

Does ISDS Work...in the Land of Smiles?

PROF. JASON YACKEE

UNIVERSITY OF WISCONSIN-MADISON; THAMMASAT UNIVERSITY

Overview

1. The costs and benefits of investment treaties
2. The Walter Bau affair
3. Thailand's main investment treaties
4. Thai investment treaties and FDI flows
5. Foreign investment in Thailand by partner
6. An econometric analysis
7. Some problems with FDI data
8. Alternative strategies?

Costs & benefits of investment treaties

Costs	Benefits
<ul style="list-style-type: none">• Interference with domestic political or policy goals?• Diplomatic difficulties or tension?	<ul style="list-style-type: none">• More (quality) investment?
<ul style="list-style-type: none">• Costs of adverse awards?• Costs of litigation?	<ul style="list-style-type: none">• Less political tension (“depoliticization”)?• Less “gunboat diplomacy”?

The Don Muang/Walter Bau affair



Thailand's major investment treaties (year in force)

No ISDS	ISDS
China (1985)	ASEAN A.P.P.I. (1988)
Netherlands (1973)	ASEAN C.I.A. (2012)
United Kingdom (1979)	Australia (2005)
USA (1966)	Belgium/Luxembourg (2004)
	Germany (2004)
	Hong Kong (2006)
	Japan EPA (2007)
	Korea (2009)

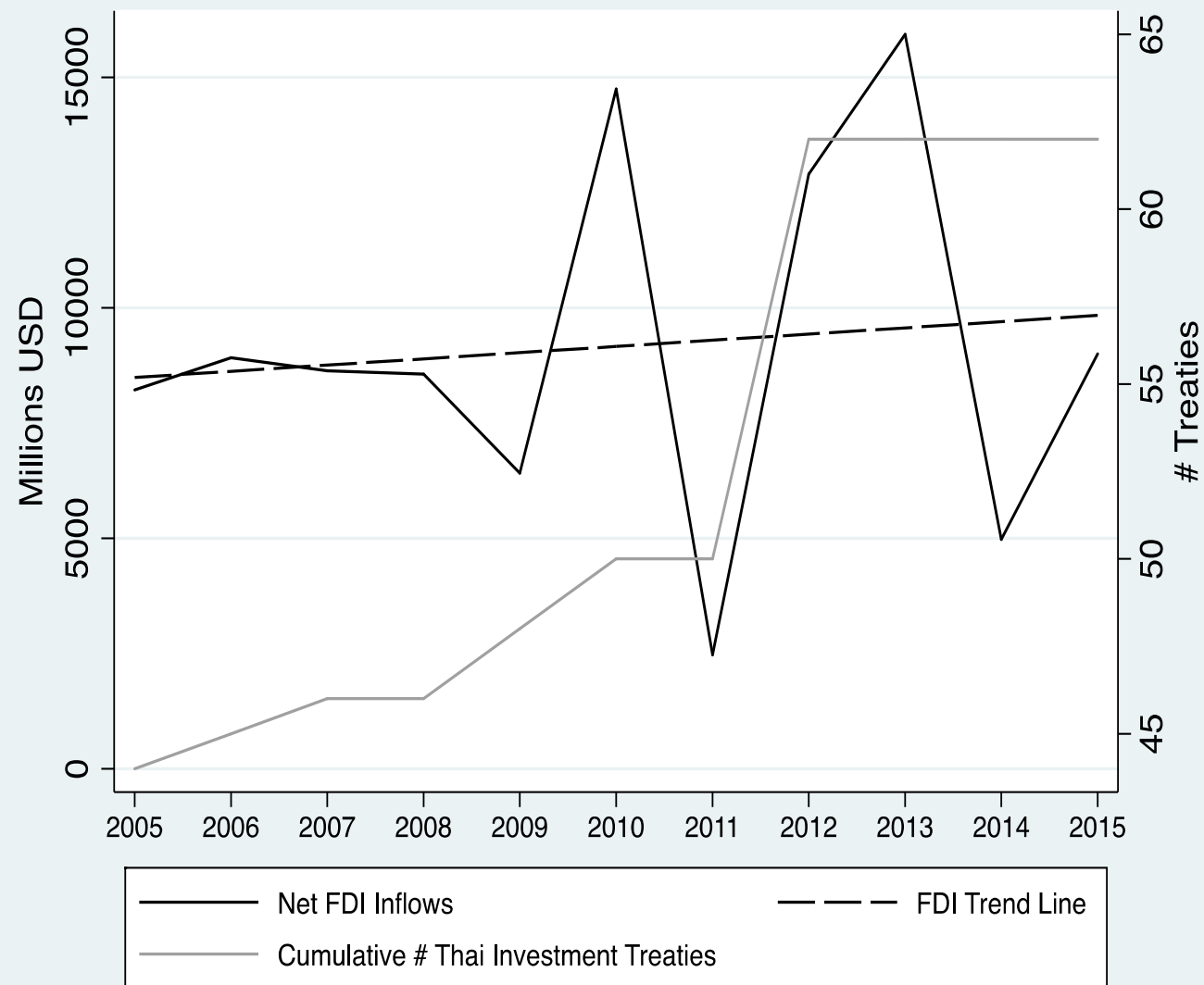
Has Thailand
agreed to
arbitrate
disputes with
Hong Kong
investors?

ARTICLE 8 Settlement of Investment Disputes

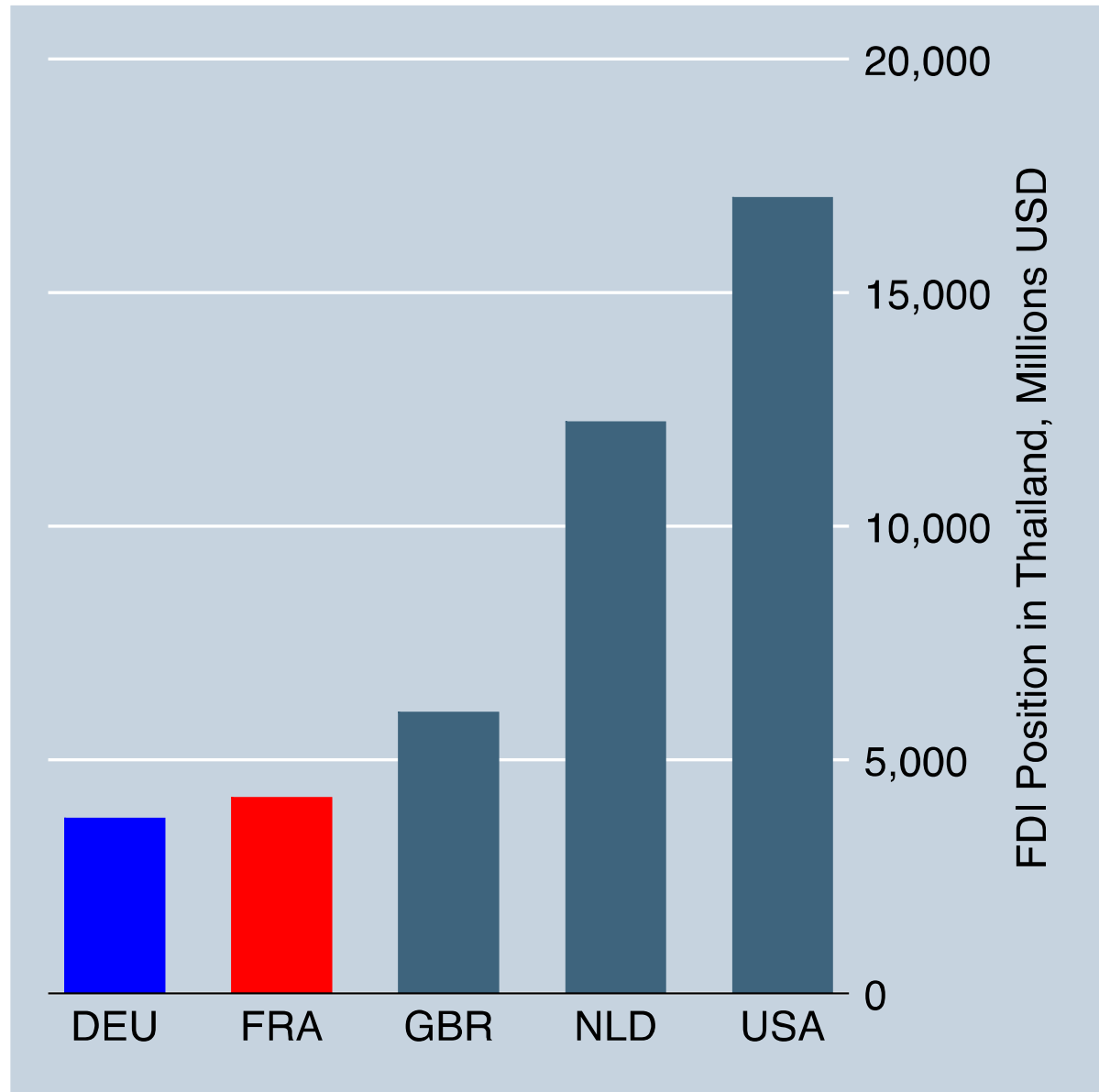
A dispute between an investor ... and the other Contracting Party ... shall... \be submitted to such procedures for settlement as may be agreed between the parties to the dispute.

If no such procedures have been agreed ... the parties to the dispute **shall agree** to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties may agree in writing to modify those Rules.

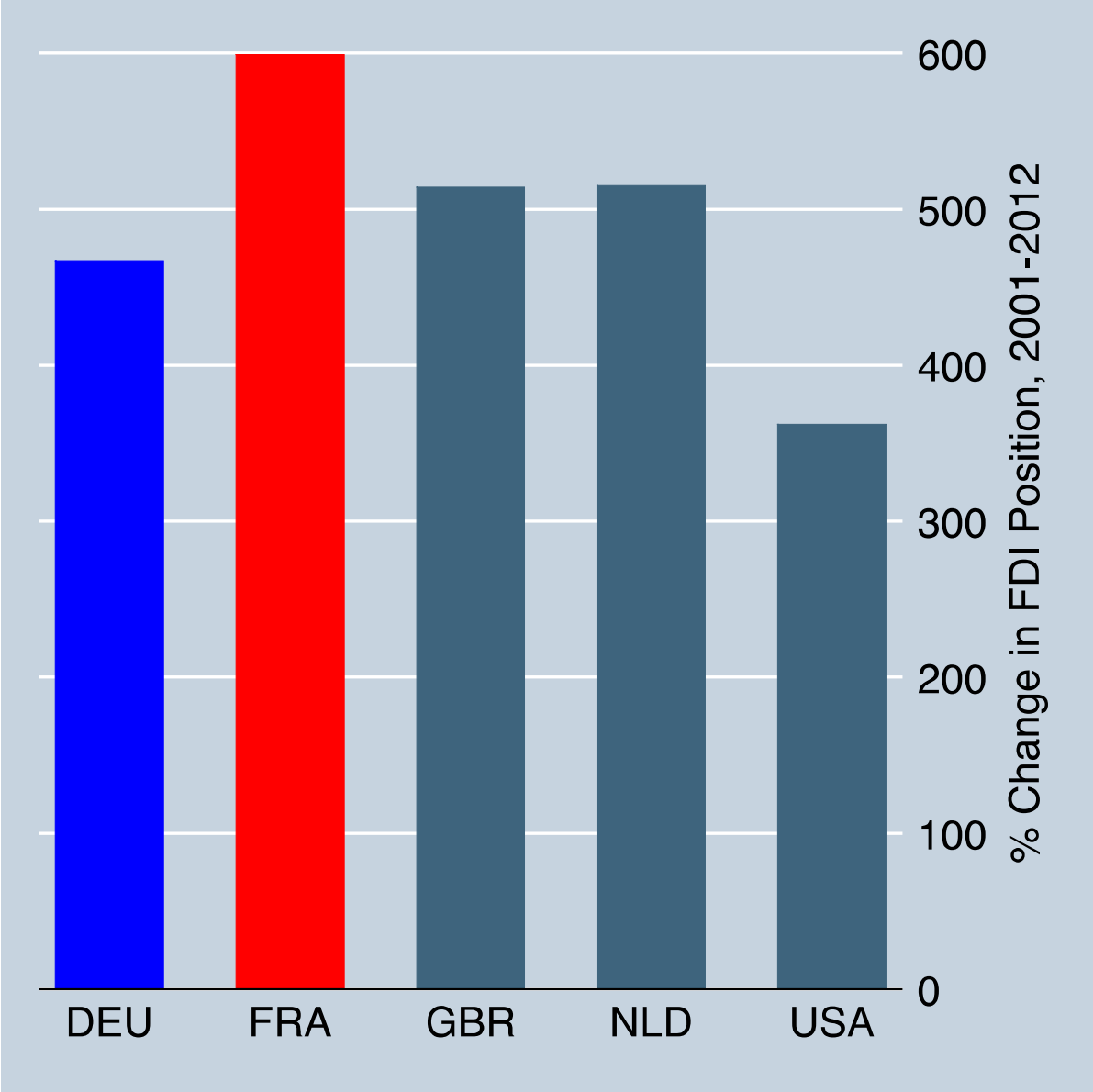
Thai investment treaties & FDI inflows



2012 FDI
position in
Thailand,
millions \$US



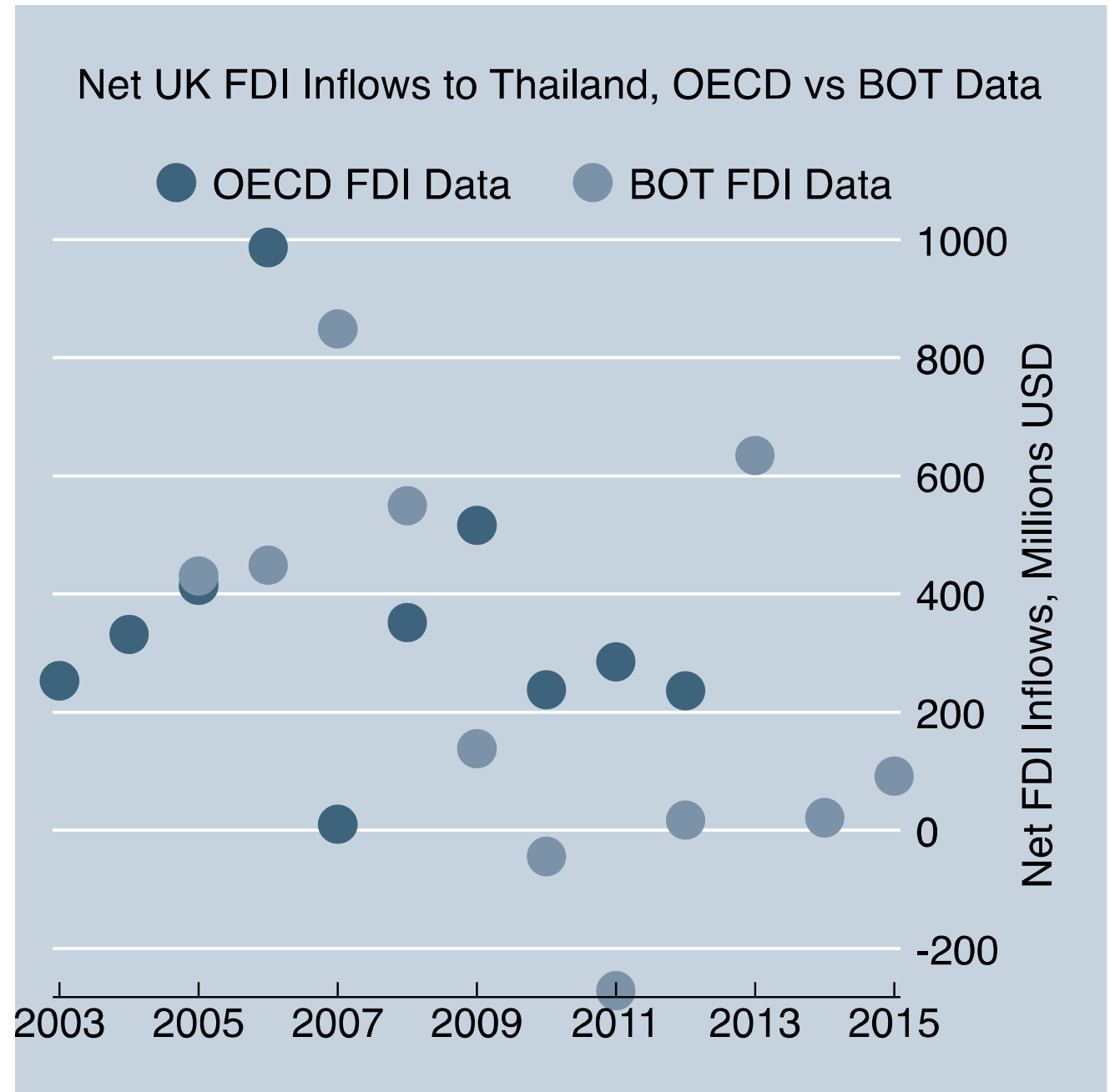
Percent change
in value of FDI
position, 2001-
2012



A simple model: fixed-effects regression results

	1.1 OECD	1.2 BOT	1.3 OECD	1.4 BOT
All investment treaties	NS	+ \$734 million FDI/year	.	.
Liberalizing treaties	.	.	NS	+ \$665 million FDI/year
Strong ISDS	.	.	NS	+ \$842 million FDI/year
Weak ISDS	.	.	NS	NS
GDP Growth	NS	NS	NS	NS
Level of Democracy	NS	NS	NS	NS
<i>Countries</i>	26	48	26	48
<i>Years</i>	2003-2013	2005-2015	2003-2013	2005-2015
<i>n</i>	184	528	184	528

Problems
measuring FDI:
comparing the
OECD and BOT
series



Other problems with using FDI data

FDI data is not good at identifying the “true” source country

- The problem of transshipment, tax havens
- Mauritius as a bigger source of investment to Thailand than Germany

FDI \neq high-quality investment

- Recorded activity may not provide additional capital or increase capital productivity

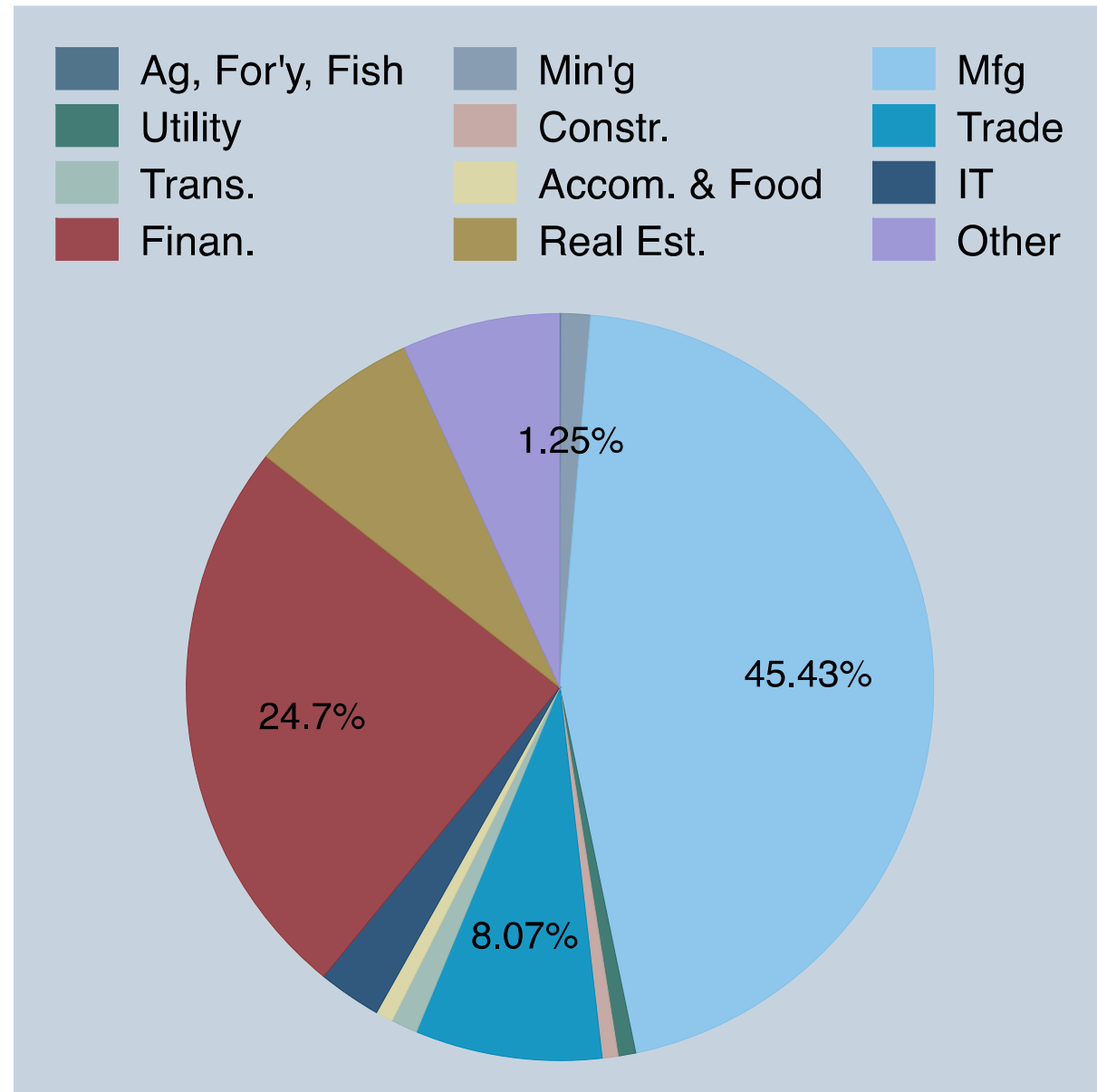
FDI \neq investment that is theoretically likely to be responsive to investment treaties

- **Not all investment needs protection**
- But we have only very limited sectoral data

The problem of simultaneous policy changes

The fact of investment treaty alternatives

Sectoral composition of FDI in Thailand



Alternative empirical strategies?

Better “FDI data?

- Not any time soon
- And useless when BITs are ubiquitous

Surveys

- And their problems

Other observational evidence

- How do investment promotion agencies market their countries?
- Which issues do Chambers of Commerce emphasize

Stock price movements?

Better theory?

Different questions?

What Do IPAs Think Investors Care About?

“Thailand’s Advantages”

- “strategically located at the heart of Asia”
- “fast growing economic market”
- “world-class infrastructure”
- “competitive human capital”
- “strong government support”
- “2nd [in] Ease of Doing Business among Emerging Economies in East Asia”
- “5th [in] Asia’s Financial Literacy Index”
- “11th [in] the World’s Most Promising Emerging Economies”
- “14th [in] Global Manufacturing Competitiveness Index”



Thailand’s Incentives

- Tax breaks and holidays

Stock price movements as hints of the (in)effectiveness of investment treaties?

