investment claims. As Table 2 shows, only three GCC states have become respondents in investment disputes. Two of the cases against Oman are still pending. The remaining disputes have been settled, discontinued, or decided in favor of the state. Hence, GCC states have so far never lost an investment dispute.

At the same time, GCC investors from all countries but Bahrain have used the system to file claims against foreign states. Many of these cases are still pending, have been settled, or have been discontinued. Of those five cases already decided, the tribunals found the state liable in four (although the investor was only awarded compensation in two). Hence, the experience of GCC states with investor-state arbitration has been very positive, benefiting from it when it comes to GCC investors abroad while not suffering its reverse consequences at home.

<sup>32</sup>UNCTAD, *supra* note 29.



## 2. Regional initiatives

Regional cooperation, integration, and coordination efforts are an integral part of GCC member states' investment policies. Aside from intra-GCC integration, GCC states are also involved in investment integration efforts at the Middle East and North African (MENA) level.

The core regional initiative is the GCC itself. The thrust of the association is to deliver regional cooperation, integration, and coordination in all domains, as enshrined in the GCC Charter of 1981.<sup>33</sup> To that end, in 2001, the member states signed the Unified Economic Agreement between the Countries of the Gulf Cooperation Council, with investment as a focus. Furthermore, the common market established in 2008, while not yet fully implemented, promises to confer upon all GCC citizens equal treatment for investment activities, capital movement, stock ownership, and formation of corporations.<sup>34</sup> GCC investors thus receive privileged treatment. In Bahrain, for instance, 100% foreign ownership of businesses is not allowed for certain types of business activities reserved for Bahraini nationals, but it is granted to other GCC citizens.<sup>35</sup> Membership in the GCC also guarantees the enforcement of arbitral awards issued in GCC member states.<sup>36</sup> This is a notable extension of the coverage for the recognition and enforcement of awards available through the ICSID convention.<sup>37</sup> Furthermore, the draft Unified Law for Arbitration, though not yet endorsed, provides for arbitration to adjudicate disputes in relation to public entities.<sup>38</sup> Statistics bear out the fruits of the GCC integration. Comparing the period from 2003–2005 to the post-financial-crisis years of 2009–2011, intra-GCC FDI projects rose from 43.0 to 47.9 billion dollars.<sup>39</sup> In 2008, such intra-GCC FDI constituted a quarter of overall FDI received by the region.<sup>40</sup>

The GCC states have also begun to jointly negotiate investment agreements with other regions of the world. During the GCC Leaders' Summit in December 2005, the GCC announced that they would negotiate trade agreements as a group from then on.<sup>41</sup> Subsequent examples include the GCC–US Framework Agreement (TIFA) signed in 2012, the GCC–Singapore FTA that entered into force in 2013, and an FTA with the European Free Trade Association (EFTA) that entered into force in 2015.<sup>42</sup> Negotiations with several other countries are also underway.<sup>43</sup>

At the MENA level, parallel intra-regional investment governance efforts are under way. In 1980, the MENA economies pushed for a regional and enforceable investment regime through the Unified Agreement for the Investment of Arab Capital in the Arab States. The Agreement not only addresses national

<sup>33</sup>Nasser Al-Mawali, *Intra-Gulf Cooperation Council: Saudi Arabia Effect*, 30 J. ECON. INTEGRATION 532, 535 (2015), [http://www.e-jei.org/upload/JEI\\_30\\_3\\_532\\_552\\_2013600079.pdf](http://www.e-jei.org/upload/JEI_30_3_532_552_2013600079.pdf) (last visited Sep 30, 2016).

<sup>34</sup>Raphael Espinoza, Ananthakrishnan Prasad, & Oral Williams, *Regional Financial Integration in the GCC*, IMF Working Paper No. 10/90 (Apr. 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1586679](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586679) (last visited Jan. 23, 2017).

<sup>35</sup>WTO Secretariat Report, *supra* note 21.

<sup>36</sup>MENA-OECD Investment Programme, *Assessing Investment Policies of Member Countries of the Gulf Cooperation Council* (Apr. 5, 2011), <http://www.oecd.org/mena/competitiveness/Preliminary%20assessment%20GCC%20joint%20policy%20es.pdf> (last visited Sep 30, 2016).

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>UNCTAD, *Regional integration and foreign direct investment in developing and transition economies* (Dec. 3 2012), [http://unctad.org/meetings/en/SessionalDocuments/ciimem4d2\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciimem4d2_en.pdf) (last visited Jan. 27, 2017).

<sup>40</sup>Hassan Hakimian & Abdulla Abdulaal, (Menapolis Policy Paper Mar. 2015), [http://eprints.soas.ac.uk/19890/2/GCC%20ECONOMIC%20INTEGRATION%20\(Khamsoon%20Site%20March%202015\).pdf](http://eprints.soas.ac.uk/19890/2/GCC%20ECONOMIC%20INTEGRATION%20(Khamsoon%20Site%20March%202015).pdf) (last visited Sep 30, 2016).

<sup>41</sup>WTO Secretariat Report, *Trade Policy Review of the United Arab Emirates*, WT/TPR/S/338 (Apr. 27, 2016).

<sup>42</sup>UNCTAD, *supra* note 29; WTO Secretariat Report, *United Arab Emirates*, *supra* note 41.

<sup>43</sup>WTO Secretariat Report, *United Arab Emirates*, *supra* note 41.

treatment, free transfers of capital, and expropriation, but also sets up an Arab Investment Court for claims arising under the Agreement.<sup>44</sup> To further stimulate intra-regional investment flows, the Agreement was amended in 2013 with three notable themes.<sup>45</sup> First, the Amendment enhanced the protection and treatment of investment.<sup>46</sup> Second, it strengthened the dispute settlement mechanism.<sup>47</sup> Third, it fostered the harmonization of investment policy and investment-related information.<sup>48</sup>

Finally, with respect to dispute resolution, all GCC members are signatories to the 1983 Riyadh Convention on Judicial Cooperation between Certain States of the Arab League, which replicates most of the obligations under the New York Convention while accounting for regionally specific requirements.<sup>49</sup>

### 3. *Domestic initiatives*

The efficacy of investment policy resides in the interplay between international and domestic frameworks. Domestic measures and institutional structures are critical to creating more favorable investment conditions and particularly for attracting FDI. In this regard, the GCC member states have deployed two strategies to attract FDI.<sup>50</sup> First, institutions and domestic laws have been established or revamped to spearhead investment liberalization efforts.<sup>51</sup> Second, discrete zones with separate sets of regulations and infrastructures have been established.<sup>52</sup>

Domestically, the GCC member states have undergone major legislative overhauls in the past decade to facilitate and incentivize investment. Several members have enacted or revised their national laws directly related to investment. For instance, in 2015, Bahrain promulgated its Arbitration Law, which fully incorporated the UNCITRAL Model Law. Similarly, Qatar amended its Foreign Investment Law, thereby allowing 100% foreign ownership in a number of sectors, including agriculture, health, education, tourism, and IT services, upon the authorization of the Ministry of Economy and Commerce.<sup>53</sup> Likewise, in recent years, Kuwait has reshaped its legal landscape to create an investment-friendly environment through the implementation of a public-private partnership law in 2014 and the enactment of a New Companies Law in 2012.<sup>54</sup>

The GCC members have also formed or retrofitted their national institutions to support and promote investment. For instance, Saudi Arabia has founded several new institutions to champion its goal of attracting more FDI. In particular, the Saudi Arabian General Investment Authority Board (SAGIA) formulates

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<sup>44</sup>Organisation for Economic Co-operation and Development [hereinafter OECD], *The Amended Arab League Investment Agreement: Key improvements and ratification process* (Technical Workshop, Arab League Headquarters, Cairo, Egypt, Apr. 7–8, 2014), [http://www.oecd.org/mena/competitiveness//Agenda\\_Technical%20Workshop%20LAS\\_7-8%20April%202014\\_Cairo\\_final.pdf](http://www.oecd.org/mena/competitiveness//Agenda_Technical%20Workshop%20LAS_7-8%20April%202014_Cairo_final.pdf) (last visited Sep 30, 2016); OECD, Draft Brochure, *The 2013 Amendment to the 1980 Arab League Investment Agreement: A step towards improving the region's attractiveness to investors*, [https://www.oecd.org/mena/competitiveness/OECD%20Study\\_Amended%20Arab%20League%20Investment%20Agreement%20\(English\).pdf](https://www.oecd.org/mena/competitiveness/OECD%20Study_Amended%20Arab%20League%20Investment%20Agreement%20(English).pdf) (last visited Sep 30, 2016).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>MENA-OECD Investment Programme, *supra* note 36.

<sup>50</sup>The World Bank, *supra* note 18.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>WTO Secretariat Report, *Trade Policy Review of Qatar*, WT/TPR/S/296 (Mar. 18, 2014).

<sup>54</sup>U.S. Department of State, *United Arab Emirates Investment Climate Statement 2015* (June 2015).

government policies on investment activities, proposes plans and regulations to foster its investment climate, and evaluates and licenses investment proposals.<sup>55</sup> Similarly, in early 2015, the UAE set up the Abu Dhabi Investment Attraction Committee, which is tasked to promote sustainable economic development and to create an attractive investment climate.<sup>56</sup> The newly-formed committee has commenced designing a foreign investment attraction strategy with a focus on the sectors identified as engines for non-oil sector growth. In addition, Kuwait launched the Direct Investment Promotion Authority (KDIPA), in accordance with Law No. 116 of 2013, which seeks to promote direct investment.<sup>57</sup> KDIPA has a broad mandate to perform developmental, promotional, regulatory, and advocacy functions in relation to investment.<sup>58</sup>

The second strategy, the creation of discrete economic zones, has been widely adopted by GCC member states. The UAE in particular has applied this approach to the fullest.<sup>59</sup> For instance, the UAE has several duty-free import zones throughout the country, where the same investment opportunities are granted to foreign companies and Emirati citizens. These zones waive requirements on majority local ownership, provide for low taxes and tariffs, and allow for repatriation of capital and profits.<sup>60</sup> In the same vein, Oman has three free zones that confer upon investors special rights and incentives. Prominent examples include no minimum capital investment requirement, zero taxes on profits or dividends for 30 years, and 100% foreign ownership.<sup>61</sup> Moreover, in each free zone, the Ministry of Commerce and Industry runs a one-stop shop that assists companies with expeditiously obtaining permits and approvals.<sup>62</sup> Kuwait is also in the process of creating its own free zone.<sup>63</sup> In short, GCC countries follow similar patterns when it comes to attracting foreign capital in order to facilitate economic diversification. With this background in mind, we now turn to the empirical analysis of GCC BITs.

#### IV. Dataset

In order to investigate the content of GCC BITs, we used the dataset developed by Alschner/Skougarevskiy (2016) comprising 1628 English language bilateral investment agreements signed between 1959 and 2015.<sup>64</sup> We are currently engaged in a comprehensive effort to expand this dataset by collecting all investment treaties currently in force and translating their texts into English.<sup>65</sup> The latter is important since most text-as-data analysis is language sensitive.

Pending the completion of this larger database, we used our existing data to provide a preliminary analysis of the investment treaty networks of GCC countries. Currently, our data includes more than half of

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<sup>55</sup>WTO, *Kingdom of Saudi Arabia*, *supra* note 19.

<sup>56</sup>U.S. Department of State, *Kuwait Investment Climate Statement 2015* (May 2015).

<sup>57</sup>Kuwait Direct Investment Promotion Authority, *About the Authority*, <http://kdipa.gov.kw/en/about-2> (last visited Sep 30, 2016).

<sup>58</sup>*Id.*

<sup>59</sup>The World Bank, *supra* note 18.

<sup>60</sup>*United Arab Emirates Climate*, *supra* note 54.

<sup>61</sup>WTO Secretariat Report, *Trade Policy Review of Oman*, WT/TPR/S/295 (Mar. 18, 2013).

<sup>62</sup>*Id.*

<sup>63</sup>*Kuwait Climate*, *supra* note 56.

<sup>64</sup>Alschner & Skougarevskiy, *Mapping*, *supra* note 5.

<sup>65</sup>See Swiss Network for International Studies, *Diffusion of International Law: A Textual Analysis of International Investment Agreements* (Call for projects on the question, "What are the design, evolution and effects of the international investment agreements currently in practice?"), 2015), [http://www.snis.ch/project\\_diffusion-international-law-textual-analysis-international-investment-agreements](http://www.snis.ch/project_diffusion-international-law-textual-analysis-international-investment-agreements).

UAE BITs (27 out of 50); about one third of BITs from Oman (14 out of 38), Saudi Arabia (9 out of 24), Bahrain (11 out of 33), and Kuwait (26 out of 80); and one quarter of Qatari BITs (12 out of 51). Our dataset of GCC BITs is thus neither comprehensive nor can we be sure that it is fully representative.

Consequently, the results below should be taken as preliminary illustrations of patterns and trends in GCC treaty practice that require future validation once more complete data becomes available.

## V. Champions of protection: Situating GCC BITs in the investment treaty universe

How have GCC countries fared in relation to global trends and patterns in international investment policy-making? As this section will show, GCC countries are global champions in investment protection. They include more protection clauses than the global average. But at the same time, they do not account for the policy flexibilities that other countries with similar deep levels of investment protection have incorporated into their agreements. GCC country BITs are thus potent tools to protect GCC capital abroad, but also create significant exposure to investment claims for GCC countries as hosts to foreign investors.

### A. Depth of GCC BITs

Over the past twenty years the globe has seen a bifurcation of the BIT universe. On the one hand, some countries have concluded short and simple agreements that focus exclusively on the protection of investments – continuing a treaty design largely inspired by draft conventions of the 1950s and 1960s. On the other hand, a number of countries, first and foremost the United States, but also Canada and Japan, have begun to sign more complex and comprehensive agreements that treat investment protection in its wider policy context.<sup>66</sup>

One way we can empirically trace this bifurcation is to use the number of articles in treaties as a proxy for their breadth and depth. Figure 1 depicts the BIT universe, distinguishing between world BITs and GCC BITs. We see that most of the GCC BITs cluster in the lower half of the chart and contain, on average, fourteen articles. Although two recent agreements signed by Japan with Kuwait (twenty-eight articles) and with Saudi Arabia (twenty-three articles) have branched out, most GCC BITs tend to be short and limited in scope.

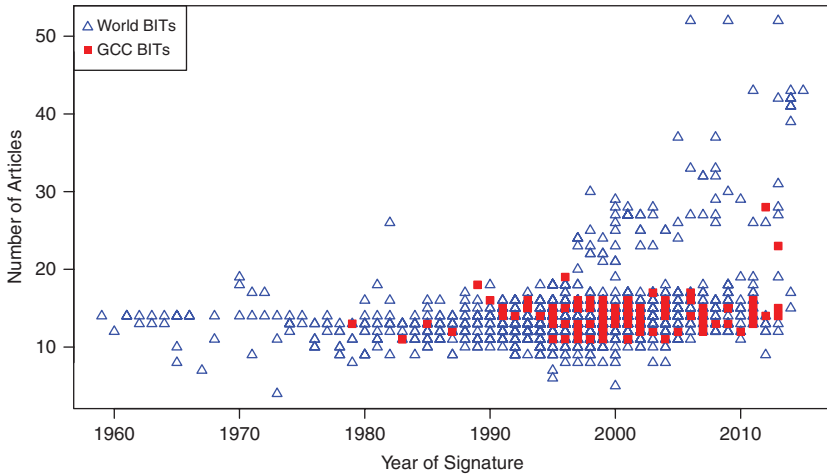
Since the number of articles is an imperfect proxy for the content of investment treaties, we turn to machine-coding results to further diagnose the content of GCC BITs in relation to the world.

### B. GCC as champions of investment protections

Turning to our machine-coding results, we arrive at a surprising finding. The GCC countries have consistently included more protection clauses in their treaties than their peers. At the same time, they have not followed the path pursued by other states that have complemented more protection with more flexibility provisions.

Beginning with investment protection clauses, we see that GCC countries sign BITs that are more protective than the global average (Figure 2). Virtually all BITs in both the world and GCC countries contain expropriation, free transfer, and compensation-for-loss clauses. Where GCC practice diverges is on less-frequently inserted protection provisions. Arbitrary measures clauses, entry of personnel articles, and

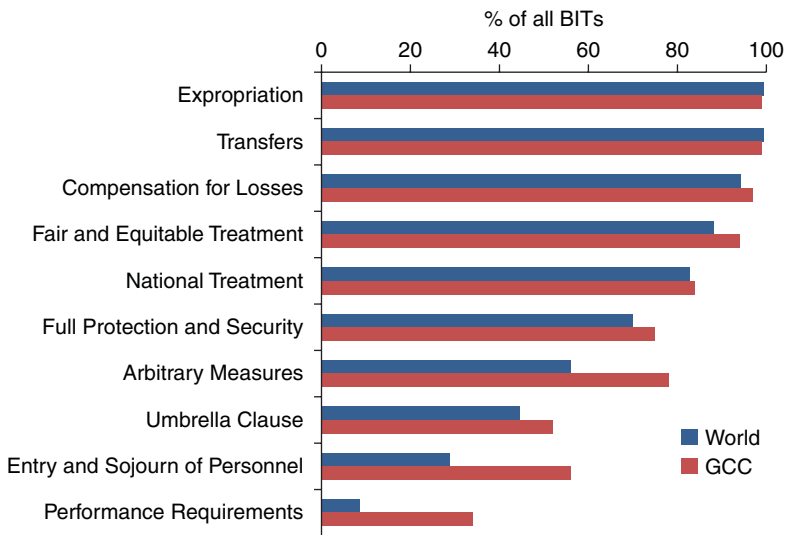
<sup>66</sup>Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) on Modern Investment Treaty Law*, 5 GOETTINGEN J. INT'L L. 455, 486 (2013) [hereinafter Alschner, *Americanization*].



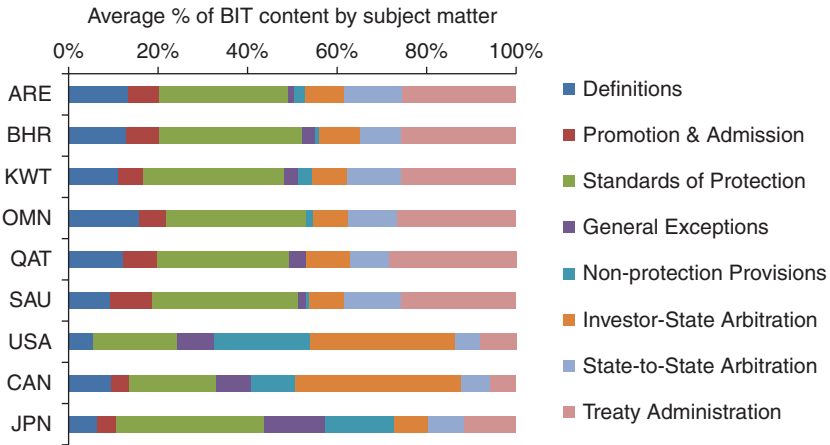
**Figure 1:** GCC BITs remain relatively short, while other recent BITs have become more complex and comprehensive measured by the number of articles.

prohibitions on performance requirements are found in only about 20% more BITs in GCC countries as compared to global practice.

GCC countries are not alone in this trend towards more investment protection clauses. The United States, starting with its first BITs signed in the 1980s, but also Canada and Japan, have systematically included additional protection provisions relating to the entry and sojourn of personnel clauses or the



**Figure 2:** GCC BITs are more protective than the global average.



**Figure 3:** GCC BITs by subject matter compared to other states.

performance requirements restrictions into their agreement.<sup>67</sup> This drive towards more protection in these states, however, has been counter-balanced by the insertion of targeted flexibility clauses, which include limited exceptions on prudential and public interest regulations as well as sectorial lists of reservations on non-conforming measures. Figure 3 compares the average share of subjects in GCC countries' treaties, measured by the number of articles per subject matter, in BITs of GCC countries signed since 2000 to those of Canada, Japan, and the United States.

Even though the United States, Japan, and Canada differ in the emphasis they accord to specific subject areas, they consistently reserve some treaty space for general exception and non-investment-protection provisions such as prohibitions of the lowering of environmental standards to attract investment. Differently put, these states aim at balancing investment protection with other public policy interests potentially affected by investment treaties. Moreover, especially with the United States and Canada, frequent respondents in investment arbitration, they reserve specific attention to detailing their treaties' investment arbitration architecture. In contrast, GCC countries have been equally consistent in not devoting significant treaty space to exception provisions and have equally done little to spell out the investor-dispute settlement architecture of the treaties in greater detail.

In conclusion, GCC countries have joined some countries' efforts to enhance investment protection. At the same time, they have not included the policy and procedural safeguards that these states have inserted concurrently. While this choice undoubtedly strengthens the protection GCC investors enjoy abroad, it also enhances the GCC's exposure to investment claims at home.

## VI. Regional convergence in the investment policies of GCC countries

We now turn from the international to the regional perspective and take a closer, comparative look at the BITs of GCC countries. In the above analysis, we already concluded that the BITs of GCC states are relatively homogeneous in their content: they are more protective than the global average, while not

<sup>67</sup>Alschner, *Myth vs. Reality*, *supra* note 13, at 40–44, 47–50; Alschner, *Americanization*, *supra* note 66, at 469.

sharing the host state flexibility mechanisms that other states with similarly protective BITs have included in their treaties. Yet, to what extent does this policy convergence of GCC states translate into a convergence in the language of their BITs? If GCC states want to speak with one voice in future negotiations with the United States, Europe, and other key investment players, they have to develop a common vocabulary as a baseline for their joint bargaining position. Our analysis suggests that while some GCC states already follow a common approach on some issues, the region has yet to develop a proper, shared investment treaty language.

Let us begin with a textual comparison of the 100 GCC BITs in our data set. Figure 4 displays similarly worded agreements as a heat map where shades of darker colors indicate more textual similarity while shades of lighter colors signal less. Every agreement is compared to every other agreement with the diagonal being a comparison of an agreement with itself. The ordering of agreements is both alphabetical, based on the GCC signatory, and chronological. We annotate the figure to identify individual country treaty networks.



**Figure 4:** Heat map of GCC country BITs depicting their textual similarity (high similarity: red, low similarity: yellow).

**Table 3:** Percentage of BITs containing a given protection clause.

	<b>Arbitrary measures</b>	<b>Umbrella clauses</b>	<b>Entry and sojourn of personnel</b>	<b>Performance requirements</b>
UAE	93%	52%	66%	41%
Bahrain	55%	55%	36%	9%
Kuwait	88%	73%	69%	81%
Oman	71%	43%	29%	7%
Qatar	50%	33%	75%	0%
Saudi Arabia	89%	33%	33%	0%

Two observations are noteworthy. First, countries in our sample differ in the consistency of their treaty networks. Whereas Kuwait and Saudi-Arabia have relatively consistent treaty networks signified by the red quadrangles that are formed by their agreements in the heat map, the other GCC states have much less consistent networks. This lack of shared vocabulary at the country level makes it difficult to find a common language.

Second, we also see that some states are closer in their treaty practice than others. Several red patches emerge where Kuwait's and the UAE's practices overlap, indicating higher textual similarity. We thus see groupings within GCC states. This is confirmed when we compare the protective features country by country in Table 3. While all GCC states have particularly protective BITs with higher than average occurrence of what are otherwise relatively rare features, some are more protective than others. Specifically, Kuwait and UAE stand out as the champions of the champions when it comes to investment protectiveness.

The finding of higher levels of policy convergence as between the UAE and Kuwait is confirmed when we look at specific treaty features. Figure 5 displays the network of performance requirements clauses in the BIT universe. Every node is a treaty article and a link is drawn between two articles if their performance requirement clauses are textually similar to at least a 50% degree. In such representations, clusters are typically made up of an individual country that, as a rule maker, signs consistently worded agreements with varying partner countries. In Figure 5, not surprisingly, we see Canadian or United States treaties clustering together. But we also see clusters made up of more than one country, such as two clusters involving interconnected treaties by Kuwait and UAE.

Table 4 illustrates the convergence of language by comparing elements from two of these interconnected clauses, Article 2 of the Kuwait–Bulgaria BIT (1997) and Article 2 of the UAE–Ukraine BIT (2003), color-coding their differences. Notwithstanding some important “shall” vs “should” and less important “laws and regulations” vs “legislation” differences, there is considerable common ground between both agreements, pointing to a convergence in the underlying BIT practice.

## VII. Conclusion: GCC BITs – In need of a change?

This contribution has used novel text-as-data techniques to review the BIT practice of GCC states. Several lessons can be drawn from this exercise.



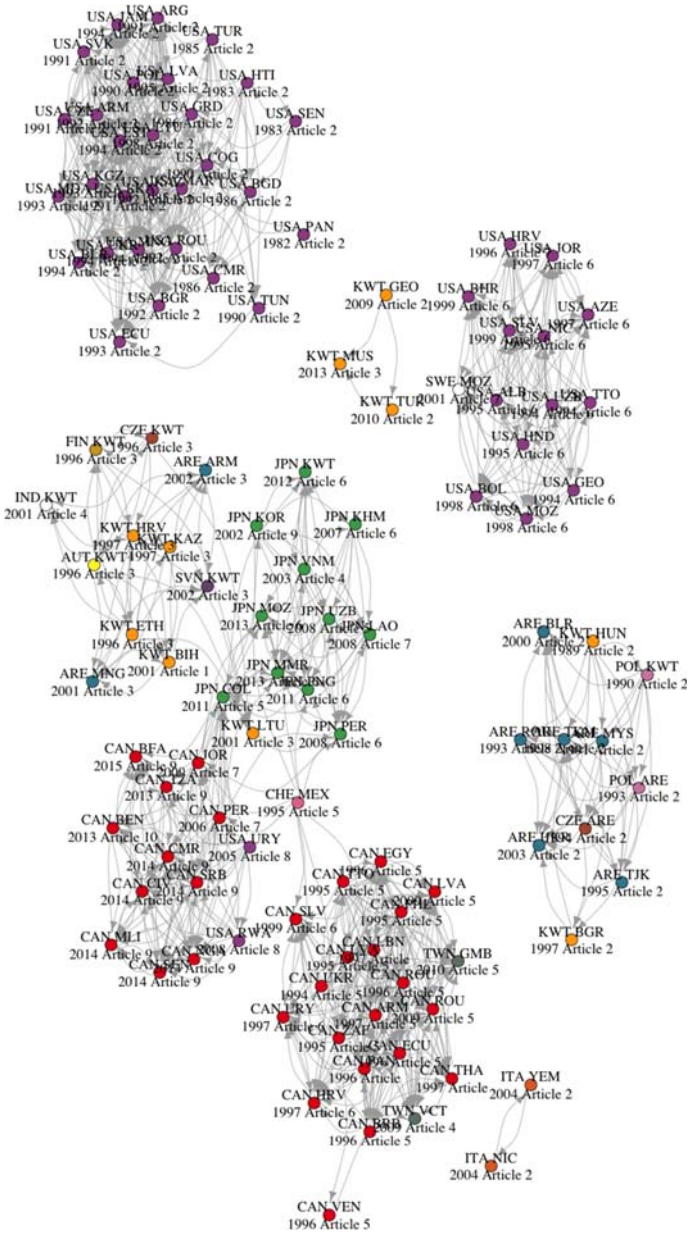


Figure 5: The network of performance requirements clauses linked by textual similarity.

**Table 4:** Convergence of treaty language between BITs of Kuwait and UAE.

<b>Kuwait-Bulgaria BIT (1997)</b> <b>Article 2</b>	<b>UAE-Ukraine BIT (2003)</b> <b>Article 2</b>
<p>(4) (a) Each Contracting State shall endeavor to take the necessary measures <b>and legislation</b> for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting State, (b) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement and the host State shall grant them all assistance, consents, approvals, licenses and <b>authorizations</b> to such an extent and on such terms, and conditions as <b>shall, from time to time,</b> be determined by the <b>laws and regulations</b> of the host State. (5) With respect to its tax policies, each Contracting State <b>should</b> strive to accord fairness and equity in the treatment of investment of investors of the other Contracting State.</p>	<p>(2) (a) Each Contracting State shall <b>in accordance with its legislation</b> endeavour to take <b>and enter into force</b> the necessary measures for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting State. (b) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement and the host State shall grant them all assistance, consents, approvals, licences <b>and authorizations to such an extent and on such terms</b>, and conditions <b>as may</b> be determined by the <b>legislation</b> of the host State. (3) With respect to its tax policies, each Contracting State <b>shall</b> strive to accord fairness and equity in the treatment of investment of investors of the other Contracting State.</p>

First of all, GCC states are champions of investment protection. This accords well with the increasing outward interests of GCC countries. Sovereign wealth funds have developed into important vehicles for income diversification with significant ownership stakes abroad. Where their existing investments and future acquisitions risk being obstructed by national security concerns, particularly in developed countries, more protective BITs can offer an effective insurance policy. At the same time, the same provisions may come back to haunt GCC countries due to their status as capital importers who count on FDI to diversify their economies at home. Thus far the balancing act has worked well: few investor-state arbitration claims have been filed against GCC countries and none of them succeeded, whereas GCC investors have been more successful in vindicating their rights abroad. Yet this situation may change in the future. GCC states may thus want to consider following the path of the United States or Canada in pairing far-reaching protective obligations with targeted host-state flexibility clauses.

Second, in spite of shared economic objectives and an overall quite homogenous international investment policy, GCC states have thus far not developed a common language in their investment protection agreements. This makes convergence at the regional level and the formulation of a joint template in negotiations with other regions more difficult. A model for such convergence is provided by the UAE and Kuwait, which uniquely show signs of a deeper policy convergence and share common language in investment provisions. Further regional consolidation efforts should thus build on that existing nucleus and strive to streamline national practices by developing a common language for investment protection that will help the GCC to speak with one voice in future negotiations.

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