UNNECESSARILY INCOMPLETE INTERNATIONAL INVESTMENT AGREEMENTS:

CAUSES, PROBLEMS, AND SOLUTIONS

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ABSTRACT

This dissertation seeks to identify various legal and institutional methods to remove unnecessarily incomplete provisions from International Investment Agreements (IIAs). An excessive number of incomplete IIAs are ratified each year. An example of an incomplete IIA is one where investment protection articles are omitted. Incompleteness in an IIA may result in negative consequences for both host and home countries. The existing literature on IIAs has neglected to consider the existence of this phenomenon, and has neither explained the causes for nor identified solutions to this phenomenon. This dissertation explains the causes of incomplete IIAs and presents the problems emanating from it. It also identifies legal and institutional solutions to reduce unnecessarily incomplete provisions in IIAs.

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I. INTRODUCTION

The China-Australia Free Trade Agreement (FTA) entered into force on December 20, 2015. A perusal of the agreement reveals that its investment chapter appears to have a serious problem, in that it is missing several articles addressing investment protection, such as clauses addressing expropriation and the minimum standard of treatment.[1] Although this may impair their ability to attract foreign investment, both parties decided not to insert investment protection terms. Instead, they included a renegotiation clause.

China and Australia are not the only countries that have failed to complete their International Investment Agreements (IIAs).[2] India and Japan have concluded an incomplete IIA.[3] Various Latin American countries have also failed to complete their IIAs.[4] New Zealand recently concluded an incomplete IIA with China.[5]

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[1] Many countries insert renegotiation clauses to supplement missing articles. See, for example, the text of the China-Australia FTA, Investment Chapter, Article 9.9 (Future Work Program):

> 1. With a view to progressively liberalising investment conditions, the Parties shall regularly review the legal framework relating to investment and the investment environment, consistent with their commitments in international agreements […]
> 3. Unless the Parties otherwise agree, the Parties shall commence negotiations on a comprehensive Investment Chapter, reflecting outcomes of the review referred to in paragraphs 1 and 2, immediately after such review is completed. The negotiations shall include, but are not limited to, the following:
> (a) amendments to Articles included in this Chapter;
> (b) the inclusion of additional Articles in this Chapter, including Articles addressing:
> (i) Minimum Standard of Treatment;
> (ii) Expropriation;
> (iii) Transfers;
> (iv) Performance Requirements;
> (v) Senior Management and Board of Directors;
> (vi) Investment-specific State to State Dispute Settlement; and
> (vii) The application of investment protections and ISDS to services supplied through commercial presence […]

[2] Section IV of the dissertation defines IIAs. The dissertation focuses mainly on the chapter on investment under the Preferential Trade Agreements (PTAs) ratified by developing countries in Asia.

[3] Incomplete IIA between Japan and India. Available at http://www.mofa.go.jp/region/asia-paci/india/epa201102/pdfs/ijcepa_ba_e.pdf (last visited October 13, 2018).

[4] Incomplete IIA between Ecuador and other Latin American countries. Available at http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/61#iiaInnerMenu (last visited October 13, 2018).

[5] Incomplete IIA between China and New Zealand. Available at http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/42#iiaInnerMenu (last visited October 13, 2018).

These incomplete IIAs exist due to the high transaction costs arise between states and within states.[6] Various factors such as strong protectionism, a lack of institutional capacity including failures in intra-government coordination and cooperation and a concomitant lack of legal and technical expertise together impede the parties to reach consensus.

In fact, the presence of incomplete IIA is not necessarily indicative of failure, inefficiency, or error. Rather, leaving things undecided and renegotiating later is rational if today's transaction costs are high, or if tomorrow's transaction costs are expected to be low.[7]

To what extent, then, should the parties leave provisions incomplete? Simply put, what is the optimum level of incompleteness in an IIA? Such a level would maximize the benefit of the parties, given the transaction costs that arise between states and within states. Given their limited resources and capacity, the optimum level would maximize the parties' economic gains by optimizing the level of investment liberalization in the main text and carving out a reservation list to best attract foreign investments.

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[6] Robert Cooter & Thomas Ulen, Law and Economics, 91 (2008) (The concept of transaction costs encompasses all of the impediments to bargaining such as search costs, bargaining costs and enforcement costs. Search costs are required for determining whether one's preferred goods or negotiating partners are available in the market. Bargaining costs are the costs that require one to complete an acceptable agreement with the other negotiating partners to the transaction. The negotiation and legal skills for drafting an agreement could be an example of bargaining costs. Enforcement costs are the costs of making sure that the other negotiating partners stick to the terms of the agreement).

[7] Steven Shavell, Foundation of Economic Analysis, 299 (2004); See also, Cooter & Ulen, supra note 6 at 218(In particular, parties tend not to specify terms and leave a gap in relation to low probability events because the expected loss from the gap will be minimal, whereas the cost of including the terms would be significant. For instance, it may take only a minute to discuss and agree upon terms regarding what to do if hiring a lawyer is required in the event of a car accident on the way to signing a deal, but if such an event is unlikely to happen, it will not be worthwhile to include a provision for such an outcome in the contract. To express this as an equation, suppose the costs of including a term for an (anticipated) contingency is C, that the likelihood of the contingency is P, and that the loss the parties would jointly suffer by failing to include a term for the contingency is L. The following equation would apply: Leave a gap → Expected loss of PL < C, Fill the gap → Expected loss of PL > C).

The optimum level can be achieved when the parties negotiate until the expected marginal benefit of adding the provisions equals the marginal transaction cost of agreeing on them.[8] The benefit of inserting one additional provision (e.g., an investment protection article) is marginal, and the cost of inserting one additional provision is marginal. The parties will perceive themselves as doing better so long as the marginal benefit of the additional provision is greater than the marginal cost of the change. The parties will continue to make these small, or marginal, adjustments as long as the marginal benefit exceeds the marginal cost and will stop adding a new provision when the marginal cost of the last change made equals the marginal benefit. This level maximizes the parties' economic gain from the IIA and reflects the optimum level of incompleteness in an IIA.

In this sense, four types of incomplete IIAs, which will be illustrated in the Chapter IV (Unnecessarily incomplete Provisions in IIA), are at the sub-optimal level, that is, less than the optimum level of incompleteness. Because of the high transaction costs which will be discussed later, the parties' economic gains from the agreed IIA are much less than they expected to achieve. For instance, the parties take years of negotiation and conclude with no article, which adds no value to the text. Sometimes, the parties conclude the text without any exceptions that liberalize their entire economies. The parties put domestic law in a reservation list that carves out entire economic sectors, and therefore, all sectors are completely carved out, which adds no value to the text. Frequently, the parties fail to agree upon critical liberalization articles such as MFN or NT.

Then, how can they reduce transaction costs and move toward the optimum level of incompleteness? In other words, how can the parties achieve greater

[8] Cooter & Ulen, supra note 6 at 26.

completeness by lowering the transaction costs of the negotiation to increase the economic gains from the IIA? The rest of the dissertation answers this. After Section II presents the background and Section III reconciles IIAs with FDI, trade liberalization, and economic growth, Section VI (Unnecessarily Incomplete Provisions in IIA) illustrates the four types of incomplete IIA that are at the sub-optimal level. Section VI (Reason for Incomplete Provisions) explains the high transaction costs associated with negotiation and Section VII (Solution to Incomplete Provisions) explains various legal and institutional remedies to reduce transaction costs and achieve greater completeness. Section VIII concludes.

1) BACKGROUND

The background section of this dissertation introduces a history of IIAs. It examines IIAs in the eighteenth, nineteenth, and early twentieth centuries, and in the immediate aftermath of the Second World War. The section also describes the development of bilateral investment treaties and the International Centre for Settlement of Investment Disputes (ICSID), the era of proliferation of IIAs (including an explanation on why states incorporate investment chapters in their preferential trade agreements), efforts toward the establishment of a global investment treaty, and the rising trend of entering into regional and multilateral treaties.

The section then reviews the structure of IIAs, that is, the main provisions and a reservation list, in detail. While the main provisions determine the overall obligations (and rights) to which both parties must conform, the reservation list identifies either the conforming measures under a positive list approach[9] (GATS-type)

[9] A positive approach is reflected in a number of IIAs. See e.g., Korea-EU FTA, Korea-ASEAN FTA.

or the non-conforming measures under a negative list approach.[10] Both approaches will be analyzed in detail.

2) IIAs AND FDI, TRADE LIBERALIZATION, AND ECONOMIC DEVELOPMENT

This section reconciles IIAs with FDI, trade liberalization, and economic growth. The section begins by explaining the two roles of an IIA: the protection and promotion of investments. The principles of security, reasonableness, non-discrimination, transparency, due process, and establishment of dispute settlement mechanisms in IIAs ensure the presence of a favorable and stable climate for foreign investments.

The section finds that IIAs are generally positively related to attracting FDI, and that FDI tends to have a positive technology spillover, which enhances the flow of trade and growth of host countries. The magnitude and type of spillovers vary according to the technology or education level, the characteristics of its industries, or local market competition of host countries.[11]

In tying IIAs to economic development, the section starts with a review of the literature on law and development and emphasizes the importance of establishing "appropriate economic and legal policies"[12] (i.e. AELP), which refer to "economic and legal rules and regulations that fit the local context and socio-political cultures" for further economic growth. Then, the section examines the development discourse in IIAs, by examining themes such as how arbitrators have failed to interpret the terms of IIAs in keeping with the spirit of economic development in host countries,

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[10] The negative approach is reflected in many bilateral and multilateral investment agreements. Some examples include Korea-US FTA, US-Singapore FTA, and Australia-Japan FTA.

[11] Section III introduces the literature and attempts to reconcile IIAs with FDI.

[12] Appropriate economic and legal policies refer to the policies that are tailored to local environments or to the culture of a society. See generally Dani Rodrik, who argues that "Appropriate Economic and Legal Policies" are critical elements for developing countries in order to achieve further economic growth. ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH 229 (2008). *See also* Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100, 100-104 (2008); Dani Rodrick, THE GLOBALIZATION PARADOX 171 (2011); Joseph E. Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (2002); Jagdish Bhagwati, IN DEFENSE OF GLOBALIZATION (Oxford, 2004).

among others.

3) UNNECESSARILY INCOMPLETE PROVISIONS IN IIAS

This section defines the concept of an "incomplete IIA" as an investment chapter of a Preferential Trade Agreement (PTA)[13] in Asian developing nations with an explicit renegotiation clause. Then, the section defines the "optimum level of incomplete IIA" and shows how an incomplete IIA only reflects sub-optimality due to high transaction costs.[14] The section further identifies four different types of incomplete provisions and exceptions to each.

The four different types of incompletion in IIAs are: 1) missing text (an IIA with a single renegotiation clause and no articles), 2) missing articles (an IIA with only a few articles that have been agreed upon and a renegotiation clause to complete the remaining articles in the future). 3) a missing reservations list[15] (main text without a reservations list). and 4) missing or unspecified measures (a reservation list with ambiguous, unspecified, or missing domestic laws). This section describes incomplete IIAs in the recently ratified PTAs between developing countries in Asia, such as India, China, and the 10 ASEAN countries. It also examines PTAs between Australia and New Zealand, which have few or no incomplete provisions.

4) COSTS OF INCOMPLETE IIAS (UNDESIRABLE EFFECTS)

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[13] PTAs are agreements among a set of countries involving the preferential treatment of bilateral trade between any two parties to the agreement relative to their trade with the rest of the world. Customs unions and FTAs are common forms of PTAs.

[14] Cooter & Ulen, supra note 6 at 91 (2008) (According to Williamson, transaction costs are the costs of negotiating a contract *ex-ante* and monitoring it *ex-post* as opposed to production costs, which are the costs of enacting the contract. To be specific, *ex-post* costs include:(1) the maladaption costs incurred when transactions drift out of alignment ... (2) the haggling costs incurred if bilateral efforts are made to correct *ex post* misalignments, (3) the setup and running costs associated with the governance structures (often not the courts) to which disputes are referred, and (4) the bonding costs of effecting secure commitments.)

[15] Section IV explains the definition of the term "reservation list" as referring to non-conforming measures under the negative list approach.

This section identifies three negative consequences associated with incomplete provisions, namely 1) opportunities missed in attracting FDI and achieving trade liberalization; 2) opportunities missed in establishing appropriate economic and legal policies(AELP); and 3) a decrease in the credibility of the IIA.

This section first examines the literature on the process of "investment targeting." It investigates ways in which such targeting can be reconciled with IIAs to attract FDI. In practice, many countries establish Investment Promotion Agencies (IPAs) to sort out the protection and liberalization sectors and to encourage FDI in the latter. Then, the section shows how different types of incomplete IIAs may harm both host and home countries' efforts to protect foreign investors and attract foreign investments. Missing or ambiguous provisions may impede investors' abilities to predict the levels of investment protection and the extent of the host countries' regulatory powers.[16]

The section also examines how incomplete provisions may prevent parties from establishing AELP to foster further growth. IIAs aimed at increasing foreign investment flows traditionally were considered an instrument for Washington Consensus policies and neo-liberalist ideas.[17] This view, however, is criticized by many scholars because many countries have signed IIAs but have failed to achieve further economic growth.[18] Many argue that IIAs should now reflect development

[16] See generally UNCTAD, Transparency (UNCTAD Series on Issues in International Investment Agreements II) (United Nations 2012). The report offers a comprehensive analysis of how IIAs can enhance transparency and predictability for investors. Available at https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=425(last visited 8 Nov. 2018)

[17] Neo-liberalism refers to the revival of market fundamentalism in the post-Cold war period which took place as a result of the failure of the Communist system in the Soviet Union. See generally, M. Sornarajah, Mutations of Neo-Liberalism in International Investment Law 3 TRADE L. & DEV. 203, 210-215(2011)

[18] Schill et al (eds.), International Investment Law and Development 46 (2018).

concerns in host developing countries and introduce various carve-out methods to secure extra policy space.[19]

The section reviews the literature on various methods for regulatory carve out and argues that the literature fails to say anything about AELP and further growth. The section further argues that, depending on the insertion or modification of the articles or a reservation list, one could secure AELP for further growth. Then, the section illustrates specific examples of treaties in which missing articles or reservation lists may frustrate the parties' efforts to protect their AELP.

Lastly, the section explains how incomplete IIAs can reduce the credibility of IIAs among members of international society. As more countries leave their IIAs incomplete and fail to correct them, countries may begin to distrust each other. They may not only believe that such behavior is common, but that there are also no international pressures or penalties to correct such behavior.

5) REASONS FOR INCOMPLETE IIAS

This dissertation identifies two reasons for incomplete IIAs: strong protectionism and lack of institutional capacity. These substantially increase transaction costs and result in incompleteness far below the optimum level.

First, the protectionist motives of a strong legislative preference for a gradual, rather than rapid, market opening, and host countries' ongoing legal reforms are arguably the main reasons for incomplete IIAs. A strong preference for gradual rather than rapid market openings by host countries' legislative bodies can induce negotiation teams to leave their IIAs incomplete. Arguably, even though the international pressure of globalization encourages host countries to execute more IIAs, a legislative body would remain opposed to ratifying an IIA that may reduce its

[19] Freya Baetens (eds), Investment law within International law, 330 (2013).

popularity among protectionist groups and citizens. If the general public or lobbying interest groups want gradual market openings or specific sectors carved out, the legislative body can block the ratification of the IIA and ask for it to be renegotiated. All of these burdensome requests hinder the negotiation team's ability to produce a final form that has been agreed upon. Therefore, the team leaves IIAs incomplete in order to avoid the administrative burden of domestic implementation.

Moreover, the complications that arise from the ongoing legal reforms in host countries including examining and sorting out unsettled domestic measures challenge the completion of IIAs further. Following the Washington Consensus,[20] many developing countries reformed their domestic measures to determine "appropriate economic and legal policies" (AELP). When host countries implement legal reform, they leave their IIAs incomplete because it is difficult for them to gather data and pinpoint exactly which domestic laws should interact with IIAs and which domestic laws should be carved out.

In addition to protectionism, a lack of institutional capacity including failures in intra-government coordination and cooperation and a concomitant lack of legal and technical expertise together cause incomplete IIAs. First, limited coordination and cooperation between a negotiation team and the line ministries result in incomplete IIAs.[21] The negotiation team may leave agreements incomplete because the ministries

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[20] Narcis Serra and Joseph E. Stiglitz THE WASHINGTON CONSENSUS RECONSIDERED 3 (2008) (defines the Washington Consensus as a set of policies governing effective development strategies that have come to be involved with Washington-based institutions such as the IMF, the World Bank, and the US Treasury. The book notes "The Washington Consensus is based on three underlying principles: a market economy, openness to the world market, and macroeconomic discipline. Generally, the Washington Consensus has a view toward "market fundamentalism," where one looks to the market as the best solution to most economic problems").

[21] For more information on line ministries' coordination failure in trade policy in general, see Raymond Senar, Trade Policy Governance through Inter-Ministerial Coordination: A Source Book for the Trade Officials and Development Experts (2010). For more on line ministries' coordination failure in terms of trade negotiation perspectives, see Roberto Bouzas, Mercosur's experiences of preparing trade negotiations with the EU: A memorandum 24 (ECDPM Discussion Paper No. 50, January 2004). (Emphasizing the importance of line coordination in the public sector, the paper used the MERCOSUS

do not (or cannot) comply with a team's requests for information in a timely fashion. Many ongoing bilateral and multilateral negotiations have deadlines and it is difficult for the line ministries to comply with all of the requested tasks in time.

Another problem is the lack of legal and technical expertise. Many host countries, particularly those that are developing countries, lack sufficient legal expertise and have trouble understanding the legal consequences of modifying the terms of an IIA.[22] This section analyzes the reasons for the absence of legal expertise, including quick staff turnover,[23] lack of human resources, and inability to hire legal counsel.

6) SOLUTIONS TO REDUCE INCOMPLETENESS IN IIAS

This dissertation proposes both legal and institutional remedies to address incomplete IIAs. The suggested remedies could substantially reduce transaction costs and achieve greater completeness, moving toward the optimum level of incompleteness. The two legal remedies are: 1) reliance on the exchange of "side

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as an example to show how they failed to coordinate the line ministries in the negotiation). See also, G-77 and China High-Level Forum on Trade and Investment, Strengthening Developing Countries' Capacity for Trade Negotiation: Matching technical assistance to negotiating capacity constraint (Doha, Qatar, Dec. 5-6, 2004). (The report reviews the different types of institutional constraints in the trade negotiation of developing countries. The constraints include the intragovernmental coordination failure and lack of human resources); See San Bilal, Preparing for the Negotiation of Preferential Trade Agreement with the EU: Preliminary lesson from some developing countries, at 12 (Written for the Meeting of Officials from the Eastern and Southern Africa Region on the Economic Partnership Agreement, 22-23, May 2003,Nairobi, Kenya) (argues that without strong political leadership and proper inter-governmental coordination, a coherent negotiation strategy cannot be pursued) available at http://www.hubrural.org/IMG/pdf/ecdpm_bilal.pdf (last visited Feb 13, 2019).

[22] Zeng Huaqun *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17 J. INT'L ECON. L. 299, 302-304 (2014) (The article argues that the advantage of a model BIT is that it gives developed states negotiating advantages because the party that drafts the model controls the negotiation. On the contrary, most developing countries suffer from unequal bargaining power in negotiations because they have not prepared model BITs. Therefore, their range of action is merely confined to accepting or slightly modifying a model BIT that was prepared by a developed country which was a negotiating partner. Only a few developing countries have prepared their own model BITs, and these are heavily influenced by the model BIT of developed countries). See also M. Sornarajah, *The International Law on Foreign Investment* 207-208 (2004), who points out that it is difficult to expect developing countries to have legal departments that are sophisticated enough to understand and analyze the nuances in the variations of the terms used in an IIA.

[23] For a general discussion on job rotation, see Tor Eriksson and Jaime Ortega, *The Adoption of Job Rotation: Testing the Theories*, 59 INDUS. & LAB. REL. REV. 653, 653 (2006).

letters" in the domestic implementation phase (i.e., after the conclusion of, but before officially signing an IIA);[24] and 2) a formal renegotiation after the ratification of an IIA through a renegotiation clause.

The section first examines the various determinants of the choice between a renegotiation clause and a side letter and examines each device in detail and analyzes the cost-efficient, flexible, and transparent nature of side letters. Unlike expensive domestic procedures (e.g., public hearing requirements from the media and legislative bodies) required by formal renegotiations, exchanging side letters has no substantial administrative requirement. Moreover, because the domestic implementation process is the last opportunity to complete the treaty before officially signing, a flexible letter accurately reflects the parties' last-minute deal. This letter could modify the effective date of a completed article or even include a renegotiation clause to avoid incomplete provisions. Moreover, side letters could reflect delayed feedback from the line ministries and flesh out a domestic law or a scheduled reform of domestic legislation to enhance the transparency of domestic law. The letter could even request the party, who is responsible for the incomplete provisions, to complete the provisions after the ratification of the treaty.

In addition to the letter, different requirements in the renegotiation clause may encourage parties to complete the IIA. Comprehensive renegotiation schedules (i.e., schedules with agendas and deadlines) may help parties avoid unnecessary debates and prevent them from postponing renegotiation. Moreover, the renegotiation clause may require the parties to renegotiate condition to the entry into force of previously

[24] The Plot, "Legal scrubbing or renegotiation? A text-as-data analysis of how the EU smuggled an investment court into its trade agreement with Canada" (The news article argues that the negotiators negotiate the concluded treaties in the domestic implementation phase. In the case of the CETA investment chapter, the article found that the text released at the end of negotiations in 2014 and the version that came out of legal scrubbing in February 2016 diverged by 19%. The vast majority of changes consisted of material alterations of the treaty text – a de facto renegotiation.) Available at http://www.the-plot.org/2016/03/24/legal-scrubbing-or-renegotiation/ (Last visited July 30, 2018).

completed articles, which may facilitate renegotiation. On the other hand, there is a spillover of expertise in the renegotiation phase. The negotiating party could hold a workshop, for instance, to deliver their legal and technical expertise to the negotiating partners to complete the treaty.

The institutional remedies are: 1) improvements to the coordination and cooperation of line ministries, and 2) upgrades in legal and technical expertise. First, a stronger negotiation team with greater political power and easier access to the line ministries may be a solution. To ensure that the negotiation team is strong, it is necessary to establish the team as a separate entity with strong political power and priority, housed within the executive office, like the United States Trade Representative (USTR), which is housed within the Office of the President, rather than in an established ministry.

Second, enhancing the legal expertise of the negotiation teams is another solution. Countries could hire more experts, extend short staff turnover periods, and provide better training for their negotiating officers. Moreover, during the course of negotiations, negotiators should ask the home state questions as a practical measure to acquire expertise in negotiation. In practice, when negotiators from home states become temporary lecturers in the "Question and Answer (Q&A) Sessions" that are held in conjunction with primary negotiations, they use the "learning-by-doing" approach. The next section starts with the background.

II. BACKGROUND

An IIA is an international arrangement between two or more countries to codify the rules of international investment.[25] The dramatic increase in the number of concluded IIAs is one of the most remarkable phenomena in the field of international law in recent decades.[26] By the 1990s, executing IIAs became the "thing to do" in developing countries, with over 1,000 signed by the middle of 2008 and a further 2,600 under negotiation.[27] There are currently over 3,200 IIAs in effect, in addition to regional and sectoral investment agreements.[28]

The section introduces a history of IIAs. It examines IIAs in the eighteenth, nineteenth, and early twentieth centuries, as well as in the immediate aftermath of the Second World War. The section also details the development of bilateral investment treaties and the ICSID, the era of proliferation of IIAs (including an explanation on why states incorporate investment chapters to the PTAs), efforts toward the establishment of a global investment treaty, and the rising trend of entering into regional and multilateral treaties.

The section then reviews the main provisions of IIA including the reservation lists. While the main articles determine the overall obligations (and rights) to which both parties must conform, the reservation list either includes the conforming

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[25] See *generally,* John P. Gaffney and James L. Loftis, *The Effective Ordinary Meaning of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims,* 8 J. WORLD INVESTMENT & TRADE 5 (2007).

[26] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U. C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005); Jason Webb Yackee, *Are BITs Such A Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm,* 12 U. C. DAVIS J. INT'L L. & POL' Y 195, 195 (2005).

[27] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2015, Chapter IV, Reforming the International Investment Regime: An Action Menu, 120, 121-125 (2015) (The document explains the general trends in IIAs and provides extensive guidance for reforms). See *also* Stephan W. Schill, International Investment Law as International Development Law; 337 Year Book on International Investment Law and Policy 2012-2013, 337(Andrea K. Bjorklund, ed., Oxford Press, 2013).

[28] *Id,*

measures under a positive list approach or identifies non-conforming measures under a negative list approach.

A. THE HISTORY OF IIAS[29]

IIAs are concluded in specific historic, economic, and social contexts. They respond to the needs that are specific to a given time.

IIAs in the eighteenth, nineteenth, and early twentieth centuries

From the eighteenth to the early twentieth centuries, most foreign investment was made in the context of colonial expansion. Since imperial powers used military force to impose their own legal systems in colonized territories, these European countries had no need for commercial and investment treaties.[30] However, the eighteenth century also saw the first commercial treaties among Western countries.[31] The United States, in particular, signed a number of friendship, commerce, and navigation (FCN) treaties—comprehensive agreements covering trade, investments, intellectual property, and human rights. Early FCN treaties were trade-oriented agreements. Thus, investment protection was not essential. These treaties had an "absolute" standard, generally guaranteeing "special protection" or "full and perfect

[29] The section generally follows a history of international investment treaties in the 'Law of investment treaties' by Jeswald. W. Salacuse (2015); See also, UNCTAD (World Investment Report 2015), supra note 27, at 121-125 (explains general trends in IIAs and provides extensive guidance on the reform of IIAs. In addition, the report explains that the expected key function of IIAs is to contribute to predictability, stability, and transparency in investment relations, and to help move investment disputes from the realm of state-to-state diplomatic action into the realm of law-based dispute settlement and adjudication. IIAs can help improve countries' regulatory and institutional frameworks in several ways, including by adding an international dimension and by promoting the rule of law and enhancing good governance. IIAs can reduce risks for foreign investors (i.e., can act as an insurance policy) and, more generally, contribute to improving the investment climate. Through all of this, IIAs can help facilitate cross-border investments, and become a part of broader economic integration agendas, which, if managed properly, can help achieve the sustainable development goals); See also Stephan W. Schill, International Investment Law as International Development Law, 337 Year Book on International Investment Law and Policy 2012-2013 (Andrea K. Bjorklund, ed., Oxford Press, 2013).

[30] M. Sornarajah, The International Law on Foreign Investment, 18-30 (3rd ed., 2010)

[31] For recent work on FCN treaties and its relevance to investment law, See J.F. Coyle, *The Treaty of Friendship, Commerce and Navigation on the Modern Era*, 51 COL. J. TRANS. L 302 (2013); For more reference, See Kenneth J. Vandevelde, The First Bilateral Investment Treaties, US Postwar, Friendship, Commerce, Navigation Treaties (Oxford, 2017).

protection."[32] Moreover, they had specific provisions covering commercial property and persons engaged in commerce. For instance, an 1815 treaty between the United States and Great Britain provided protections for "merchant[s] and traders" and agreed to "the most complete protection and security for their commerce."[33] Early FCN treaties also granted foreign nationals the right of equal access to domestic courts and included most favored nation (MFN) and national treatment (NT) provisions covering other business-related activities.[34] At this time, these treaties also included provisions addressing expropriation, prohibiting the seizure of "vessels, cargoes, merchandise, and effects" of the other party's nationals without the payment of "equitable and sufficient compensation" or "sufficient indemnification."[35]

The Treaty of Paris of 1783, negotiated between the United States and Great Britain, is another example with provisions on investment protection. It granted fishing rights to US fishermen and recognized the lawfully contracted debts that had to be paid to creditors on both sides. It also recognized the rightful owners of all confiscated lands and provided "for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects."[36] Lastly, the US promised to prevent the confiscation of the property of British subjects in the future.[37]

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[32] *Id.*
[33] Convention of Commerce between the United Kingdom of Great Britain and Ireland and the United States See available at https://iea.uoregon.edu/treaty-text/1815-ukusacommerceentxt (last visited October 1, 2018).
[34] One of the earliest MFN provisions appeared in a US-France FCN.
[35] See, e.g., 1824 Columbia FCN; 1825 Central American federation FCN
[36] The text of the treaty of Paris is available at http://www.washingtontradereport.com/ParisPeace.htm (last visited October 13, 2018). For more information on the history of early FCN treaties, see Kenneth J. Vandevelde, Bilateral Investment Treaties, History, Policy and Interpretation, 23 (2010).
[37] *Id.*

FCN treaties originally addressed commercial matters, but a significant investment protection component was developed after the Second World War.[38] Over 40 FCN treaties are still in force today and exist alongside Bilateral Investment Treaties(BITs).[39] In fact, many of the concepts and terms used in these FCN treaties were later included in the investment treaties that were concluded in the twentieth and twenty-first centuries.[40]

Between the World Wars

After the First World War, US FCN treaties increasingly dealt with investment protection such as the protection of American property from arbitrary and discriminatory government action and expropriation, etc. In the 1920s, the US broadened its commercial treaty program, focusing particularly on the expansion of foreign trade.[41] One of the results of the effort was the development of a new FCN treaty model providing "the most constant protection and security," and guaranteeing national and MFN treatment regarding the right of the national of one party to "engage in scientific, religious, philanthropic, manufacturing and commercial work" in the territory of another.

IIAs in the immediate aftermath of the Second World War

After the Second World War, a new set of international institutions for global economic expansion were established, such as the International Bank for Reconstruction and Development (IBRD) that went to become the World Bank (one

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[38] Wolfgang Alschner. *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 GOETTINGGEN J. INT'L L, 455, 457 (2013).
[39] For an overview of US FCN treaties in force, see the website of the US Trade Compliance Center see http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (last visited October 13, 2018).
[40] Jeswald W. Salacuse, The Law of Investment Treaties 93 (Oxford, 2015)
[41] *Id* at.86.

of its stated purposes was "to promote private foreign investment"), [42] the International Monetary Fund (IMF),[43] and the General Agreement on Tariffs and Trade (GATT), which laid the foundation for the multilateral trading system that evolved into the World Trade Organization (WTO).

Similarly, the United States and other European countries attempted to establish a similar framework to govern investments. The first attempt at regulating multilateral investment occurred in 1948, within the framework of the proposed Havana Charter. It was designed to establish an International Trade Organization (ITO) to promulgate rules on international investment and trade.[44] The purpose of the Charter was to foster "the international flow of capital for productive investment." It contained various provisions involving foreign investment and focused on the relationship between host states and foreign investors. Its Article 11(2)(a), for example, would have authorized the ITO to make recommendations for and promote bilateral or multilateral agreements on measures designed to assure the just and equitable treatment of skills, capital, enterprise, arts, etc. However, these provisions did not provide effective protection for investment. For instance, the term "just and equitable" did not place a legal obligation on host countries, but merely authorized the ITO to recommend that this standard be included in future agreements. Ultimately, the developed capital-exporting and developing capital-importing countries failed to reach a consensus as to the Charter. In particular, they failed to agree on the interpretation of customary international law and the minimum standard for the treatment of foreign investors.

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[42] Articles of Agreement of the International Bank for Reconstruction and Development (formulated at the Bretton Woods Conference 1-22 July 1944) (entered into force December 27, 1945)

[43] Article of Agreement of the International Monetary Fund (formulated at the Bretton Woods Conference July 1-22, 1944) (entered into force December 27, 1945).

[44] Todd S Shenkin, *Trade-Related Investment Measures in Bilateral investment treaties and the GATT: moving toward a multilateral investment treaty*, 55 U. PITTS. L. REV. 541, 555 (1994).

The Charter never entered into force and thus efforts to create the ITO ultimately failed. The ITO failed largely because the United States Congress failed to ratify the Havana Charter.[45] Under US constitutional and legal requirements, the government requires the approval of the US Congress to formally accept the Havana charter, but the US Congress refused to ratify the Charter. This failure of ratification was partly because the American business community believed that the investment protection provisions had been weakened too much at the insistence of developing countries.[46]

IIAs after the Second World War (1960 onward)

Despite the failure to implement a global treaty on investment, capital-exporting countries continued to make international rules at both the bilateral and multilateral levels. After the Second World War, the US implemented a program to conclude a network of bilateral FCN treaties to facilitate direct investment abroad.[47] It began to negotiate to insert two new provisions in its existing FCN treaties: 1) the protection of investment property; and 2) the protection of matters other than property that were nevertheless to the legal and economic status of foreign-owned property. The provisions in the first category addressed the seizure of property, protection of the security of property, equitable treatment, unreasonable and discriminatory measures, and public ownership.[48] The provisions in the second category included MFN and NT and expanded their coverage to include intellectual property. For the first time in US treaty practice, FCN treaties incorporated a provision offering a legal remedy for the resolution of conflicts between parties on the interpretation and

[45] Jackson et al, Legal Problems of International Economic Relations, 62 (Thomson West, 2008)
[46] Vandevelde, supra note 36 at 41.
[47] See generally, JW Salacuse, *BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries,* 24 INT'L LAWYER 655, 651-61 (1990)
[48] Salacuse, supra note 40, at 97.

application of treaty provisions, namely state-to-state adjudication.[49] FCN treaties also encouraged dispute resolution through commercial arbitration by providing for the judicial enforcement of arbitral awards.

In addition to bilateral efforts, after the Havana Charter negotiations failed, countries and international bodies drafted multilateral conventions concerning foreign investments. These included the Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), and the Organization for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property (1967).[50] However, no consensus was reached.

The development of bilateral investment treaties and the establishment of the ICSID

An important phase in the history of IIAs began in the 1960s, when individual European countries began to negotiate new bilateral treaties that differed from previous ones. These new treaties, which covered foreign investments exclusively and established a regulatory framework to govern investments made by the nationals of one country in the territory of another, were a new, modern type of BIT.

The first BIT, between Germany and Pakistan, was signed in 1959.[51] At this time, other European countries began entering into BITs with their former colonial rulers and other developing countries, motivated by the need to safeguard their nationals' existing investments in the newly independent territories and to facilitate

[49] R Wilson, *Postwar Commercial Treaties of the US*, 43 AM. J. INT'L L. 262, 275 (1949) ("disputes shall be submitted to the ICJ unless the parties shall agree to settlement by some other pacific means").
[50] Salacuse, supra note 40 at 99.
[51] See available at http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf (last visited on October 15, 2018).

future investments. By 1980, European countries had concluded about 150 BITs with developing countries.[52]

These BITs bore marked similarities, as many countries seemed to have followed the German model. They contained specific protections, including protection from expropriation and the right to make monetary transfers. The most significant innovation in these BITs was the inclusion of investor-state arbitration.[53] Prior to this, aggrieved investors could only request their home country to press claims against a host country and the home country then had full discretion to act. If it decided to do so, the home country became the owner of that claim, and had the exclusive power to decide what to do with it. The development of investor-state dispute settlement through arbitration (ISDS) ultimately allowed aggrieved investors to bring claims directly against host governments for violations of BITs. This process became a powerful tool to assure respect for the treaty provisions in the host country.

The ICSID was established in 1965 to resolve investment disputes between investors and host countries. The World Bank believed that the lack of a fair and effective means of investment dispute settlement impeded the flow of capital for the economic development of developing countries.[54] It thought that developing countries could encourage foreign private capital flow by implementing an adequate procedural method of investor-state dispute settlement to improve the investment climate in their own economies. The ICSID did not create any substantive obligations. Instead, it made available a facility that states could then invoke in their later IIAs. Both

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[52] Salacuse, supra note 40, at 101

[53] ISDS is an instrument of public international law that grants an investor the right to use dispute settlement proceedings against a foreign government. Provisions for ISDS are contained in a number of BITs and in certain international trade treaties, such as the North American Free Trade Agreement (Chapter 11) and the TPP (Chapters 9 and 28); See generally, Rudolf Dolzer and Christoph Schreuer, Principles of International Investment law, 232 (Oxford, 2012).

[54] Paper by the General Counsel of the World Bank and Transmitted to the Members of the Committee of the Whole, SID/63-2 (February 18, 1963) 3 in ICSID, History of the ICSID Convention (1968) vol. 2, part I at 73.

developed and developing countries were expected to be members of the ICSID and participate actively in its governance.[55]

ICSID is neither an international court nor a tribunal. It merely provides an institutional framework that facilitates conciliation and arbitration. The actual settlement of disputes takes place mainly through arbitral tribunals that are constituted on an *ad hoc* basis for each dispute. The ICSID secretariat consists of a Secretary-General and a Deputy Secretary-General. The Secretary-General of ICSID keeps a list of contracting countries that contains all data and information relevant to their participation in the ICSID convention. The Secretary-General maintains all procedural developments and archives containing the texts of all documents related with any proceeding.

The key function of the secretariat is to give administrative support during arbitral proceedings. This includes providing a place for meetings as well as translation services. The Secretary-General appoints an experienced member of ICSID's legal staff as the Secretary for each tribunal, who in turn makes the necessary arrangements for hearings, and prepares drafts and orders.[56]

The first BIT to include an ICSID clause was the Netherlands-Indonesia treaty signed in 1968, about 10 years after the conclusion of the first BIT.[57] It later became a standard practice for BITs to include an ICSID clause. Consequently, ICSID membership grew steadily. As of August 2017, it has a membership of 161 countries.[58]

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[55] Report of the World Bank Executive Directors on the ICSID Convention, Doc ICSID/2 in ICSID, History of the ICSID convention (1968) vol. 2, part II at 1072-4.
[56] Christoph Schreuer, International Centre for Settlement of Investment Disputes (ICSID) available at http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (last visited October 13, 2018).
[57] R. Dolzer and M Steven, Bilateral Investment Treaties 130 (1995).
[58] As of October 2018, the number of signatory and contracting states is 162. https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited on October 13, 2018).

ICSID became an important institution in resolving international investment disputes. As of June 30, 2018, ICSID had registered 676 cases under the ICSID Convention and Additional Facility Rules.[59] It has administered over 70% of all known international investment proceedings and in 2017 alone, it administered 258 cases, which is the most in any single year of its history.[60]

The era of proliferation of IIAs

BITs gained substantial momentum in the 1990s due to the fall of the Berlin Wall in 1989 and the subsequent dissolution of the Soviet Union. The transformation of former Communist countries led to a broad, even if only superficial, acceptance of the concept of private property. China also started to seek foreign investments for economic development. These events significantly influenced economic globalization. A large number of developing countries actively opened up their markets, while developed countries began to seek production locations abroad due to lower costs.

The number of BITs expanded rapidly during this period. Although only 381 existed by the end of the 1980s, they had multiplied five-fold by the end of 2000, totalling 2,067.[61] Both developed and developing countries considered participating in the BIT regime a must in the realm of global competition for foreign investments. Thus, by the mid-2000s, almost all countries had at least a few BITs. Countries such as China and India, with enormous potential as both recipients and sources of FDI, rapidly expanded their treaty networks.

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[59] ICSID caseload statistics, available at https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf (last visited October 13, 2018).
[60] ICSID Annual Report 2017 available at https://openknowledge.worldbank.org/handle/10986/28558 (last visited October 01, 2018).
[61] UNCTAD (World Investment Report 2015), supra note 27, at 123.

Meanwhile, the number of BITs involving two developing countries (i.e., "south-south") started to increase dramatically. By the end of 2005, the number of south-south BITs had grown to 644, representing 26 percent of BITs overall. Similarly, two industrialized countries also formed their own BITs ("north-north"). An example of this is the 1988 agreement between the US and Canada that created a free trade area. This FTA includes an investment chapter that in effect functions as a BIT, closely paralleling the BITs that the US had negotiated previously. In 1994, the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the US, which contained an investment chapter, came into force.[62]

The evolution of BIT clauses in FTAs and efforts to create a global treaty governing investment

Incorporating an investment chapter into FTAs became a trend. Following the NAFTA, the US signed FTAs with Jordan, Australia, Singapore, Bahrain, Chile, Columbia and Korea, among other countries. All of these treaties included separate investment chapters.[63] Japan followed this path in promoting its economic partnership agreements (EPAs) which also contain chapters on investment and provide for investor-state dispute settlement.

There are two reasons. First, it is cost-effective to incorporate investment matters into FTAs from the perspective of administrative costs.[64] In many countries, the responsible ministries are often the negotiators of BITs and FTAs.[65] Instead of conducting a separate BIT, the parties rather pursue an FTA and incorporate

[62] The full text of the NAFTA is available at https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last visited on October 13, 2018).
[63] The full text of FTAs concluded by US are presented on the website of the US Trade Representative, available at https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text (last visited on October 13, 2018).
[64] Chang-fa lo, *A comparison of BIT and the Investment Chapter of Free Trade Agreement from Policy Perspective,* 3 ASIAN J. WTO & INT'L HEALTH L. & POL. 147, 149 (2008).
[65] Ziegler et al, European yearbook of international economic law 2017 482 (2017) (also provides an example that the Ministry of Commerce in china is in charge of both BIT and FTA negotiation).

investment chapter. There is no legal and technical barrier to incorporating the contents of a BIT into an FTA and there would be no legal difference between incorporating investment provisions in the FTA investment chapter or in a BIT.[66] The parties could simply choose the cheaper option by conducting an FTA and include an investment chapter.[67]

Second, the parties recognize that investment is often considered a trade-related issue.[68] Although conceptually distinct, they are functionally connected in that most firms make investments in order to trade. Through trading the products they produce, most investment ultimately secures profits for its owner. For instance, gas companies invest in exploration to find gas that they can extract and sell on the international market. Tourism companies invest in hostels and motels in south Asian countries to sell their services to tourists.

Multinational investors are not only concerned with protecting their investments in the countries they invest in but also want to make sure that they can export goods and services back to their home country or to another third country's export markets so as to maximize their return on their investment. Recent FTAs with investment chapters enable these functions. The prospect of the economic benefits of increased exports of goods and services produced in their territories has been a powerful incentive for host countries to agree to a high standard of foreign investor protection. Whereas traditional BITs imposed legal obligations only on host countries to protect foreign investments, FTAs impose obligations on both host (to protect foreign investments) and home (requiring them to accept the importation of goods produced in their treaty partner's territories) countries.

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[66] Chang-fa lo, supra note 64, at 147.
[67] *Id.*
[68] *Id.*

The connection between trade and investment was also recognized by GATT during the Uruguay Round of negotiations between 1986 and 1994. The member states consented to the Agreement on Trade-Related Investment Measures (TRIMs), which prohibits the imposition of measures that are inconsistent with NT and the prohibition of quantitative restrictions. The main purpose of this agreement was to prevent members from imposing local content requirements, including mandatory local hiring.

Efforts to establish a global investment treaty

After the Cold War, capital-exporting countries began to design a global treaty on investment. The first attempt began in April 1991 when the World Bank requested that the Multilateral Investment Guarantee Agency (MIGA)[69] prepare a legal framework to promote FDI. The result was the "Guideline on the Treatment of Foreign Investment," which set out a general framework for the treatment of foreign investment, standards of the treatment and transfer of capital, expropriation and compensation for it, and dispute settlement.[70]

The second attempt to establish a global treaty on investment originated within the OECD. Negotiations for the Multilateral Agreement on Investment

[69] See Paul E. Comeaux and N. Stephen Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 J. INT'L & COMP. L. 1, 40 (1995) (The article presents the background of MIGA. The World Bank, a multilateral lending agency and MIGA's parent company, was formed over forty years ago. It consists of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation, as well as MIGA. MIGA entered the political risk insurance market in 1988. "One of its basic objectives is to increase the flow of capital and technology to developing countries… by complementing government-sponsored and private investment guarantee programs." Many national insurance programs, due to their respective national objectives, contain strict eligibility requirements that exclude many investors and investments. In addition, national insurance programs have limited financial resources. MIGA's insurance program overcomes some of these shortcomings and helps to fill the gaps." Further, because MIGA is a multilateral agency, it can insure projects for both US and non-US investors).

[70] The guideline is available at http://documents.worldbank.org/curated/en/955221468766167766/Guidelines (last visited on October 13, 2018).

(MAI)[71] took place between 1995 and 1998. The OECD mandate called for "a broad multilateral framework for international investment with high standards of liberalization of investment and investment protection and with effective dispute settlement procedures."[72] However, member states could not reach a consensus on the core principles of investment protection (e.g., definition of investment, degree of investment liberalization, indirect expropriation, Investor-State Dispute Settlement, cultural exceptions, and labor and environmental issues). The question of investment liberalization, in particular, provoked many disagreements among members. Each member had different regulatory procedures and different industries that they wanted to protect from foreign investors.

In addition to the disagreement among OECD members, India opposed the MAI. It believed that a global treaty on investment constituted a substantial threat to its policy space and economic independence. India also challenged the legitimacy of the forum, which did not permit developing countries to participate fully in the negotiation process. Many NGOs also challenged both the process and the content of

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[71] Laura J. Loppacher and William A. Kerr, Investment Rules: *The U.S. Agenda in Bilateral Trade Agreements,* 7 J. WORLD INVESTMENT & TRADE 39, 42 (2006) (review the history of MAI. "Negotiations at the OECD began in 1995, when representatives at the OECD authorized negotiation of an international investment treaty, the Multilateral Agreement on Investment (MAI). According to many economists, this was the easiest forum because OECD Members are mostly industrialized countries and thus are more likeminded on investment policies and have similar, relatively liberal investment regimes. Many developed countries did not want to enter negotiations with developing countries because there would be less common ground to work with. The MAI, as initially envisioned, was expected to establish rules for removing existing barriers and controls on all types of foreign investment. However, despite their similar levels of development and overall goals, the countries involved in the negotiations could not reach an agreement. Delegates had a multitude of issues for which they wanted exceptions. The United States feared that European governments would not let it maintain unilateral sanctions against foreign-owned companies engaged in transactions with Cuba, Iran and Libya. Other countries had reservations about certain sectors, such as the cultural industries. This resulted in the MAI becoming a document without universal rules. When a draft of the MAI was leaked, it was met with significant opposition from many individuals and groups who saw it as being too friendly to owners of investments. In addition, negotiators struggled with how the MAI would interact with other international investment agreements. While the MAI would have been complementary in many cases, there were also areas in which provisions would be contradictory or where offers made in the MAI would have to be extended to non-OECD Members as a result of most-favoured-nation (MFN) clauses in other bilateral or multilateral agreements. As a result of these difficulties, the MAI was abandoned in November 1998").

[72] See the mandate and MAI documents http://www.oecd.org/daf/mai/intro.htm (last visited on October 13, 2018)

the MAI. In 1997, the NGOs obtained a leaked draft of the MAI and found that the negotiators had consulted business entrepreneurs, but not other members of civil society or NGOs. These NGOs believed that the negotiator had worked secretly with businesses at the expense of labor unions, environmentalists, and human rights organizations.[73]

As the public within OECD countries became aware of these controversies, member states became cautious about concluding the treaty. Finally, in December 1998, the OECD declared the MAI negotiations closed. There were several reasons for the failure of the MAI.[74] First, many argued that the OECD was the wrong forum for such negotiations, which needed a global scope because the treaty would have affected many non-OECD countries. Second, the negotiation process gave the public the impression that the OECD was fostering corporate interests at the expense of society as a whole. Third, the timing was bad since many countries were still in the process of adjusting to treaties that had already been concluded, including the NAFTA and the WTO. They needed time to implement these treaties domestically before submitting to another set of regulatory rules.

Likewise, the WTO failed to create any investment treaty. Ministerial meeting of the WTO members in Doha in November 2001 agreed to include the subject of foreign investment in the agenda for its next round of talks. The work plan recognized "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly FDI that will contribute to the expansion of trade."[75] However, this was dropped from the Doha Round pursuant to the "July 2004 Package," which determined that "no work toward

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[73] Salacuse supra note 40, at 120.
[74] Salacuse, supra note 40 at 121 (The article introduces detailed explanations on why MAI have failed).
[75] Ministerial Declaration (adopted on November 14, 2001, World Trade Organization Ministerial Conference (November 9-14, 2001).

negotiations on any of these issues will take place within the WTO during the Doha Round."[76]

The trend toward regional trade and investment treaties

As a result of the failure of the MAI and the WTO, the number of regional and sectoral trade agreements including investment chapters increased dramatically.[77] Governments began substituting regional treaties for bilateral ones.[78] Regionalization was the effect of organizations' or countries' deeper economic integration agendas, such as the ASEAN's Comprehensive Investment Agreement (ASEAN CIA, 2013), the Trilateral China–Japan–Korea Investment Treaty (2012),[79] the Trans-Pacific Partnership (TPP),[80] the Regional Comprehensive Economic Partnership Agreement (RCEP),[81] the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA), the Tripartite Agreement among the Common Market for Eastern and Central Africa (COMESA), the East African Community (EAC), the Southern African Development Community (SADC), the EU-Japan Free Trade Agreement, and the Australia–ASEAN–New Zealand FTA.

Further developments took place in the second half of the 2000s, which was a period of reorientation. For instance, US were subject to many NAFTA investment

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[76] See "Decision adopted by the General Council on 1 August 2004" WT/L/579.
[77] Efraim Chalamish, *The future of Bilateral Investment Treaties: A De Facto Multilateral Agreement.* 34 BROOK.J. INT'L L. 304, 305 (2009)
[78] Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contraction?* 17 J. OF INT'L ECON. L. 271, 298 (2014); see also, UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, 103-7 (United Nations, 2013).
[79] The "Agreement among the Government of the Republic of Korea, and the Government of Japan, and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment" was signed on May 13, 2012. Ministry of Foreign Affairs Japan, "Signing of the Korea-China-Japan Trilateral Investment Agreement," Press release, May 13, 2012, available at http://www.bilaterals.org/?japan-china-korea-trilateral&lang=en (last visited on October 13, 2018).
[80] The text of the TPP is available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited on October 13, 2018).
[81] See generally, Kenneth J. Vandevelde, *A Brief History of International Investment Agreements,* 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005); Jason Webb Yackee, *Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm,* 12 U. C. Davis J. Int'l L. & Pol' Y 195, 195 (2005).

arbitrations. In response, they created new model BITs to narrow the scope of investment protection. For instance, NAFTA defines investment broadly, as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment" and includes a non-exhaustive list of "forms" such investments may take, including shares and intellectual property. The 2004 Model BIT narrowed this definition by stating that the "characteristics of an investment" include "the commitment of capital […], the expectation of gain or profit, or assumption of risk. With respect to Minimum standard of treatment, while undefined in NAFTA, the 2004 Model BIT defined it as "fair and equitable treatment" and "full protection and security."

The 2004 Model BIT also included specific language on safety, the protection of public health and the environment, and the promotion of internationally recognized labor rights. It also incorporated important ISDS provisions such as open hearings, the publication of related legal documents, and the possibility for non-disputing parties to submit amicus curiae briefs to arbitral tribunals.

The US further modified the Model and produced the 2012 Model BIT, but the 2012 US Model BIT does not differ much from the 2004 version of the US Model BIT.[82] Critics were particularly disappointed, as the model made few changes to the provisions of the 2004 Model BIT.[83] The model imposes additional burdens and restrictions on host states to facilitate and protect foreign investment and adds some protection for the government's regulatory power in the area of financial services. The model also strengthens protection of the environment and labor rights.[84]

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[82] Mark Kantor, *Little has changed in the New US Model Bilateral Investment Treaty*, 27 ICSID Rev. 335, 335 (2012).
[83] *Id.*
[84] Lise Johnson, The 2012 US Model BIT and What the Changes (or lack thereof) Suggest about Future Investment Treaties. Political risk Insurance Newsletter Vol VIII (2012) available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjizp6QyYrf

During this period, investment disputes became more complex, raising difficult legal questions regarding the line between the permitted regulatory power of the host countries and illegal interference with investor rights. Accordingly, governments entered into an evaluation and reflection phase in which they evaluated the costs and benefits of IIAs and reflected on their future objectives and strategies. As a result, several countries undertook IIA reforms by rejecting ISDS provisions and either revising or renegotiating their previously ratified IIAs with the goal of concluding "new generation" IIAs.

Some countries rejected ISDS because they wanted to protect their industries and did not want their own laws to be subjected to scrutiny. For instance, Australia decided to exclude ISDS in response to the rigorous lobbying by NGOs and interest groups.[85] In determining the withdrawal of the ISDS, the government requested the government affiliated Productivity Commission to conduct independent research on issues pertaining to the ISDS. The Commission consulted academics, the business sector, government agencies, and other interested parties, and invited submissions from the public. Many protectionist lobbying groups including NGOs, trade unions, and academics made submissions that were highly critical of ISDS.[86] The Commission's final report was released in December 2010. It strongly recommended that the government should "seek to avoid" the inclusion of ISDS provisions.[87] First, the Commission found no evidence that Australia's domestic courts were unfavorable

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AhUMy7wKHZvRC7YQFjAAegQIARAC&url=http%3A%2F%2Fccsi.columbia.edu%2Ffiles%2F2014%2F01%2Fjohnson_2012usmodelBIT.pdf&usg=AOvVaw35cSG8EDwopl-S8efV-Vp8 (last visited Dec 6 2018).

[85] Jurgen Kurts, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication,* 27 ICSID REVIEW, 65, 68 (2012); Leon Trakman, *Investor State Arbitration or Local courts: Will Australia Set a New Trend?* 46 J. WORLD TRADE, 83, 93 (2012).

[86] Available at http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ (last visited on October 13, 2018).

[87] Productivity Commission, 2010. Bilateral and Regional Trade Agreements: research Report. Available at http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf (last visited on October 13, 2018).

toward foreign investors.[88] Second, the Commission found that insurance and investor-state contracts were more appropriate tools in dealing with political risk than ISDS.[89] Based upon the commissions' result, the Australian government finally announced that it would no longer include ISDS in future IIAs.[90]

India unilaterally terminated the BITs it had previously ratified and conducted a new BIT renegotiation with their own Model BIT. This was a response to the increasing number of challenges to government measures under investment treaties. A new Model BIT that narrowed the scope of the standard of treatment of investors (avoiding the term "fair and equitable treatment"). While retaining investor-state arbitration, the model requires investors to exhaust local remedies first, before commencing international arbitration.[91]

Many countries have expressed concerns about India's Model BIT. For instance, the US Ambassador noted that the model BIT contains "departures from the high standards that we had seen in other treaties India had negotiated, for example, with South Korea and Japan"[92]. One major concern is the requirement for all local remedies to be exhausted. An aggrieved investor's claim could take years to litigate locally, even before the commencement of ISDS, given the substantial delays common in Indian courts.[93]

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[88] *Id.* at 269.
[89] *Id.* at 270.
[90] Gillard Government Trade Policy Statement: Trading our Way to More Jobs and Prosperity 14 (April 2011) ("Trade Policy Statement"). Although they announced the exclusion in 2011, they recently included the ISDS in Australia-Korea FTA and Australia-China FTA in 2014.
[91] IISD, "India takes steps to reform its investment policy framework after approving the new Model BIT" https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/ (last visited on October 13, 2018).
[92] Business line, US expresses concern over 'difficulty' in BIT talks. https://www.thehindubusinessline.com/economy/us-expresses-concern-over-difficulty-in-bit-talks/article8780181.ece (last visited Nov 27 2018).
[93] Herbert Smite Freehills, Arbitration notes, India seeks to renegotiate bilateral investment treaties with over 47 countries https://hsfnotes.com/arbitration/2016/07/07/india-seeks-to-re-negotiate-bilateral-investment-treaties-with-over-47-countries/ (last visited Nov 27 2018).

Likewise, the US also renegotiated their previously ratified IIAs. For instance, US President Donald Trump recognized the negative effect of globalization and trade liberalization on the US economy and ultimately issued a presidential memorandum on Jan. 23, 2017, immediately after his inauguration, regarding the withdrawal of the US from the TPP.[94] President Trump's withdrawal from the TPP fulfilled a campaign promise. In his 7-points plan to rebuild the American Economy by fighting for Free Trade, he pledged to withdraw from the TPP.[95] In April, President Trump sent international shockwaves by threatening to withdraw from NAFTA and the Korea-United States FTA. He warned that these two agreements could be saved only if the counterparts agreed to renegotiate.[96]

Overall, however, despite the President's previously stated views on the deficiencies and negative effects of globalization and trade on the US economy, the Trump administration has not shown a desire to displace prior US policies favoring the use of investment chapters and ISDS.[97] On March 28, the acting US Trade Representative sent a letter to the US Senate Finance and Ways & Means Committees that contained a draft of negotiating proposals and objectives for updating NAFTA. Under the heading "Investment," or Chapter 11 of NAFTA, the objective is to "maintain" and "improve" current ISDS procedures. Specifically, the US intends to "Maintain and seek to improve procedures to resolve disputes between US investors

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[94] See Office of the Press Secretary, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, WHITE HOUSE (Jan. 23, 2017) available at https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/ (last visited Nov 27 2018).

[95] Junji Nakagawa, *TPP-11 as a means to revive the TPP after US' withdrawal,* 12 ASIAN J. WTO & INT'L HEALTH L & POL'Y 405 407(2017)

[96] Binyamin Appelbaum and Glenn Thrush, Trump's Day of Hardball and Confusion on NAFTA, New York Times (27 April 2017); Philip Rucker, Trump: We May Terminate U.S.-South Korea Trade Agreement, Washington Post (27 April 2017).

[97] Investment Claims, The Trump Administration's current policy on Investor- State Dispute Settlement, available at http://oxia.ouplaw.com/page/trump-ISDS/the-trump-administrations-current-policy-on-investor-state-dispute-settlement (last visited Feb 15 2019).

and the NAFTA countries through, among other things, mechanisms to deter the filing of and eliminate frivolous claims; procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims; and procedures to ensure transparency and public participation in dispute settlement proceedings." The Trump administration seems to support the continued use of ISDS procedures and will maintain prior US policy.

B. OVERVIEW OF THE PROVISIONS IN IIAS

This section reviews provisions in the main text and a reservation list. The section, for instance, examines the provisions in a definition of investment, protection and security, fair and equitable treatment, expropriation, prohibition on performance requirements, MFN, NT, ISDS, and a reservation list.

Investment

International investment is international because of two defining characteristics: 1) the individual or entity undertaking the investment is not a citizen, or at least not a resident, of the host countries; and 2) the investment process involves the transfer of funds or capital from a foreign country to host countries.[98] Simply put, international investment in a particular host country is made by a foreign corporation or foreign individual and involves the transfer of money or capital from one country to another.

Most IIAs contain a general phrase defining investment (such as 'all assets') and introduce illustrative lists of assets that fall within that definition. For instance,

[98] Salacuse, supra note 40, at 28.

Art 11.28 of the investment chapter in the Korea-US FTA defines investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." The article then introduces an illustrative list of forms of investment, such as an enterprise, share, stock, bond, future, options, etc. [99]

Fedax v Benezuela[100] is the first case law that significantly affected the understanding of 'investment.' The tribunal listed five criteria that should be applied when defining investment: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significance for the host states' development. Among these five elements, four (i.e., substantial commitment, a certain duration, assumption of risk, and a significance for the host states) came to be widely accepted. These four criteria were set forth in *Salini v Morocco*[101] in 2001 and this approach became known as the '*Salini criteria'* for investment. The number of Salini criteria has varied in arbitral practice. All tribunals have included a contribution by the investors, duration, and risk. Other tribunals have added the significance for

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[99] Art 11.28 in the investment chapter of the Korea-US FTA reads:
Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges
For purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment.
[100] Fedaz v Venezuela, Decision on Jurisdiction, 11 July 1997, paras 21-33
[101] Salini v Morocco, Decision on Jurisdiction, 23 July 2001, para 56.

the contribution to host states' development[102], while regulatory of profit has been included only occasionally.[103]

Protection and Security[104]

All IIAs promise to give some degree of 'protection and security' to investors and the investments of other contracting parties. This standard requires the parties to exercise due diligence in providing physical protection and security from injurious acts done by governments to the investor and investment. The standard imposes an objective obligation that must not be less than the minimum standard of vigilance and care required by international law.[105]

This due-diligence obligation requires a host state to exercise all measures that could be reasonably expected to prevent damage to foreign investments. According to the case laws and commentators, due diligence means the reasonable measures of prevention that a government could be expected to exercise under similar circumstances.[106] A state's lack of resources or the existence of crises are not defenses to this obligation and a state may breach this obligation by action, failure to act, or omission to act.[107]

The nature and scope of the standard vary by treaty wording and its place in the treaty relative to other standards of investment treatment. Certain tribunals have ruled that protection may be expanded to cover non-physical injuries. In other words, the host states may be held liable for failure to provide legal security or legal

[102] The most controversial criterion has been the need for a contribution to the development of the host state which will be discussed in detail in next section (i.e. Development discourse in IIA).
[103] Salacuse, supra note 40, at 75.
[104] See generally, Christopher Schreuer, *Full protection and security*, 10 J. INT'L DISPUTE SETTLEMENT (2010)
[105] American Manufacturing and Trading, INC v Zaire, ICSID Case No. ARB/93/1(Award) (21 February 1997) §6.06.
[106] Salacuse, supra note 40, at 217.
[107] Wena Hotels LTd v Arab Republic of Egypt, ICSID Case No. ARB/98/4(Award on Merits)(8 December 2000) (rules that the failure to act satisfies the breach of the 'full protection and security")

protection. For instance, in *CME Czech Republic v Czech Republic,* the investor claimed that certain acts and omissions of the Czech Media Council (a quasi-governmental medial regulatory body) violated the obligation to provide full protection and security.[108] The tribunal found that the Council removed security and legal protection from the investor's investment and so violated the standard. The tribunal noted, "the host state is obligated to ensure that neither by amendments of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."[109]

The decision on CME could be regarded as a strong precedent for expanding the standard's scope, but this was weakened by two factors.[110] First, in the related case of *Lauder v Czech Republic*, which involved the same parties with the same facts as in CME, the tribunal found no violation of the standard. Second, the CME tribunal failed to provide a historical analysis of the standard and did not give any clear reason for departing from the historical interpretation focusing on physical injury.[111]

In addition to the scope of the standard, the case laws represent two different views about the nature of the standard. On the one hand, some view it as part of a minimum standard of international law elaborated in customary international law.[112] On the other hand, some view it as an independent standard to be interpreted without reference to the limitation of customary international law.[113] For instance, NAFTA article 1105(1) states that: "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." The

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[108] CME Czech Republic BV v Czech Republic (Partial Award)(13 September 2001)
[109] *Id.* at § 613
[110] Salacuse, supra note 40 at 213.
[111] *Id.*
[112] Dolzer & Schreuer. supra note 53, at 166.
[113] *Id.*

parties stated in a note of interpretation that the "the concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[114] That is, the NAFTA parties assumed that the standard reflects those requirements embodied in the concept of the minimum standard on the level of general international law as applied to aliens.[115]

Fair and Equitable Treatment (FET)[116]

Tribunals have most often applied the following five standards in interpreting FET standards:1) failed to protect the investor's legitimate expectations; 2) failed to act transparently; 3) acted arbitrarily or subjected the investor to discriminatory treatment; 4) denied the investor access to justice or procedural due process; or 5) acted in bad faith.[117] These elements do not constitute an exhaustive list.

First, it is unfair for a host state to create certain expectations in the minds of investors through its laws and regulations and then, once the investment is made, change those laws and regulations in ways that frustrate or cancel the expectations. Thus, changes in a country's natural conditions, such as political stability or markets, are not what the FET is aimed to protect against. Rather, it is aimed at host countries'

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[114] *Id.* Art 1105 in the NAFTA reads:
1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

[115] NAFTA Free Trade Commission, Notes of interpretation of certain chapter 11 provisions(31 July 2001).

[116] See Generally, Patrick Dumberry, The fair and equitable treatment standard (2013).

[117] Salacuse, supra note 40 at 230.

actions through law and policy.[118] In *Tecmed,* for instance, the tribunal notes that "the foreign investor also expects the host states to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[119]

The failure to act "transparently" towards an investor also violates the FET standard. The government should be transparent about the exercise of laws and regulations. Once an investment is made, the government should inform the investor of changes in the relevant domestic laws so the investor may revise plans accordingly. Protecting investors' legitimate expectations is combined with the principle of transparency.[120] Many tribunals have found that a violation of FET has occurred where a host states has both failed to act transparently and to protect investors' legitimate expectations.[121]

Governments' arbitrary and/or discriminatory actions constitute a violation of the FET standard. Tribunals frequently refer to the ELSI case under the International Court of Justice to examine arbitrary and discriminatory actions. The court stated that an illegal act is not necessarily arbitrary and further noted that arbitrariness "is willful disregard of due process of law, an act which shocks, or at least surprises, a sense of

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[118] *Id.*

[119] Tecnicas Medioambientales Teemed SA v The United Mexican States, ICSID case No ARB(AF)/00/2(Award)(29 May 2003), ¶154.

[120] See T. Walde, *Energy Charter Treaty-Based Investment Arbitration* 5 J World Trade & Investment, (2004)

[121] See Metalclad Corp v United Mexican States (Award) (30 August 2000) (In metalclad, the government of Mexico and the state government issued construction and operating permits for the investors' landfill project and the government officer in the Mexico also assured the investor that it had all the permits it required. However, the state government later refused to grant the permit. The tribunal ruled that the investor was entitled to rely on the representation of the government officer and Mexico had violated the FET standard under the Art 1105(10 NAFTA. The tribunal also noted that Mexico failed to ensure a transparency and predictable framework for Metalclad's business planning and investment.)

juridical propriety."[122] Moreover, the court determined that the elements of a discriminatory measure include: 1) an intentional treatment, 2) in favor of a national, 3) against a foreign investor, and 4) that is not taken under similar circumstances against another national.[123]

Fair procedure is a critical element of the FET standard. The US Model BIT 2012 clarifies that the FET covers protection from denial of justice and guarantees due process. Article 5(2) provides that "fair and equitable treatment" includes the obligations not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the world's principal legal systems. Generally, tribunals have ruled that violation of the denial of justice occurs when government or judicial processes have failed to give investors appropriate notice of the hearing or process. For instance, in *Middle East Cement*, an investor complained that the Egyptian government had seized and auctioned its ship without proper notice. The tribunal decided that the auction procedure was not "under due process of law" as required by the treaty.[124]

Lastly, a government's good faith is an element of the FET standard. However, bad faith is not an essential element of a violation of the FET standard. The Mondev tribunal, for example, noted that "what is unfair or inequitable need not equate with the outrageous of egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[125] In fact, no modern tribunals have actually found a state to have acted in bad faith.[126]

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[122] Elttronica Sicula SpA(United States v Italy)(judgement) (20 July 1989)ICJ Rep 1989, p.15
[123] Salacuse supra note 40 at 241.
[124] Middle East Cement shipping and handling Co SA v Arab Republic of Egypt, ICSID Case No ARB/99/6(Award) (12 April 2002) ¶147.
[125] Modev v United States, Award, 11 October 2002. ¶116.
[126] Salacuse, supra note 40 at 243.

To conclude, a host country treats an investor fairly and equitably when its actions advocate the investors' legitimate expectations, are transparent, are not arbitrary or discriminatory, respect due process, and are done in good faith.

Expropriation[127]

It is generally accepted that the legality of a measure of direct expropriation requires three or four conditions. The measure must serve a public purpose and the measure must not be arbitrary and discriminatory. Moreover, some treaties require that the procedure of expropriation must follow the principle of due process. Lastly, the measure must be accompanied by prompt, adequate, and effective compensation. Adequate compensation is regarded as the market value of the expropriated investment. NAFTA's article 1110 is a good example.[128] The article states that no party may expropriate an investment except if a measure is for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and accompanied by fair market valued compensation. In short, the treaty provision allows expropriation for public purposes with some limitations.

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[127] See generally, August Reinisch, "Expropriation" in Peter Muchlinsk et al. (eds.), The Oxford Handbook of International Investment Law, 407-458 (2008).

[128] See Art 1110 in the NAFTA. Available at http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng (last visited on Nov 29 2018).

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable. […].

Indirect expropriation cases are far more common than direct expropriation cases. This happens when host states exercise their regulatory power to reduce investors' benefits derived from their investments without actually changing or canceling investors' legal titles to their assets or weakening their control over them. To be specific, based upon arbitral cases, disproportionate tax increases, interference with contract rights, interference with the management of an investment, and revocation or denial of government permits or licenses have been regarded as indirect expropriation.[129]

Most tribunals have struggled to define a clear boundary between legitimate regulation and illegitimate regulatory taking. The tribunal in *Fireman's Fund Insurance Company v United Mexican States* provides a useful framework for drawing this boundary. The framework includes: 1) the degree of intensity of interference with investor property rights; 2) the frustration of investors' legitimate expectations; 3) lack of proportionality; 4) non-transparency, arbitrariness, and discrimination; and 5) the effects and purpose of the measure.

Although IIAs have not traditionally provided specific criteria on how to differentiate indirect expropriation from legitimate regulatory action, IIA recently appears to have moved in the direction by showing such explicit criteria. The Korea-US FTA illustrates such criteria in the annex of the investment chapter.[130] The third

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[129] Salacuse, supra note 40 at 301.

[130] See ANNEX 11-B of the investment chapter in Korea-US FTA.) available at https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited on Nov 29 2018).

Annex 11-B (EXPROPRIATION)

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
2. Article 11.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 11.6.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

paragraph of the annex notes that the determination of indirect expropriation should be made case-by-case and should look at the economic impact of the government action and whether the measure interferes the reasonable investment-backed expectation and the objectives and purposes of the government measures.

Prohibition on Performance requirement

Performance Requirements are conditions imposed by a host country on foreign investors that require them to achieve certain goals with respect to their commercial activities in the host country.[131] Performance Requirements are used with other policy instruments, such as tax incentives, to achieve economic development objectives. Other examples of performance requirements include the requirements that an approved investment project export a minimum percentage of its production and use a minimum amount of local goods or services.

Performance requirements are prohibited by most IIAs and by the WTO's Agreement on Trade-Related Investment Measures ("TRIMS"). This is based on the notion that such requirements control the behavior of foreign investors in a manner

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(a) The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:
(i) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
(iii) the character of the government action, including its objectives and context.
Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.
(b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.

[131] Salacuse, supra note 40 at 329.

that distorts international markets and is thus counterproductive.[132] TRIMS are prohibited because they compel foreign firms to use domestic goods and services, even though these could be more expensive or of lower quality.[133]

Most prohibitions of performance requirements in IIAs consist of a simple restatement of the obligations imposed under TRIMs. For instance, Art 12.7 of the investment chapter in the Korea-China FTA notes that "the provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to WTO Agreement are incorporated into and made part of this Chapter, *mutatis mutandis* and shall apply with respect to all covered investments under this Chapter." However, recent IIAs have gone beyond this standard by specifying a broader range of performance requirements. For instance, Chapter 11 of NAFTA includes seven specific requirements (e.g., obligation of a technology transfer, obligations to export certain goods or services, utilization of domestic suppliers, etc.) that the contracting states may not impose on investments with their counterpart.[134]

Most Favored Nation (MFN)

The MFN requires the state party to an investment treaty to provide investors with treatment no less favorable than the treatment it provides to investors under other investment treaties.[135]

The scope of protection varies from treaty to treaty. Some treaties specify the area to which MFN applies, for instance, "to the establishment, acquisition, expansion,

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[132] David Collins & Tae Jung Park, *Interaction of tax Incentives and Performance requirements in Bilateral Investment Treaties: Its Role in Implementing right Institutions in Developing Countries*, 41 FORDHAM INT'L L. J. 207, 215 (2017).
[133] WTO, Agreement on Trade-Related Investment Measures Art 2 (1994).
[134] See investment chapter in the NAFTA available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng (last visited on Nov 29 2018).
[135] See generally, Dolzer and Schereuer, supra note 53, at 186.

management, conduct and sale or other disposition of an Investment,"[136] while others generally state that "investment by nationals and companies of either contracting state… shall not be subjected to treatment less favorable than that accorded to investments by nationals and companies of third states."[137]

Most MFN cases involve a situation in which an investor that is covered under a treaty from one country takes advantage of benefits that the host country has granted to a 3rd party in another treaty. Theoretically, the MFN allows the investor to import the standard of protection from other treaties into the treaty applicable to the investment. Interpretations of the MFN clause, however, vary across tribunals.[138] For instance, whereas some tribunals allow the direct importation of substantive standards of treatment (e.g., fair and equitable treatment) from other treaties through the MFN clause, other tribunals believe that this importation undermines the intention of the parties and their consent to the terms of the agreement. Instead, these tribunals examine each element of the MFN (e.g., whether the treatment was in fact "more favorable" and whether it was accorded in "in like circumstances").[139]

Controversy also exists as to whether the MFN clause also extends to procedural rights such as dispute settlement procedures. *Maffezini v Spain* first triggered this issue. The claimant, an Argentine national, initiated an ICSID arbitration against Spain under the Spain-Argentina BIT. This BIT requires resorting to local courts for a period of 18 months before an investor triggers the ISDS. The claimant argued that he was not required to do so and was entitled to the lesser requirement because the Spain-Chile BIT did not require 18 months. The ICSID

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[136] See Art 3.2 in the Korea-Brunei BIT (14 Nov. 2000).
[137] See Art 3(1) Malaysia-Chile BIT (11 Nov 1992).
[138] See generally, Simon Batifort and J. Benton Heath, *The New debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873 (2018); Facundo Perez-Aznar, *The Use of Most Favored Nation Clauses to Import Substantive Treaty provisions in International Investment Agreements*, 20 J. INT'L ECON. L. 777, 777 (2018).
[139] *Id.*

tribunal ruled in favor of the claimant and Maffezini did not have to seek his claim for 18 months in Spanish courts before initiating ICSID arbitration. In contrast, in *Salini v Jordan,*[140] the tribunal refused to allow the claimant to import dispute resolution provisions from another IIA.

National Treatment (NT)

The NT clause requires the host country to guarantee equal treatment to both domestic and foreign investors when enforcing laws and regulations, irrespective of the economic sectors that the laws and regulations govern.[141] A typical NT provision states "each contracting party shall, subject to its laws and regulations, accord to investments of investors of the other contracting party treatment no less favorable than that which is accorded to investments of its investors."[142]

Typically, three-step analysis is used to decide whether the NT obligation is met. First, a tribunal should decide whether the foreign investor and the domestic investor are placed in a comparable setting, in "a like situation," or in "like circumstances." Second, a tribunal should seek whether the treatment accorded to the foreign investor is at least as favorable as the treatment accorded to domestic investors. Lastly, in the case of less-favorable treatment, a tribunal should determine whether the differentiation was justified.

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[140] Salini Construttori SpA and Italstrade SpA v Jordan, ICSID Case No ARB/02/13(Decision on Jurisdiction)(9 November 2004).

[141] For an extensive analysis of NT in the field of international investment law, See Guiguo Wang, *The Globalized Economy in Quest of Globalization of the Rule of Law: From the Perspective of National Treatment Principle*, 2 J. WORLD INVESTMENT 21, 22 (2001). (The article examines the legal status of the NT principle in international law and its evolution from international trade law to international investment law. It also discusses characteristics of the NT principle in contemporary treaties and agreements).

[142] Art 4(3) of the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investment (8 February, 1999).

First, there is controversy about the measuring criteria used to compare the activities of domestic investors and those of a foreign claimant. In *Feldman v Mexico*, "in like circumstances" was interpreted to refer to the same business.[143] In contrast, *Occidental v Ecuador* referred to local producers in general.[144] Many tribunals have been cautious not to construe the basis of comparison for the applicability of the NT too narrowly and interpret broadly.[145]

The second step requires a tribunal to see whether the treatment of the foreign investor differs from that accorded to local investors. Most tribunals have concluded that discrimination may be de jure or de facto. In *SD Meyers v Canada*, the tribunal concluded with two factors: 1) whether the practical effect is to create a disproportionate benefit for nationals over non-nationals; and 2) whether on its face the contested measure appears to favor the host country's nationals over non-nationals protected by the treaty.[146] Moreover, tribunals also have held that demonstrating discriminatory treatment does not require showing discriminatory intent of the host country.[147]

The last step is to see if there is any policy justification for different treatment between local and foreign investors. This requirement allows some room to secure policy space for the host country. The tribunal in *Pope & Talbot* stated that "differences in treatment will presumptively violate Art 1102(2) unless they have a reasonable nexus to national policies that 1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and 2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[148]

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[143] Feldman v Mexico, Award, 16 December 2002, para 171.
[144] Occidental v Ecuador, Award, 1 July 2004, para 173.
[145] Salacuse, supra note 40, at 200.
[146] SD Meyers Inc, v Canada (First partial Award) (13 Nov 2000) UNCITRAL (NAFTA)
[147] *Id* at ¶254.
[148] Pope & Talbot v Canada, Award on merits, 13 Nov 2000, ¶78

In fact, earlier NAFTA decisions in *SD Meyer*, *Pope & Talbot*, and *Feldman* assumed that the relevant WTO jurisprudence was indeed suitable for guiding NAFTA tribunals.[149] However, tribunals have recently started to take a different approach. In *Occidental v Ecuador*,[150] the tribunal rejected the argument that WTO jurisprudence applies to a BIT. The tribunal noted that "like product" in the WTO and "like situation" in the BIT are different and WTO policies concerning competitive and substitutable goods cannot be directly treated in the same way as the BIT concerning "like situation."[151]The Methanex tribunal ruled that "like circumstance" in the context of foreign investment cannot be identical with the concept of "like good" and thus the NAFTA provision should be interpreted autonomously and independently from trade law considerations.[152]

Investor-State Dispute Settlement (ISDS)

ISDS provisions offer foreign investors an option to bring arbitration proceedings against host governments for a breach of treaty obligations. They give international investment law immense force, because private enforcement is likely to lead to more claims than would diplomatic protection, the traditional means of protecting investor rights. Many IIAs choose ICSID arbitration rules for investment arbitration,[153] but arbitration can take place under different rules, such as those of UNCITRAL or the International Chamber of Commerce. For convenience, this section focuses on ICSID procedures.

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[149] See generally, Jurgen Kurtz, The WTO and International Investment Law, the converging system (Cambridge, 2016).
[150] Occidental v Ecuador, Award, 1 July 2004
[151] *Id*. at para 176,
[152] Methanex v United States, Award, 3 August 2005, at Para 35, 37.
[153] Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States (ICSID Convention), in Washington DC on March 18, 1965. It entered into force on October 14, 1966, 575 UNTS. 159. For an overview of ICSID arbitration, including details of its advantages and disadvantages, see Lucy Reed et al., Guide to ICSID Arbitration (2004).

Consent to ISDS is prerequisite for a tribunals' jurisdiction and this can be achieved in many ways. States and foreign investors can directly insert dispute settlement clauses in their contracts. Inserting an arbitration clause in the domestic law of the host country is another option. For instance, domestic laws that govern foreign investment may allow investors to trigger ISDS under the ICSID.[154] The most typical way is to insert ISDS provisions in the IIA between the host country and the country of a foreign investor. Most IIAs contain a clause offering arbitration to the nationals of one state party to the treaty against the other state party to the treaty.

Requirements to initiate ISDS vary by treaty provision. Some treaties require an investor to seek resolution before the host country's domestic court before initiating the ISDS.[155] The fork-in-the-road provision is another option. This provision requires the investor to choose between the host country's domestic court or international arbitration and once the choice is made, that choice is final.[156]

ICSID proceedings are triggered by a request for arbitration sent to the Secretary-General of the ICSID.[157] The request must include information concerning the dispute, the parties, and the jurisdictional requirements.[158] Once the request is registered, the Secretary-General will notify the parties in writing.

Sole arbitrators are rare and tribunals are almost always composed of three arbitrators. Each party appoints one arbitrator and the presiding arbitrator is appointed

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[154] See Art 8(2) of the Albanian law on foreign investment of 1993 notes that ' the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consent to the submission thereof, to the International Centre for Settlement of Investment Disputes.

[155] Argentina-Germany BIT notes that ' the disputes may be submitted to an international arbitration tribunal in any of the following circumstances: a) at the requests of one of the parties to the dispute if no decision on the merits of the claim has been rendered after the expiration of a period of eighteen months from the date in which the court proceedings referred to in para 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties persist; [...]

[156] E.g. NAFTA requires that the claimant submits a waiver of the right to initiate or continue before domestic judiciaries any proceeding with respect to the measures taken by the respondent that are alleged to be in breach of the NAFTA.

[157] Art 36(1) of the ICSID rule.

[158] Art 36(2) of the ICSID rule.

by agreement of the parties.[159] Arbitrators should be independent of the parties and conflicts of interest may lead to the arbitrator's disqualification.

Under ICSID Rule 41(5), a party may within 30 days of the tribunal's composition object on the basis that the claim is manifestly without merit. This allows the tribunal to expeditiously dismiss unmeritorious cases. The tribunal in *Trans-Global Petroleum v Jordan* found that the word "manifestly" required the respondent to "establish its objection clearly and obviously, with relative ease and dispatch."[160]

A tribunal's first session usually involves procedural questions such as the place and language of proceedings, the number and sequences of the pleadings, the date of the hearings, and the production of evidence. Usually, the proceeding consists of written and oral phases. The claimant's memorial is followed by the respondent's counter-memorial. In most cases, there is another round of written exchanges termed reply and rejoinder. The oral phase consists of a hearing in the presence of the tribunal and the tribunal may hear witnesses and experts. The evidence submitted to the tribunal consists of documents, witness testimony, and expert opinion. After the pleadings of the parties conclude, the tribunal renders the award. Awards cover all questions submitted to the tribunals and are final.

Approaches to Scheduling a Reservation List

IIAs take two approaches to organizing a reservation list: the negative approach (NAFTA-inspired) and the positive approach (GATS-inspired type). Negotiating partners may use a negative list approach, where the main text imposes a set of obligations and the reservation list contains the domestic measures to which these obligations do not apply. For instance, the NAFTA parties agreed to apply NT

[159] Art 37(2) of the ICSID rule.
[160] Trans-Global Petroleum v Jordan, Decision under Arbitration Rule 41(5), 12 May 2008, para 88.

to all foreign investments, but at the same time, each party listed those particular measures, sectors, and/or activities to which the Agreement's NT obligation does not apply, either in part or full. This approach is especially useful for developing host nations to produce a detailed inventory of all non-conforming measures for regulatory power.

The negative list approach model generally has a clear distinction between investment chapter and the chapter on cross-border trade in services. The investment chapter acts as the depositary of, or controls, all investment provisions of both goods and services. Therefore, investments in services and trade are, according to Mode 3, commercial presence (i.e., the supply of a service through a business or professional establishment in the territory of the country in which the service is supplied) and thus covered by the investment chapter.[161] The cross-border trade in services chapter is only devoted to the liberalization of services provided without a commercial presence.[162]

Under the negative list approach, the main features of non-conforming measures must be specified in detail. These measures include: 1) the economic sector in which the reservation is made, 2) the specific industry in which the reservation is made, 3) the activity covered by the reservation, 4) the substantial or procedural obligation under which the reservation is made (e.g., MFN or NT), and 5) a description of the specific legislation, regulation or other measure for which the reservation is made. The following is an example of a reservation list in the Korea–India Comprehensive Economic Partnership Agreement (CEPA):[163]

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[161] Jean-Pierre Chauffour & Jean-Christophe Maur (Ed.) World Bank, Preferential Trade Agreement Policies for Development, Handbook (Chap 14, Investment), 311 (2011).
[162] OECD, The interaction between investment and services chapters (chapter 4), 245 (2008).
[163] The CEPA was signed on August 7, 2009 in Seoul. The negotiations took 3.5 years, with the first session being held in February 2006. The agreement was passed in the South Korean parliament on

Sector	Manufacture of Chemical Products
Sub-Sector	Manufacture of Biological Products
Industry Classification	KSIC 24212 Manufacture of Biological Products
Type of Reservation	Performance Requirements (Article 10.5)
Reservation Measure	Pharmaceutical Affairs Act (Law No. 8552, February 29, 2008), Article 42; Enforcement Regulations of the Pharmaceutical Affairs Act (Ordinance of the Ministry of Health and Welfare No. 71, October 16, 2008), Article 21
Description	A person who manufactures blood products must procure raw blood materials from a blood management body in Korea

The example shows that Korea reserves the right to refuse compliance with the performance requirement (Article 10.5) in the biological products manufacturing industry.

The reserved domestic laws (i.e., Article 42 of the Pharmaceutical Affairs Act and Article 21 of the Enforcement Regulations of that Act) require manufacturers of blood products to procure raw blood materials from a blood management body in Korea.

The negative list may consist of several annexes.[164] For example, measures may be included in Annex II (Reservation for Future Measures), which lists the economic sectors and the activities where future restrictive measures can be

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November 6, 2009. See http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf (last visited on October 13, 2018).

[164] Besides Annexes I (Reservation for Existing Measures) and II (Reservation for Future Measures), additional annexes can be drafted as agreed upon by the negotiating parties. For instance, Mexico, under NAFTA, included Annex III (Activities Reserved by the State) to reserve measures governing the regulation of activities reserved by the State as decreed in the Mexican Constitution (primarily in the oil and gas sector). The unique nature of Annex III is that it has no requirement to specify the exact nature of non-conforming measures maintained in each sector, as in Annex II. Another example is an Annex on Exceptions to MFN. This annex carves out a number of sectors and exempts them from MFN treatment (as opposed to individual measures to be listed in Annex I). Thus, this annex offers greater reservation flexibility, allowing host countries to protect entire industries (e.g., the steel industry) without the level of specificity applied to Annex I. Lastly, this annex can focus solely on measures in the financial services sector. For more information, see UNCTAD, *Preserving flexibility in IIAs: The Use of Reservation, UNCTAD series on International Investment Policies for Development* (2006), available at http://unctad.org/en/Docs/iteiit20058_en.pdf. (last visited Feb 19, 2019).

implemented regardless of whether the non-conforming measures are currently applied.

The negative list approach usually implies a "standstill" commitment,[165] that is, the negotiating partners are prohibited from introducing new non-conforming measures that exceed the level of those that are already included in the list. Standstill clauses effectively freeze the degree of regulation in particular sectors.

Starting with NAFTA, a number of agreements have featured a so-called "ratchet" effect. A ratchet effect not only bars a country from reverting to more restrictive measures, but also forecloses the withdrawal of subsequent liberalizing measures.[166] For example, if a reservation list allowed Korea to limit foreign equity ownership in the Korea Gas Corporation to 30 percent, a later decision to raise that limit to 50 percent cannot be rescinded. In other words, under a ratchet regime, once a new rule, like an increase to 50 percent, is implemented, the party can only maintain that level or move toward greater liberalization, beyond 50 percent.

Alternatively, a positive approach means a listing of sectors, subsectors, and individual modes of supply in which countries agree to liberalization commitments. Under this approach, a treaty's obligations apply only to the activities listed in a country's schedule and solely on the terms described therein.

Unlike the negative list approach, investment in services is covered in the cross-border trade in services chapter and therefore, the treatment of investment is influenced by the services concept from GATS. While the investment chapter protects the asset-based definition of investment, the trade in services chapter does not define

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[165] *Id.*

[166] See *generally*, Organization for Economic Cooperation and Development International Investment Law: Understanding Concepts and Tracking Innovations (2008) (This document explains that "existing non-conforming measures that are listed in Annex I cannot be changed unless it is to increase the conformity of the measure with the obligation." The "ratchet" effect locks the investment regime in and includes any new effort toward liberalization as commitments under the RTA. Therefore, these agreements generally bring a higher degree of certainty and predictability for investors).

investment but relies on the concept of commercial presence (mode 3) (i.e., the supply of services through a business or professional establishment in the territory of the country in which the service is supplied).[167]

The positive list recognizes four "modes": 1) across borders (e.g., the Internet); 2) consumption abroad (e.g., tourists); 3) establishing a commercial presence (FDI); and 4) the temporary presence of a natural person to deliver a service. Governments can make different levels of commitment for each mode. The following table illustrates how this would work to limit obligations with respect to market access and NT.

Sector or sub-sector	Limitations on market access	Limitations on NT	Additional commitments
8. HEALTH-RELATED SERVICES			
Hospital Services (9311)	(1) None (2) None (3) Unbound (4) None (registration and certification)	(1) (2) (3) (4)	

As seen in the table, different entries under numbers 1 through 4 indicate the government's approach to each of the four modes of supply for each service. When a country does not wish to restrict market access in a sector or sub-sector in any of the four modes of supply, it uses the word "NONE." A full commitment using the term "NONE" means that the country cannot restrict the market access of foreign suppliers

[167] Jean-Pierre Chauffour & Jean-Christophe Maur, supra note 161, at 312.

who want to supply any form or aspect of hospital services (9311) through Modes 1 and 2 by using any of the market access measures that are specifically prohibited. It cannot discriminate in favor of its own service providers, either. If a country decides to restrict market access through Mode 3, thereby protecting the hospital services market, the word "UNBOUND" is used in the column to allow the blockage of FDI in the hospital industry. If a country wants to commit to a sector, but only under certain circumstances or in a particular way, it must spell out the limitations that it wants to maintain very clearly. In the table, the host country allows temporary foreign investors to work in the area of hospital registration and certification. However, it reserves the right to exclude other temporary activities in the area.

This section has summarized a brief history of IIA and examined the descriptions of main provisions in IIAs. The next section starts with the effects of IIAs on FDI and how FDI relates to trade liberalization and growth.

III. THE RELATIONSHIP BETWEEN IIAS AND FDI, TRADE LIBERALIZATION, AND ECONOMIC DEVELOPMENT

This section examines the relationship between IIAs and the level of FDI, trade liberalization, and economic growth. The section starts with the effect of IIAs on FDI promotion and protection and analyzes how FDI relates to the level of trade liberalization. Then, it analyzes the relationship between IIAs and economic development by introducing the literature of law and development and emphasizing the importance of establishing appropriate legal and economic policies (AELP) for further economic growth. The section concludes by introducing the development discourse in IIAs.

A. THE ROLE AND EFFECT OF IIAS

1. THE ROLE OF IIAS: INVESTMENT PROTECTION AND INVESTMENT PROMOTION

One motivation to sign IIAs is the desire of foreign investors to invest abroad in a safe and secure manner. These investors seek a stable international legal framework to facilitate and protect their foreign investments. By receiving foreign investments, developing countries (in this dissertation, the reference to developing countries is indicative of their status as host countries), expect both the infusion of capital and transfer of technology to increase their economic growth. Capital-exporting countries, in turn, have an interest in facilitating the entry of their investors into host countries. A major obstacle to an otherwise attractive market is the existence of political and legal risks in developing countries as host countries. Any recourse available under the host nation's domestic law and courts may be inadequate because its legal system is likely to be less developed. An IIA is an instrument to reduce or eliminate this obstacle by supplying the investment protection that domestic law fails to guarantee adequately. Simply put, an IIA between home and host countries rests on

a grand bargain: a promise to protect the capital offered in return for the prospect of more capital in the future.[168]

What does the host country's promise entail specifically? The provisions of IIAs strengthen the liberal principle of investment protection and security. Generally, IIAs contain a broad provision guaranteeing foreign investments fair and equitable treatment as well as full protection and security. The former secures an investor's legitimate expectations arising from guarantees made by the host country, while the latter imposes a duty on the host country to exercise reasonable care to protect the investment. The host country is liable when it fails to show due diligence in protecting investors from harm. A definition of due diligence is "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstance[s]."[169] Moreover, IIAs provide that a state may not expropriate the property of an alien except: 1) for a public purpose; 2) in a non-discriminatory manner; 3) upon the payment of just compensation; and, in most instances, 4) with provision for some form of judicial review. With respect to the standard of compensation, most IIAs adopt the traditional rule called the "Hull Formula," wherein any compensation awarded must be "prompt, adequate, and effective."[170]

Some IIAs include a provision guaranteeing the right of investors to transfer payments related to an investment into a freely convertible currency.[171] Some IIAs require the host country to compensate foreign investors for losses attributable to the

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[168] 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. 67,77(2005)
[169] Salacuse, supra note 40, at 210.
[170] *Id*. at 135.
[171] *Id.* at 134.

host country's requisitioning or destruction of investment during war or a civil disturbance.[172]

An investor-state dispute settlement (ISDS) provision creates a separate international arbitration procedure, often under the auspices of ICSID, to settle disputes between an aggrieved foreign investor and the host country's government. By signing an IIA, the two contracting states consent to the establishment of an ICSID or other arbitral tribunal in the event of a future dispute. Although the investor must first try negotiation, diplomatic protection,[173]or exhaust any other local remedies available, it ultimately has the power to invoke compulsory arbitration to secure a binding award. Without an IIA, international investors are forced to rely on the host countries' laws for protection, which exposes their investments to a variety of risks.

By providing investment protection, IIAs play a critical role in the promotion of investments. Based on promises of investment protection, together with an enforcement mechanism, host countries expect to attract more investments from capital-exporting countries to further their economic growth. IIAs implement clear and enforceable rules to protect and facilitate investments and reduce risks. Such a reduction of risks, in turn, encourages further investment.[174] This is consistent with the US BIT program. A Deputy US Trade Representative stated that the US goals in negotiating BITs are undertaken to 1) protect US investments abroad in those countries where US investors' rights are not protected through existing agreements; 2)

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[172] *Id*. at 136.

[173] Salacuse, supra note, 39 at 398-399(Diplomatic protection is a means for a state to take diplomatic and other action against another State on behalf of its national whose rights and interests have been injured by the other State. The availability of diplomatic protection for investors totally depends on their home country's willingness to support assistance. The decision to espouse a claim or not, and to pursue it vigorously or not, is totally within the discretion of home country. Once the home country has espoused the claim, it means that it controls how the claim will be made, what settlement it will accept, and whether any portion of the settlement will be paid to the national. The diplomatic protection did not result meaningful results in many investors cases. In many cases, investors received no material compensation and therefore it was uncertain remedy for injured investors.)

[174] JW Salacuse & NP Sullivan, supra note 168 at 77.

encourage the adoption of market-oriented domestic policies that treat private investment fairly in foreign countries; and 3) support the development of international law standards consistent with these objectives.[175]

2. THE EFFECT OF IIAS: A MIXED RESULT

Empirical studies linking FDI and IIAs have reported mixed results. For instance, some studies show that IIAs have a clear positive impact on attracting FDI, [176] while others show only a modest effect. Some show no impact at all, while a few show a negative correlation. A majority of studies, however, have found a positive relationship between the conclusion of IIAs and an increase in foreign investment flows, and those finding a negative impact rest on questionable assumptions.

Eric Neumayer and Laura Spess used data gathered from 119 countries between 1970 and 2002. They found that concluding additional BITs increases a host country's share of FDI, with the magnitude of the impact depending upon institutional quality.[177] A study by Tim Buthe and Helen V. Milner of investment flows to 122 developing countries with populations in excess of 1 million persons over a period of from 1970 to 2000 found "a positive, statistically and substantively significant correlation between BITS and subsequent inward FDI into developing countries."[178] Peter Egger and Michael Pfaffermayr examined investment flows between 10 investing countries and 54 host countries between 1982 and 1997. They found that

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[175] See USTR website. https://ustr.gov/trade-agreements/bilateral-investment-treaties (last visited on September 9, 2018).
[176] See Andrew T. Guzman, *Why LDCs sign Treaties that hurt them: explaining the popularity of bilateral investment treaties,* 38 VA. J. INT'L L 639, 679 (1998).
[177] Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 33 WORLD DEV. 1567, 1582 (2005).
[178] Tim Buthe and Helen V. Milner "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis." In the Effect of Treaties on Foreign Direct Investment 213 (Karl P. Sauvant and Lisa E. Sachs eds. 2009)

BITs exert a positive and significant influence on real stocks of outward FDI.[179] A few studies since 2004 that concentrated on particular regions found a positive correlation between BITs and increases in FDI. In 2005, Robert Grosse and Len J. Trevino found that BITs increased FDI flows into central and eastern European countries.[180] Keven P. Gallagher and Mellissa B. L. Birch examined FDI flows in Latin America and found that the total number of BITs had an independent and positive influence on FDI flows.[181]

Other scholars, however, did not confirm this observation. In 2003, Mary Hallward-Driemeier examined the bilateral flows of FDI from 20 OECD countries to 31 developing countries from 1980 to 2000.[182] In her study, she found that the existence of a BIT between two countries did not result in an increase in FDI from developed countries to developing signatory countries. Comparing the BIT variable with various measures of institutional quality, she found a positive correlation in the interaction term that was statistically significant. This suggests that BITs are complements to good institutional quality and therefore do not perform their assumed function, namely to provide guarantees to foreign investors in the absence of good domestic institutional quality. Jennifer Tobin and Susan Rose-Ackerman studied FDI flows of 63 countries from 1980 to 2000.[183] While both studies drew upon data provided by the International Country Risk Guide (ICRG), Hallward-Driemeier used

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[179] Peter Egger and Michael Pfaffermayr, *The impact of bilateral investment treaties on foreign direct investment,* 32 J. COMP. ECON. 788 (2004).
[180] Robert Grosse and Len J. Trevino, *New Institutional Economics and FDI location in Central and Eastern Europe,* 45 MGT INT'L. REV. 123(2005)
[181] Kevin P. Gallagher & Mellissa B. L. Birch, *Do investment agreements attract investment? Evidence from Latin American,* 7 J WORLD INVESTMENT & TRADE 961 (2006).
[182] Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit…and They Could Bite 19 (World Bank, Development Research Group, Policy Research Working Paper N. WPS 3121, 2003)
[183] See Jennifer Tobin & Susan Rose-Ackerman, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Yale Law and Economics Research Paper No. 293 (2005) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121&rec=1&srcabs=616242&alg=1&pos=1 (Last visited on October 13 2018).

institutional quality measure, whereas Tobin and Rose-Ackerman used the aggregate political risk measure. Tobin and Rose-Ackerman found that a higher number of BITs either in total or signed with a high-income country lowered the FDI received as a share of global FDI flows for countries with high levels of risk; and conversely, raised the FDI received only for countries with low levels of risk.[184]

Jeswald Salacuse and Nicholas Sullivan focused specifically on the effect of US BITs on investment flows. They analyzed FDI going to more than 100 developing countries between 1998 and 2000 and US FDI flows to 31 other countries over a 10-year period. They concluded that having a signed BIT with the US made a developing country more likely to experience an increase in FDI from the US.[185]

Many scholars have noted that these studies and their findings failed to take into account several important factors.[186] In Hallward-Driemeier's study, for instance, the model presumed that a BIT would only have an effect on the flow of FDI from one developed country, namely the signatory, to a developing country. However, this presumption failed to consider the signaling effect.[187] In concluding a BIT, a developing country makes a commitment toward protecting foreign investments. While it explicitly undertakes to protect only the FDI from developed countries that are signatories to the BITs, it implicitly also signals its willingness to protect all FDI from other countries. There are likely to be positive spillover effects from signing a BIT. Hallward-Dreimeier's study fails to capture this possible signaling effect, and

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[184] See Jennifer Tobin & Susan Rose-Ackerman, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Yale Law and Economics Research Paper No. 293 (2005) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121&rec=1&srcabs=616242&alg=1&pos=1 (Last visited on October 13 2018).

[185] Jeswald W. Salacuse and Nicholas P. Sullivan, supra note 168, at 105.

[186] Kenneth J. Vandevelde, Bilateral Investment Treaties, History, Policy and Interpretation 118 (2010)

[187] Elkins at al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000,* Ill, L. Rev. 265,265(2008).

therefore may have underestimated the effect that signing a BIT has on the inward flow of FDI.

The other two studies (i.e., Tobin and Rose-Ackerman, Salacuse and Sullivan) relied on small sample sizes. A sample of 31 or 63 developing countries is insufficient for being a representative. Moreover, these studies failed to consider the difference in the effectiveness of IIAs – that is, some IIAs are more effective than are others. For instance, US BITs, which are among the most rigorous, are more likely to attract FDI than other BITs. Scholars noted that studies on the correlation between BITs and FDI do not take into account different levels of rigor, such as those with ISDS provisions and those without.[188]

It is always possible that BITs are more effective in certain circumstances than in others.[189] Countries with the least attractive investment climates may negotiate large numbers of BITs in an effort to compensate their inability to receive investment, while countries with more attractive investment climates and better institutional quality may see less need for a BIT. Sometimes, the motivation behind concluding BITs may not be that the BITs actually attract FDI, but rather that their absence will discourage it.[190]

In sum, developing countries as host countries conclude IIAs to attract FDI. IIAs provide a better investment climate, driven by the principles of security, reasonableness, non-discrimination, transparency, and due process. They also provide a dispute settlement mechanism to ensure a more favorable and stable climate for investments. Some studies have revealed a weak positive relationship between IIAs and FDI. However, these inconsistent results may be a product of reliance on different

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[188] Jason W. Yackee, *Conceptual difficulties in the empirical study of bilateral investment treaties,* 33 BROOKLYN J. INT'L L. 405 (2008).
[189] As noted, some paper concludes different results depending upon different degrees of institutional quality of host countries.
[190] Elkins et al, supra note 187

sources of data, models and their contents, statistical methodologies, stages of development of host countries, and investment liberalizing policies, among other factors.[191]

B. FDI AND TRADE LIBERALIZATION

1. THE RELATIONSHIP BETWEEN FDI AND TRADE LIBERALIZATION: A POSITIVE RELATIONSHIP

Foreign firms can increase the exports of host countries directly or indirectly. A direct increase in exports will take place when foreign firms produce raw materials or labor-intensive final products in host countries. Many developing countries find it difficult to enter the international market because they lack the capacity to set up a distribution network and discover consumer tastes, etc. Foreign firms can be a good alternative as they have broader business networks, better marketing skills, and superior technology. Sometimes, the foreign firms receive unfinished and intermediate goods from indigenous domestic firms, and assemble those goods to produce final products that are ready for export.

An indirect increase in the trade flow of host countries is possible through technology spillover. Foreign firms also may have better knowledge of consumer and factor markets. These firm-specific advantages in product-process technology, management, and marketing competence affect the structure and performance of local firms heavily. Foreign firms in a host country can hire local domestic firms as subsidiaries or local employees to transfer knowhow, new technology, and/or management practices. This, in turn, stimulates improvements in productivity and enhances the competitiveness of local industries.

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[191] Niti Bhasin and Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI inflows? Evidence from India,* 41 J DEC. MAKERS. 275, 278 (2016).

The empirical literature generally confirms the positive relationship between FDI and trade.[192] Zhang and Song demonstrated the performance of inward FDI on Chinese manufacturing exporting at the provincial level during the period of 1986 to 1997 and found that FDI has a strong effect on the level of export.[193] Zhang and Felmingham examined the causal relation between inward FDI and export performance based on China's national and provincial level- from 1986 to 1999,[194] while Ghosh found that trade openness is positively correlated with FDI in 43 emerging countries.[195] Further, Andrea Martens selected and summarized 21 studies published between 1999 and 2007 and concluded that trade liberalization and attracting FDI are essentially complements. That is, the greater the trade liberalization, the greater the FDI attracted.[196] Similarly, Stone and Jeon found that FDI and trade liberalization are complementary because FDI promotes an increase in domestic investment that, in turn, can enhance trade. More investment leads to more production, and thus to more exports.[197] Liu et al. stated that there was a complementary relationship between FDI and trade liberalization after they investigated the exports and imports of goods and services and FDI between China and 19 other countries. They concluded that the increase of China's imports from a specific country or region caused the growth of FDI into China from that country. This rise in FDI in turn

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[192] See Andrea Martin, Trade Liberalization and Foreign Direct Investment in Emerging Countries: An Empirical Survey, written at the request of the International research network on Poverty and Economic Policy, (2008). Available at http://anciensite.pep-net.org/fileadmin/medias/pdf/Martens-trade-FDI-final.pdf (last visited Feb 21 2019).
[193] Kevin Hongli Zhang & Shunfeng Song, *Promoting exports: The role of inward FDI in China,* 11 CHINA ECON. REV. 385, 385 (2000).
[194] Qing Zhang & Bruce Felminham, *The relationship between inward direct foreign investment and Chin's provincial export trade*, 12 CHINA. ECON. REV. 82, 82 (2001).
[195] Ghosh, *The relationship between Trade and FDI in developing countries – A Panel Data Approach*, 7 GLOB. ECON. J. 1, 1 (2017).
[196] Martin, supra note 192.
[197] Stone, F.S. & B.M. Jeon, *Foreign Direct Investment and Trade in the Asia-Pacific Region: complementarity, Distance, and Regional Economic Integration:* 15 J. ECON. INTEGRATION 460, 460-485 (2000)

increased China's exports to the country where the FDI originated.[198] Lee and Van der Mensbrugghe examined Asian Pacific Economic Cooperation (APEC) countries and found that trade liberalization led to an increase in inward FDI in the manufacturing sector, in every APEC country.[199] Addison and Heshmati analyzed 110 developed and developing countries. They found that trade liberalization had a positive impact on FDI, although it varied by region. It was the strongest in Latin America and weakest in sub-Saharan Africa.[200] Faini examined 92 developing countries using levels of external tariffs as an indicator for trade liberalization. He found that the higher the external tariff the lower was the FDI, indicating that FDI and trade liberalization are complementary.[201]

2. A REASON FOR A POSITIVE RELATIONSHIP: TECHNOLOGY SPILLOVER

The degree and magnitude of technology spillover determines the effect of FDI on trade. There are three channels through which technology spillover manifests, namely demonstration, labor turnover and vertical linkages.[202] The demonstration effect represents the "imitation" channel of spillover, a mechanism of "learning by watching."[203] Local firms may adopt technology through imitation or reverse engineering. As new technologies are introduced, domestic firms can observe foreign

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[198] Liu et al, *Causal Links between Foreign Direct Investment and Trade in China,* 12 CHINA ECON. REV. 190, 190-202 (2001)

[199] Lee, H. & D. van der Mensbrugghe, A General Equilibrium Analysis of the Interplay between Foreign Direct Investment and Trade Adjustment, International Centre for the Study of East Asian Development, Kitakyushu and Development Prospects Group, World Bank, Washington DC. Available at https://www.rieb.kobe-u.ac.jp/academic/ra/dp/English/dp119.pdf (last visited Feb 11 2019).

[200] Addison, T.A. & A. Heshmati, The New Global Determination of FDI flows to Developing Countries- The importance of ICT and Democratization, Discussion Paper No. 2003/45, World Institute for Development Economics Research, United University, Helsinki (2003). Available at https://www.wider.unu.edu/sites/default/files/dp2003-045.pdf (last visited Feb 11 2019).

[201] Faini R., Trade Liberalization in a Globalizing World, Discussion Paper No. 1406 (2004) available at https://pdfs.semanticscholar.org/84c9/9c5f340b43b79958f00205971b7412613e09.pdf (last visited Feb 11 2019).

[202] Kamal Saggi, *Foreign Direct Investment, and International Technology Transfer: A Survey,* 17 THE WORLD BANK RES. OBS. 191, 209 (2002).

[203] Jutta Gunther, *FDI as a multiplier of modern technology in Hungarian industry* 37 InterEcon.: REV. EUR. ECON. POL. 263-269 (2003).

firms' actions, skills, and techniques and imitate them to obtain such techniques. This argument is derived from the assumption that acquiring new technology and knowhow is too expensive for local firms. Spillover also occurs in the labor market when workers employed by foreign affiliates who have acquired technical and managerial skills move to other domestic firms or open their own firms.[204] Lastly, foreign firms may transfer technology to firms that are potential suppliers of intermediate goods or buyers of their own products.[205]

Many empirical studies support the finding that these different types of spillovers are positively related to a host country's exports and growth.[206] Kohpaiboon argued that FDI is an essential part of the development strategy of developing countries, because FDI introduces advanced technology that can enhance the technological capability of the host country firms, thereby generating higher trade flow and growth.[207] Caves examined data from 23 Australian manufacturing industries between 1962 and 1966 and concluded that the higher productivity of local firms was strongly related to higher foreign subsidiary shares of employment in the same industry.[208] Globerman also concluded that the foreign share of industry output had a positive effect on labor productivity in Canadian manufacturing industries in 1972.[209]

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[204] Fosfuri et al, *Foreign direct investment and spillover through worker's mobility*, 53 J. INT'L ECON. 205-222 (2001).
[205] Richard Harris, Spillover and backward Linkage Effect of FDI: Empirical Evidence for the UK, SERC Discussion Paper 16 (2009). http://eprints.lse.ac.uk/33206/1/sercdp0016.pdf (last visited Feb 19 2019).
[206] See generally, Smruti Ranjan Behera, *Technology Spillover and determinants of foreign direct investment: An Analysis of India Manufacturing Industries*, 40 J ECON. DEV. 55, 55 (2015)
[207] Kohpaiboon, *A, Foreign Direct Investment and technology spillover: A Cross-Country Analysis of Thai Manufacturing,* 34 WORLD DEV. 541-556 (2006).
[208] Richard Caves, *Multinational Firms, Competition, and Productivity in Host Country Markets,* 41 ECONOMICA, 176-193 (1974).
[209] Steven Globerman, *Foreign direct investment and "spillover" efficiency benefits in Canadian manufacturing industries*, 12 CANADIAN J. ECON. (1979).

The degree of spillover, however, depends on many other factors, such as the technological or educational levels of the host country and the degree of competition in the domestic market. For instance, Kozlov showed that the spillover in Russia was positive due to the high level of education among the adult population.[210] Konings found that spillovers were smaller in industries with larger labor productivity gaps between local and foreign firms.[211]

Competition in the domestic market affects the degree of spillover. A high level of competition forces foreign firms to bring new and sophisticated technologies from their parent company to retain their market shares. Technologies may be leaked to domestic firms in the host country and thereby increase the competition further.[212]

The size of foreign firms also matters. Dimelis and Louri argued that small foreign firms produced higher spillover effects: large firms may be better prepared to meet their needs on their own, and thus operate in isolation from domestic firms. On the other hand, small foreign firms may be more willing to interact with local firms, which would result in higher spillovers.

In sum, FDI tends to have a positive technology spillover, which, in turn, enhances the trade flow and economic growth of host countries. However, the magnitude and type of spillovers vary according to the technology and/or education levels of the host country, the characteristics of its industries, local market competition, etc. Host countries need to have the *capacity to absorb transfers of knowledge*, which is an outcome of development policies in education, science, management, labor skills training, and engineering.

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[210] *Id.*
[211] Konings, J, *The effects of foreign direct investment on domestic firms Evidence from firm-level panel data in emerging economies*, 9 ECON. TRANS. 619-633(2001).
[212] Sjoholm, Fredrik, *Technology Gap, Competition and Spillovers from Foreign Direct Investment: Evidence from Establishment Data,* 36 J DEV. STUD. 53-73 (1999).

Thus far, we have established that IIA attracts FDI under certain conditions. Moreover, we found that FDI has a positive relationship with trade liberalization and that the degree of correlation varies based on the level of readiness for absorbing technological spillovers.

C. IIAs and Economic Development

1. Law, Development and AELP

Law and development is the field that analyzes the relationship between the rule of law and economic development. There is no clear consensus on the definitions of the terms "rule of law," "institutions," and "development." Some scholars discuss, for instance, the relationship between law and economic growth,[213] while others focus on the interplay of law and freedom, and law and democracy.[214] This dissertation restricts the discussion to one of many perspectives that have recently gained attention, namely the discussion of law and development from an institutional perspective.[215]

Beginning in the 1990s, the institutional perspective on development became increasingly prominent in the field of law and development. New institutional economists argued that individuals make economic decisions based on incentives and

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[213] Two seminal books have been written on the trend of focusing on institutional aspects in the field of law and development: David Trubek and Alvaros Santos, The New Law and Economic Development: A Critical Appraisal (New York: Cambridge Press, (2006); Kenneth Dam (The Law-Growth Nexus: The Rule of Law and Economic Development (Washington, DC: Brookings, 2006).

[214] Amartya Sen, Development as Freedom, 3 (Oxford University Press, 1999) (defines "development" as a "process of expanding the real freedoms that people enjoy").

[215] There seems to be no consensus on the definition of the term "institution." While there is an understanding that it is important, the term is difficult to define. In his article in The Economist, (March 13, 2008), Dani Rodrik asks: "Am I the only economist guilty of using the term (rule of law) without having a good fix on what it really means? Well, maybe the first one to confess it". See generally Douglass C. North, *Institutions*, 5, J. ECON. PERSP. 97 (1991) (He defines institutions as follows: "Institutions are the rules of the game of a society, or, more formally, the humanly devised constraints that structure human interactions. They are composed of formal rules (statute law, common law, regulation), informal constraints (conventions, norms of behavior, and self-imposed codes of conduct), and the enforcement characteristics of both"). See also, M. Trebilock and M. M. Prado, What Makes Poor Countries Poor? Institutional Determinants of Development 27-8, (Chetenham, UK and Northampton, USA, Edward Elgar, 2011)(They argue that institutions are those organizations (formal and informal) that are charged or entrusted by a society with making, administering, enforcing, or adjudicating its laws or policies).

that many of these incentives are created by institutions.[216] These institutionalists believed that developing countries must establish AELP in order for economic growth to continue.

AELP refer to policies that are tailored to suit the local environment or socio-political culture. Since developing countries face constraints and challenges that are not present in developed countries, institutions that perform well in the latter may not work well in the former. Developing countries do not require an extensive set of institutional reforms. Rather, they need to examine their current institutions in an effort to find "appropriate" arrangements to further institutional growth. By doing so, developing countries can discover their own country-specific paths to development based on their institutional capacities. Developing countries should adopt an experimental attitude for policy selection and formulation, because each country functions at a different economic stage with varying institutional capacities. For instance, export-led growth occurs at different times and in different places based on institutional capacity. South Korea adopted an export-led growth strategy immediately after their Import Substitution Industrialization (ISI) period (i.e., a trade and economic policy that advocates replacing foreign imports with domestic production)[217] while China adopted the ISI and export-oriented policies at the same time.[218]

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[216] Douglass C. North, The New Institutional Economics and Third World Development 23 (London, Routledge, 1995)

[217] The ISI strategy is based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products.

[218] Development strategies in China have been a combination of ISI and export-oriented policies. For instance, China adopted ISI in the 1950s. They imposed tariffs on all imports to mobilize all domestic resources rather than to rely on foreign assistance. However, China lacked modern technology and equipment. To resolve this issue, China initiated the campaign called, "Leap Forward by Foreign Means" in 1976. The following ten-year plan that was drafted in 1978 called for the construction and completion of 120 large development projects, including the establishment of iron and oil industries, and railroads, and electricity stations. However, the government faced financial difficulties in running these projects. They had to borrow large amounts of foreign debt, which was why the campaign was called "Leap Forward by Foreign Means." This ultimately caused a large deficit in China's balance of

Further, the difference in performance between Latin America and East Asia proves the importance of AELP. In Latin America, for instance, the countries that followed the Washington Consensus policies, such as trade liberalization, did not achieve particularly significant economic growth. Furthermore, the policies aggravated income polarization. [219] Economic growth under the Washington Consensus was half of what it was in the 1950s through the 1970s when non-Washington Consensus policies, such as import substitution, were practiced.[220]

In contrast, East Asian countries followed a different strategy by implementing AELP. As a result, they achieved rapid economic growth. Instead of merely pursuing trade liberalization policies, East Asian countries came up with country-specific policies for further growth. The rapid economic growth in South Korea, for instance, was a consequence of the government's pursuit of policies of export subsidies, such as tax incentives. Export subsidies are currently prohibited by provisions in IIAs that reflect the WTO Agreement on TRIMs and Prohibition of Performance Requirement. However, South Korea utilized these policies successfully to boost its economy.

South Korea's tax incentive policies in the 1970s and 1980s are also examples of AELP.[221] President Park Chung-Hee made exports his top priority and significantly expanded the scope of export subsidization. Exporters were allowed many tax incentives such as tax exemptions and duty-free imports of raw materials. The government began to impose specific export targets for firms. A noteworthy feature of

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payment. The failure encouraged reformers like Deng Xiaoping to step into an export-oriented policy in the early 1980s. For further reading, see Tianbia Zhu, Rethinking Import-Substituting Industrialization, Development Strategies and Institutions in Taiwan and China, (World Institute For development Economic Research, Research Paper No. 2006/76, 2006)

[219] Serra and Stiglitz, supra note 20 at 4.

[220] *Id.*

[221] Dani Rodrik, New Direction in Trade Theory: Taking Trade policy Seriously: Export Subsidization as a case study in policy effectiveness *355* (Levinsohn et al, 1995)

the South Korean tax incentive was that it applied not only to the final exporters, but also to indirect exporters, that is, firms that supplied intermediate inputs used in direct exports.[222] Foreign investors gained tax incentives in exchange for the transfer of technology and knowhow. They had to train local Korean employees to qualify for the tax incentives. A large number of government officers maintained contact nearly every day with major exporters and the minister frequently intervenes in difficult situations, such as overcoming delays in customs clearance for inputs. All tax incentives were monitored and reviewed at monthly trade promotion conferences chaired by the president and attended by ministers, bankers, and exporters.

Many Studies have revealed that export subsidy policies were AELP in South Korea at that time because those policies reflected the cultural and political atmosphere prevailing in South Korea at that particular stage of development.[223] This shows how policies other than the Washington Consensus ones can lead to increased economic development and that the implementation of AELP—tailored to suit the prevailing socio-political culture is crucial because there is no quick or standard reform menu for growth.[224]

However, determining AELP is difficult for many developing countries. For example, even among developed countries, the organization of political systems, public administration, and legal systems vary enormously. Even if one believes that institutional quality is an important factor for a country's development prospects, there is clearly no single optimal blueprint for the design of these policies.[225]

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[222] *Id*. at 357
[223] The dissertation uses the term "certain stage of development" because export subsidies, for instance, were allowed earlier, but are currently prohibited in many IIAs and model BITs.
[224] Serra and Stiglitz, supra note 20 at 4.
[225] Michael J. Trebilock and Mariana Mota Prado, Advanced Introduction to Law and Development, 37 (2014).

Recent experience with institutional reform in developing countries shows how daunting this challenge is. Scholars have found that 40-60 percent of recent attempts at institutional reform in developing countries appear to have had no impact on the effectiveness of their respective governments.[226] Others found that many rule of law reform initiatives in developing countries bore poor outcomes.[227]

Many scholars have suggested various approaches that may be used to find AELP. Some advocate referring to policies in other countries that share historical experiences and have similar institutional characteristics, and contend that doing so will be useful in gathering information and ideas on what is likely to work.[228] Others argue that ambitious or highly innovative cross-border political, bureaucratic, or legal reforms carry a significantly greater risk of failure than more modest or incremental reforms.[229]

2. DEVELOPMENT DISCOURSES IN IIAS

Development discourses arise in two areas of IIAs[230]: 1) in respect of the definition of an investment, and 2) whether host countries' level of economic development affects the substantive standard of investment protection.

First, after Salini v. Morocco,[231] an ICSID case, [232] scholars debated whether the requirement of a contribution to the host country's economic development should

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[226] M. Andrews, The Limits of Institutional Reform in Development (2013).
[227] M. Trebilock and R. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (2008).
[228] S. Mukand and Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation and Economic Performance*, 95 AM. ECON. REV. 374 (2005).
[229] Terbilock and Prado, supra note 225 at 40.
[230] Schill et al, supra note 18, at 23.
[231] Salini Construttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction(23 July 2001).
[232] Schreurer provides five guidelines in establishing whether a particular dispute may be considered an "investment dispute" within the meaning of Art 25(1) of ICSID convention. Under the guidelines, an investment are: 1)a monetary contribution; 2) a certain duration of the economic activity; 3) the investors' intention to make profits; 4) the assumption of risk; and 5) a contribution to the economic development of the host country. ICSID tribunals have reflected this in the saline case and otherwise known as the Salini test.

be an element in the definition of investment under the Washington Convention. Some tribunals have taken this factor into account.[233] The tribunals note that although the ICSID convention has no definition of "investment," a contribution to the host country is an important factor because the Preamble of the ICSID Convention describes "economic development" of the host states through private investment as one of its goals.[234] Other tribunals, however, have disagreed on the extent to which an investment should contribute to economic development of the host state. Some argued that the contribution must be significant,[235] while others believe that a significant contribution is not required.[236]

Second, development is critical irrespective of whether the host country's level of development affects the interpretation of treaty-based investment protection standards or not.[237] For instance, the stage of developing in the host country has been considered while assessing an investor's legitimate expectations.[238] The legitimate expectation of an investor is a key factor in the analysis of the fair and equitable treatment standard. Some tribunals emphasize that the investors' legitimate expectation must be evaluated by considering "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host state."[239] A tribunal in Alex Genin v. Estonia argued that the revocation of a banking license is not in violation of the rule of fair and equitable treatment because the investor had knowingly invested in

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[233] Mitchell v Congo, Decision on Annulment, 1 November 2006, paragraphs 25-33,39.
[234] Salini supra note, 231, para 52.
[235] See Ceskoslovenska Obchodni Banka v Slovakia, ICSID Case No. ARB/97/4(Decision on Objection to Jurisdiction of May 24,1999), para 88.
[236] Mitchell, supra note 233, para 33.
[237] See Generally, Ursula Kriebaum, Are Investment Treaty Standards flexible enough to meet the needs of developing countries? In Freya Baetens, Investment law within International Law 330(2013); Maria Gritsenko, Relevance of the host state's development status in investment treaty arbitration in Freya Baetens, 341(2013).
[238] *Id*.
[239] Duke Energy Electroquil Partners and Electorquil SA v. Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008.

immature financial institutions in a state that was in transition from socialist planning to a market economy. [240]

Other tribunals have disregarded the host country's developing status. In GAMI v. Mexico,[241] the tribunal dealt with GAMI's investment in Mexican sugar mills and the Mexican regulation of the sugarcane industry. Mexico argued that a proper implementation of the regulation was too difficult in light of the country's circumstances. The tribunal noted that the deficient culture or cost of compliance could not be an excuse for non-implementation of the regulations. In Lemire v. Ukraine,[242] Ukraine argued saying, "in the initial years of independence, constant political battles and economic instability caused a lack of coordination in the activities of state bodies and hampered their ability to create an effective system of government." The tribunal ignored this country-specific situation and held that "on a general level, the claimant could expect a regulatory system for the broadcasting industry that was to be consistent, transparent, fair, reasonable, and enforceable without relying on arbitrary or discriminatory decisions."[243]

So far, we found that host developing nations conclude IIAs to attract FDI. Some studies have revealed a weak positive relationship between IIAs and FDI. However, these inconsistent results are due to different sources of data, models and their contents, statistical methodologies, stages of development of host countries etc. Moreover, we found that FDI has a positive relationship with trade liberalization and that the degree of correlation varies based on the level of readiness for absorbing technological spillovers. Afterwards, we examined development discourse arise in

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[240] Alex Genin Eastern Credit Limited, INC and AS Baltoil v Estonia, ICSID Case NO ARB/99/2, Final Award (25 June 2008) Para 348.
[241] GAMI Investments, Inc. v, Mexico, UNCITRAL Arbitration Rules, Final Award, 15 November 2004. Para.94.
[242] Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction, 14 January 2010, para 239.
[243] *Id*. at para 267.

IIAs with respect to the definition of an investment and the substantive standard of investment protection such as fair and equitable treatment.

Before explaining the causes, problems and solutions to incomplete IIAs, the next section first defines incompleteness in IIA and illustrates various types of incomplete IIAs.

IV. UNNECESSARILY INCOMPLETE PROVISIONS IN IIAS

Many developing countries conclude unnecessarily incomplete IIAs. In Asia, for instance, two large investment-targeted countries, China and India, have frequently concluded incomplete IIAs. China's FTAs with Australia and Korea in 2015 have several missing articles and include renegotiation clauses. Almost all of India's IIAs have incomplete provisions and many of their reservation lists lack specificity. ASEAN members (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) as a group have also concluded incomplete IIAs.

This section defines incompleteness in IIAs and illustrates the types of incomplete provisions. It also analyzes chapters on investment in recent PTAs of China, India, and ASEAN countries to illustrate unnecessarily incomplete provisions. Lastly, the section illustrates some of Australia's and New Zealand's IIAs to present exceptions to the norm of concluding unnecessarily incomplete IIAs.

A. DEFINITION OF AN UNNECESSARILY INCOMPLETE IIA

The dissertation defines an incomplete IIA as an investment chapter of a PTA in Asian developing nations with an explicit renegotiation clause.[244] The parties fail to agree upon particular provisions in the IIA and decide to insert a renegotiation clause to complete these incomplete provisions later.

Here, renegotiation may have two different meanings: The first is that all terms were fixed but the parties agreed to revisit them. Under the FTA regime, this is

[244] The reason inserting a renegotiation clause will be explained in detail in Sec VII (Solution to Incomplete Provisions). See generally, Haftel et al., *Who Cares about Regulatory Space in BITs? A Comparative International Approach, Prepared for the 2nd Sokol Colloquium on "Comparative International Law*," University of Virginia School of Law (November 2015). Haftel's paper classifies different types of renegotiation clauses in IIAs. https://papers.ssrn.com/sol3/papers.cfm?bstract_id=2773686 (last visited Feb 19 2019). A detailed explanation of the renegotiation clause is addressed in Section VII A2 of this dissertation.

normally done through amendment procedures under the FTA joint committee. The FTA joint committee is mainly established to review the implementation process of the FTA, but the committee could also consider amendments or modify the text. The recent renegotiation of the Korea-US FTA is a good example. Paragraph 3 (c) of the Art 22.2. (Joint committee) in Chapter 22 (Institutional Provisions and Administration) of the Korea-US FTA allows the committee to consider amendments to the Agreement or modifying the Agreement.[245]

The other meaning is that the parties agreed to have a new negotiation because they failed to fix anything in the original negotiation. Normally, the parties put a renegotiation clause in the investment chapter of the FTA and the working group of the investment chapter renegotiates the incomplete articles after ratification of the treaty. The above joint committee could still become a venue for new negotiations as

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[245] A Joint Committee Article in the Korea-US FTA reads.
ARTICLE 22.2: JOINT COMMITTEE

1. The Parties hereby establish a Joint Committee comprising officials of each Party, which shall be co-
    1. chaired by the United States Trade Representative and the Minister for Trade of Korea, or their respective designees.

2. The Joint Committee shall:
    (a) supervise the implementation of this Agreement;
    (b) supervise the work of all committees, working groups, and other bodies established under this Agreement;
    (c) consider ways to further enhance trade relations between the Parties;
    (d) seek to resolve disputes that may arise regarding the interpretation or application of this Agreement;
    (e) establish the amount of remuneration and expenses that will be paid to panelists; and
    (f) consider any other matter that may affect the operation of this Agreement.
3. The Joint Committee may:
    (a) establish and delegate responsibilities to *ad hoc* and standing committees, working groups, or other bodies;
    (b) seek the advice of non-governmental persons or groups;
    (c) consider amendments to this Agreement or make modifications to the commitments therein;
    (d) issue interpretations of the provisions of this Agreement, including as provided in Articles 11.22 (Governing Law) and 11.23 (Interpretation of Annexes);
    (e) adopt its own rules of procedure; and
    (f) take such other action in the exercise of its functions as the Parties may agree.

long as the parties agree to this in their renegotiation clause. Then, the Joint Committee would supervise and oversee the renegotiation of the investment chapter working group, along with working groups of other chapters. For the purpose of this dissertation, renegotiation refers to the latter definition.

The following section classifies four different types of incomplete provisions: missing text, missing articles, missing reservation lists, and missing or unspecified measures. Next, the section reviews the recent PTAs of developing countries in Asia to illustrate incomplete IIAs. It also examines the IIAs of developed countries to demonstrate IIAs that are free of incomplete provisions.

B. OPTIMUM LEVEL OF AN INCOMPLETE IIA

Coase pioneered the concept of transaction costs.[246] Coase's work challenges the neoclassical assumptions of complete information and costless exchanges in contractual arrangements. He argues that a market transaction requires different costs to be considered, including search costs and negotiation costs.[247] He indicates that if transaction costs were considered, many contractual arrangements would not be made.[248]

Williamson subsequently refined the concept of transaction costs.[249] According to him, transaction costs are the costs of negotiating a contract *ex-ante* and monitoring it *ex-post* as opposed to production costs, which are the costs of enacting the contract.[250] To be specific, *ex-post* costs include:

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[246] *See* R. H. Coase, The Nature of the Firm, 4 ECONOMICA 286 (1937).
[247] R. H. Coase, The Problems of Social Costs, 3 J. LAW & ECON. 1, 15 (1960). ("In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on").
[248] *See* R. H. Coase, Notes on the Problems of Social Costs, in the Firm, the Market, and the Law, 157,157 (1988).
[249] Oliver E. Williamson, The Economic Institutions of Capitalism, 15-32 (1985).
[250] *Id.* at 21

> (1) the maladaption costs incurred when transactions drift out of alignment ... (2) the haggling costs incurred if bilateral efforts are made to correct *ex post* misalignments, (3) the setup and running costs associated with the governance structures (often not the courts) to which disputes are referred, and (4) the bonding costs of effecting secure commitments.[251]

This view is accepted by many economists, and now, the concept of transaction costs encompasses all of the impediments to bargaining. The view has three forms: 1) search costs, 2) bargaining costs, and 3) enforcement costs.[252] Search costs are required for determining whether one's preferred goods or negotiating partners are available in the market. Bargaining costs are the costs that require one to complete an acceptable agreement with the other negotiating partners to the transaction. The negotiation and legal skills for drafting an agreement could be an example of bargaining costs. Enforcement costs are the costs of making sure that the other negotiating partners stick to the terms of the agreement. In general, enforcement costs are low when violations of the agreement are easy to observe and punishment is cheap to administer.

What if transaction costs are zero and both contracting parties enjoy perfect information of the world? Then, we can expect a perfect and complete contract. Every contingency would be anticipated and the associated risks would be efficiently allocated between the parties because all relevant information would be communicated. A perfect contract is also efficient. Each resource is allocated to the party that values it the most and each risk is allocated to the party that bears the risk at the lowest cost. The contract would assign risks and obligations perfectly in every state. Zero bargaining costs would make it easier for both contracting parties to agree on any special circumstances.

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[251] Williamson, supra note 249 at 21.

[252] Carl Dahlman suggests that transaction costs include: 1) search and information costs; 2) bargaining and decisions costs; and 3) policing and enforcement costs. Dahlman points out that what these three elements have in common is that they represent resource loss due to lack of information (The Problem of Externality, 22 J. LEGAL STUDIES 141, 148 (1979).

There is, however, no perfect and complete contract in reality because the transaction costs cannot possibly be zero and there is no way for the parties to foresee every possible scenario that will arise in the future.[253] A contract always requires the cost of finding the right contracting partners, the right drafting skills, etc. In fact, a contract will always be incomplete in the sense that the parties will fail to include all the variables that are potentially relevant to it.[254]

In this regard, the presence of incomplete provisions with a renegotiation clause in an IIA is not necessarily indicative of failure, inefficiency, or error. There is no complete IIA because the parties cannot foresee every possible scenario that will arise between the investors and the host countries. Rather, leaving things undecided and renegotiating later is rational if today's transaction costs are high, or if tomorrow's transaction costs are expected to be low.[255]

To what extent, then, should the parties leave provisions incomplete? Simply put, what is the optimum level of incompleteness in an IIA? Such a level would maximize the benefit of the parties, given the high transaction costs that arise between states and within states. Given their limited resources and capacity, the optimum level would maximize the parties' economic gains by optimizing the level of investment liberalization in the main text and carving out a reservation list to best attract foreign investments. In fact, finding an optimum level revolves around empirical matters, which vary significantly in different countries with distinct markets. Each country has

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[253] Cooter & Ulen, supra note 6, at 225.
[254] Robert E. Scott and Paul Stephan, The Limits of Leviathan: Contract Theory and the Enforcement of International Law, 76 (2006). For incomplete contract theory in legal studies, *see* Richard Craswell, The "Incomplete Contract" Literature and Efficient Precautions, 56 CASE W. RES. L. REV. 151, 151 (2005)(presents literature on incomplete contracts in a more easily accessible form and highlights one shortcoming of the literature. The literature says nothing about decisions regarding precautions that might reduce the likelihood of an accidental breach. The author points out that the recent economic literature has been too single minded in its commitment to one particular mathematical model); *See also*, Robert E. Scott and George G. Triantis, Incomplete Contract and the Theory of Contract Design, 56 CASE W. RES. L. REV**.** 187, 193 (2005).
[255] Shavell, supra note 7, at 299; See also ,Cooter & Ulen, supra note 6 at 218

unique domestic circumstances with varying levels of market protection, intra-governmental cooperation, and legal expertise of the negotiation team, etc. Thus, each party's optimum level of incomplete IIA would be different.

The optimum level can be achieved when the parties negotiate until the expected marginal benefit of adding the provisions equals the marginal transaction cost of agreeing on them.[256] The benefit of inserting one additional provision (e.g., an investment protection article) is marginal, and the cost of inserting one additional provision is marginal. The parties will perceive themselves as doing better so long as the marginal benefit of the additional provision is greater than the marginal cost of the change. The parties will continue to make these small, or marginal, adjustments as long as the marginal benefit exceeds the marginal cost and will stop adding a new term when the marginal cost of the last change made equals the marginal benefit. This level maximizes the parties' economic gain from the IIA and reflects the optimum level of incompleteness in an IIA.

In this sense, four types of incomplete IIAs, which will be illustrated in the next section, are at the sub-optimal level, that is, less than the optimum level of incompleteness. Because of the high transaction costs arising between states and within states, the parties' economic gains from the agreed IIA are much less than they expected to achieve. For instance, the parties take years of negotiation and conclude with no article, which adds no value to the text. Sometimes, the parties conclude the text without any exceptions that liberalize their entire economies. The parties put domestic law in a reservation list that carves out entire economic sectors, and therefore, all sectors are completely carved out, which adds no value to the text.

[256] Cooter & Ulen, supra note 6 at 26.

Frequently, the parties fail to agree upon critical liberalization articles such as MFN or NT.

Then, how can they reduce transaction costs and move toward the optimum level of incompleteness? In other words, how can the parties achieve greater completeness by lowering the transaction costs of the negotiation to increase the economic gains from the IIA? The rest of the dissertation explains this. Section VI (Reason for Incomplete Provisions) explains the high transaction costs associated with negotiation and Section VII (Solution to Incomplete Provisions) explains various legal and institutional remedies to reduce transaction costs and achieve greater completeness.

The following section classifies four different types of incomplete provisions: missing text, missing articles, missing reservation lists, and missing or unspecified measures.

C. INCOMPLETE PROVISIONS IN THE MAIN TEXT

1. MISSING TEXT

IIAs are incomplete owing to missing text when the parties decide not to draft the main text at all. The main text merely includes a single renegotiation clause containing the promise to renegotiate later. The Trans-Pacific Strategy Economic Partnership Agreement (TPSEPA) is a good example of an IIA with missing text.[257]

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[257] The TPSEPA is a trade agreement among four Pacific Rim countries concerning a variety of matters under the broad ambit of economic policy. The agreement was signed by Brunei, Chile, Singapore, and New Zealand in 2005 and entered into force in 2006. It is a comprehensive trade agreement affecting trade in goods, rules of origin, trade remedies, sanitary and phytosanitary measures, technical barriers to trade, trade in services, intellectual property, government procurement, and competition policy. Among other things, it called for a 90 percent reduction of all tariffs among member countries by January 1, 2006 and a reduction of all trade tariffs to zero by 2015. The renegotiation clause to correct the missing text reads as follows:

> Article 20.1: Investment Negotiations
> Unless otherwise agreed, no later than 2 years after entry into force of this Agreement the Parties shall commence negotiations with a view to including a chapter on investment in this Agreement on a mutually advantageous basis.

The four parties to the TPSEPA (Brunei, Chile, New Zealand, and Singapore) failed to agree on any provisions in the investment chapter. Instead, they agreed to a comprehensive renegotiation clause and promised to negotiate the terms of the investment chapter within two years from the date of ratification of the treaty.

The China–Switzerland FTA is another example of an IIA with missing text.[258] The investment chapter in this FTA contains only two articles promising renegotiation. Article 9.1 of the Treaty states that both parties recognize the importance of promoting cross-border investment and technology flows as a means of achieving economic growth and development. Both parties agree to cooperate with each other with respect to 1) identifying investment opportunities; 2) exchanging

[258] On July 1, 2014, the FTA between Switzerland and China entered into force. It was signed on July 6, 2013 as a result of negotiations that began in January 2011. There were nine rounds of bilateral negotiations. This is an important development, not only because it is the first FTA between China and a continental European country (China had previously entered into an FTA with Iceland in 2013), but also because it has the potential to influence business decisions significantly in terms of investments and the operation of global value chains. For more information, *see* http://fta.mofcom.gov.cn/topic/enswiss.shtml (last visited on October 13, 2018). The renegotiation clause reads as follows:

> ARTICLE 9.1
> Investment Promotion
> The Parties recognise the importance of promoting cross-border investment and technology flows as a means for achieving economic growth and development. Cooperation in this respect may include:
> (a) identifying investment opportunities;
> (b) exchange of information on measures to promote investment abroad;
> (c) exchange of information on investment regulations;
> (d) assistance of investors to understand the investment regulations and the investment environment in both Parties; and
> (e) the furthering of a legal environment conducive to increased investment flows.
>
> ARTICLE 9.2
> Review Clause
> 1. Upon request of a Party, the other Party shall provide information on measures affecting investment.
> 2. With the objective of progressive facilitation of investment conditions, the Parties affirm their commitment to review the investment legal framework, the investment environment and the flow of investment between them, no later than two years after the entry into force of this Agreement.
> 3. If, after the entry into force of this Agreement, a Party concludes an agreement with any third country or group of countries that contains provisions providing for a better treatment with respect to establishment in non-services sectors than the treatment granted to the other Party, that Party shall, upon request by the other Party, enter into negotiation with a view to provide equivalent treatment on a mutual basis.

information on measures to promote investment abroad; 3) exchanging information on investment regulations; 4) assisting investors in understanding the investment regulations and the investment environment of both parties; and 5) furthering the development of a legal environment conducive to increased investment flows. Article 9.2 then obliges both parties to review their legal investment frameworks, the investment environment, and the flow of investments between them, no later than two years after the agreement enters into force.

Moreover, in the ASEAN–Japan Comprehensive Economic Partnership Agreement,[259] Article 51 is the only provision in the investment chapter. All other articles are missing. Whether the ASEAN countries would engage in negotiations after the treaty entered into force remains uncertain because the phrase "shall endeavour," as found in the text, obliges the parties to merely make an effort to negotiate.

2. MISSING ARTICLES

IIAs with missing articles come about when host countries conclude their agreement with a few articles alone. The Investment Chapter in the China–Australia

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[259] The Agreement on Comprehensive Economic Partnership between Japan and Member States of the Association of Southeast Asian Nations (Japan–ASEAN Comprehensive Economic Partnership Agreement) entered into force on December 1, 2008 between Japan, Singapore, Laos, Vietnam, and Myanmar The agreement was to become effective in relation to other ASEAN member states once the parties issued a notification on the completion of the respective legal procedures necessary for the entry into force of the agreement. *See* http://www.mofa.go.jp/policy/economy/fta/asean.html (last visited on October 13, 2018). The renegotiation clause reads as follows:

> Article 51 Investment
>
> 1. Each Party shall endeavour to, in accordance with its laws, regulations and policies, create and maintain favourable and transparent conditions in the Party for investments of investors of the other Parties.
> 2. The Parties shall, with the participation of Japan and all ASEAN Member States, continue to discuss and negotiate provisions for investment, with a view to improving the efficiency and competitiveness of the investment environment of Japan and ASEAN Member States through progressive liberalisation, promotion, facilitation and protection of investment […]

FTA is an example.[260] The parties completed NT, MFN, and ISDS provisions but decided to renegotiate articles on minimum standard of treatment, expropriation, transfers, performance requirements, senior management, and the board of directors, investment-specific State to State Dispute Settlement, the application of Investment protections and ISDS to services supplied through commercial presence and a reservation list.

The ASEAN–China–Hong Kong FTA is another example.[261] The parties decided to renegotiate their Schedules of Reservations in Annex I, procedures for the

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[260] The China–Australia Free Trade Agreement (ChAFTA) is a bilateral Free Trade Agreement (FTA) between the governments of Australia and China. The agreement entered into force on December 20, 2015" (*see* https://dfat.gov.au/trade/agreements/in-force/chafta/Pages/australia-china-fta.aspx (last visited on October 13, 2018)). The renegotiation clause reads as follows:

> Article 9.9 Future Work Program
>
> 1. With a view to progressively liberalising investment conditions, the Parties shall regularly review the legal framework relating to investment and the investment environment, consistent with their commitments in international agreements
>
> […]
>
> 3. Unless the Parties otherwise agree, the Parties shall commence negotiations on a comprehensive Investment Chapter, reflecting outcomes of the review referred to in paragraphs 1 and 2, immediately after such review is completed. The negotiations shall include, but are not limited to, the following:
>
> (a) amendments to Articles included in this Chapter;
>
> (b) the inclusion of additional Articles in this Chapter, including Articles addressing:
>
> (i) Minimum Standard of Treatment;
> (ii) Expropriation;
> (iii) Transfers;
> (iv) Performance Requirements;
> (v) Senior Management and Board of Directors;
> (vi) Investment-specific State to State Dispute Settlement; and
> (vii) The application of investment protections and ISDS to services supplied through commercial presence….

[261] The renegotiation clause of ASEAN-China-Hong Kong reads as follows:

> Article 22
> Work Programme
> 1. The Parties shall enter into discussions on:
> (a) Annex 1 (Schedules of Reservations);
> (b) procedures for the modification of Annex 1 (Schedules of Reservations);
> (c) the application of Article 10 (Expropriation and Compensation) to taxation measures that constitute expropriation;
> (d) the definition of "natural person of a Party";
> and
> (e) Article 20 (Settlement of Investment Disputes between a Party and an Investor).

modification of Annex 1, the application of Article 10 (Expropriation and Compensation) to taxation measures that constitute expropriation, the definition of "natural person of a Party," and Article 20 (Settlement of Investment Disputes between a party and an investor). The parties agreed to complete the renegotiation within a year from the ratification of the treaty.

D. INCOMPLETE PROVISIONS IN A RESERVATION LIST[262]

1. MISSING RESERVATION LIST

An IIA with a missing reservation list occurs when the parties decide to conclude the main text without a reservation list. The concluded and ratified IIA is in force without reserving sectors. The ASEAN–India Comprehensive Economic Cooperation Agreement (CECA) is one example.[263] Article 6 (Work Programme) states that both parties shall enter into discussions to draft a reservation list and lays

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2. The Parties shall conclude the discussions referred to in paragraph 1 within one year of the date of entry into force of this Agreement under paragraph 1 or 2 of Article 26 (Entry into Force), unless otherwise agreed by the Parties. The discussions shall be overseen by the AHKFTA Joint Committee.
3. Annex 1 (Schedules of Reservations) shall enter into force on a date to be agreed by the Parties.
4. Article 3 (National Treatment) and Article 4 (Most Favoured-Nation Treatment) shall not apply until Annex 1 (Schedules of Reservations) enters into force in accordance with paragraph 3.

[262] As noted in Section II, a list of non-conforming measures under the negative list approach is called the reservation list. This dissertation focuses on the reservation list under the negative list approach since the list requires the insertion of domestic measures, whereas the positive list approach has no such requirements.

[263] The renegotiation clause in the Investment Chapter of the CECA reads as follows:

> Article 6 Work Programme
>
> 1. The Parties shall enter into discussions on:
>
> (a) Schedules of Reservations to this Agreement; and
>
> (b) Procedures for the modification of Schedules of Reservations.
>
> 2. The Parties shall conclude the discussions referred to in paragraph 1 of this Article, within three (3) years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Joint Committee on Investment established under Article 23 (Joint Committee on Investment).
>
> 3. Schedules of Reservations referred to in paragraph 1 of this Article shall enter into force on a date agreed to by the Parties.

out procedures for its modification and indicates that it must be completed within three years from the date of ratification.

The New Zealand–Malaysia FTA[264] is another good example of an IIA in which the reservation list is missing. In Article 10.17 (Work Programme), the parties agree to enter into negotiations to determine non-conforming measures within three months of entry into force and conclude the negotiation process within six months of ratification of the treaty, unless the parties agree otherwise.

2. MISSING OR UNSPECIFIED MEASURES

IIAs with missing measures arise when host countries omit specific information on domestic measures in the reservation list. Japan and India, for example, failed to identify domestic laws in the reservation list in their EPA.[265] Neither the

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[264] See Paragraph 4 of Article 10.17, Chapter 10, in the Malaysia–New Zealand FTA, available at https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/Malaysia/mnzfta-text-of-agreement.pdf (last visited on Oct 13, 2018). The provision reads as follows:

Article 10.17 Work Programme

> 1. The Parties shall enter into negotiations on Schedules of non-conforming measures within three months of entry into force of this Agreement, unless the Parties otherwise agree.
> 2. The Parties shall conclude the negotiations referred to in paragraph 1, no later than six months from the date of entry into force of this Agreement, unless the Parties otherwise agree. These discussions shall be overseen by the Committee on Investment established under Article 10.18 (Committee on Investment).
> 3. Schedules of non-conforming measures referred to in paragraph 1 shall enter into force by exchange of notes on a date agreed to by the Parties.
> 4. Articles 10.4 (National Treatment), 10.5 (Most Favoured Nation Treatment) and 10.11 (Non-Conforming Measures) shall not apply until the Parties' Schedules of non-conforming measures have entered into force in accordance with paragraph 3.

[265] Japan and India began their official negotiations in January 2007 and reached a broad agreement in the Chief Negotiator's Session in September 2010. They completed their negotiation at the Summit Meeting on October 25, 2010. The then Foreign Minister of Japan Seiji Maehara and Minister of Commerce and Industry of India Anand Sharma signed the EPA on February 15, 2011. It came into force on August 1, 2011." (*see* http://www.meti.go.jp/policy/trade_policy/epa/epa_en/in/ (last visited on Oct 13. 2018). The missing measures in the reservation list reads as follows:

> Sector All Sector
>
> Sub-Sector National (Article 85)
> Most-Favored Nation treatment (Article 86)
> Prohibition of Performance Requirements (Article 89)
>
> Description Any existing measures framed by the State Governments/ Union territories/local governments are not subject to either National Treatment, Most-Favored nation

measures nor the descriptions are specified. The text merely indicates "any existing or current regulation or measures."

The Singapore and New Zealand Closer Economic Partnership (CEP) is another example.[266] Singapore carved out its regulatory power in the areas of printing and publishing, manufacture and repair of transport equipment, and power and energy. However, it did not identify the domestic laws that reflect the carved-out area.

IIAs with unspecified measures occur when the host countries place ambiguous domestic measures in the reservation list. Host countries include the name of the act or law without referring to particular articles or sections. For instance, in the Japan–India EPA, while India carved out the "acquisition of land" in the reservation list, it did not provide detailed information of the exact domestic measures that fell within the scope of the reservation, such as the Transfer of Property Act of 1882 or the Registration Act of 1908.

Similarly, in the Australia–Singapore FTA, Singapore included the "Companies Act, Cap 50" without a reference to specific articles.[267] The reservation

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Treatment or Prohibition of Performance Requirement obligation.

Reservation Measure Any existing or current regulations or measures in force on the date of entry of this Agreement

[266] The agreement between New Zealand and Singapore on a Closer Economic Partnership (CEP) entered into force on January 1, 2001. It is the most comprehensive trade agreement outside the ambit of the Closer Economic Relations with Australia, negotiated by New Zealand. See https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/singapore/ (last visited on October 13, 2018). The renegotiation clause reads as follows:

Sector: Printing&Publishing
Manufacture & Repair of Transport. Equipment
Power/Energy
Types of Limitation: National treatment (Article 29)
Legal Citation:
Description: More favourable treatment may be accorded to Singapore nationals. and permanent residents in the above sectors.

[267] Singapore's reservation list in the Australia-Singapore FTA is available at https://www.iesingapore.gov.sg/~/media/IE%20Singapore/Files/FTA/Existing%20FTA/Singapore%20

states that only citizens, permanent residents, and employment pass holders of Singapore could register a business without appointing a local manager.[268] However, Singapore did not specify the relevant law. Instead of adding "Division 1, 19 (Registration and Incorporation)" of the Companies Act, Cap 50, Singapore simply listed the Companies Act, Cap 50 entirely.[269]

E. INCOMPLETE IIAS CONCLUDED BY DEVELOPING COUNTRIES IN ASIA AND EXCEPTIONS TO THEM

1. UNNECESSARILY INCOMPLETE IIAS IN DEVELOPING COUNTRIES IN ASIA

International investment law has traditionally been associated with BITs, but in recent years, governments have increasingly turned away from bilateral treaties and have begun to conclude PTAs[270] to protect foreign investors.[271] About every fourth investment treaty signed in 2012 was a regional one and, at the same time, the annual number of newly concluded BITS dropped to pre-1990 levels in 2013.[272] The

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Australia%20FTA/Legal%20Text/Chapter%207/4IB2020SingaporeS20Reservations.pdf (last visited on September 11, 2018).

[268] *Id.*

[269] The Act has a variety of regulations including incorporation, allocation of power, shares, titles and transfer, management and administration, account and audit, etc.

[270] See T.N. Srinivasan, Preferential Trade Agreement with special reference to Asia, see available at https://pdfs.semanticscholar.org/9879/4fc5207beba84f5c05598613a84b9026837f.pdf (last visited on October 13, 2018). ("PTAs are agreements among a set of countries involving preferential treatment for bilateral trade between any two parties to the agreement relative to their trade with the rest of the world. Preferences, however, need not extend to all trade between the two, and the coverage could depend on the type of PTA. Customs Unions (CUs) and the so-called Free Trade Areas are common forms of PTAs. Members of most PTAs belong to well-defined geographical areas, such as the EU, NAFTA, and ASEAN. For this reason, regional PTAs are called Regional Trade Agreements (RTAs). The most common form of an RTA is the euphemistically named Free Trade Area, with few CUs, which requires the partners to maintain a common external trade policy in addition to free trade with each other.").

[271] UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development 103-7 (Geneva: United Nations, 2013); Hamed El-Kady, 'An International Investment Policy Landscape in Transition: Challenges and Opportunities,' 10 TRANS. DISP. MGT. (TDM) (2013), http://www.transnational-dispute-management.com/article.asp?key1/41978 (Last visited on September 11, 2018)

[272] UNCTAD, World Investment Report 2013 at 101 (At the end of 2012, over 2,200 BITs were reported to be in force, over 2,850 signed, and only a fraction of the 339 until the end of 2012 were PTAs with investment chapters).

regionalization of investment law takes place intra-regionally, either as part of an organization's deeper economic integration agenda such as ASEAN's Comprehensive Investment Agreement (ASEAN CIA), or ad hoc, like the Trilateral China–Japan–South Korea Investment Treaty.[273] The trend toward regionalization also encompasses inter-regional agreements, as evidenced by the TPP,[274] an African Tripartite Agreement,[275] and the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.[276]

In fact, many developing nations have begun signing PTAs to achieve a higher level of liberalization than was in the previously signed BITs.[277] For instance, Chinese BITs have undergone the most drastic transformation, leaving many of China's previously signed BITs "outdated."[278] China started to sign BITs in the early 1980s. The first generation of Chinese BITs was not only brief, simple, and vague, but the consent to international arbitration was limited to disputes over the amount of compensation for expropriation.[279] In contrast, China's PTAs today are highly complex and relatively comprehensive.[280]

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[273] Ministry of Foreign Affairs Japan, 'Signing of the Japan-China-Korea Trilateral Investment Agreement,' Press release, May 13, 2012, www.mofa.go.jp/announce/announce/2012/5/0513_01.html (last visited September 11, 2018).
[274] For more information see www.ustr.gov/tpp (last visited September11 2018). For a critical view on TPP see tppinfo.org/ (last visited September 09 2018).
[275] For more information see www.comesa-eac-sadc-tripartite.org/ (last visited September 09 2018).
[276] For more information see ec.europa.eu/trade/policy/in-focus/ttip/ (last visited September 09 2018).
[277] Hicks et al., When a BIT just isn't enough: Why we see investment chapters in Preferential Trade Agreements, presented at the annual meeting of the American Political Association (The article explains why countries might prefer PTAs over BITs). In fact, previously enacted BITs are incomplete by nature. For instance, China concluded 129 BITs and all of them involve missing reservation lists. First generation BITs are especially incomplete. Not only are they brief, simple, and vague, but also focus exclusively on investment protection obligations. Whereas the first Germany–Pakistan BIT (1959) was only 14 articles long, the US–Rwanda BIT (2008) has 37 articles and the Canada–Peru BIT (2006) has 52. For more information on the incomplete nature of BITs, see Wolfgang Alschner, Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory, 11 (submitted for the 30th Annual Conference of the European Association of Law and Economics (EALE, 2013); Alschner, supra note 78, at 275 (The rise in regionalism in IIAs can be a stepping stone for deeper investment liberalization through deeper integration).
[278] Alschner, *Id*. at 18.
[279] *Id.*
[280] *Id.*

In this respect, this dissertation mainly considers the investment chapters of PTAs in developing countries in Asia as examples.[281] The following section examines the most recently enacted PTAs in China, India, and the 10 ASEAN countries.[282] It illustrates and reviews the exceptions where IIAs have complete provisions. The following table 1 shows that the ASEAN countries concluded all seven PTAs with missing provisions.

Table 1: Incomplete ASEAN IIAs[283]

	Incomplete Main Text		**Incomplete Reservation List**	
ASEAN's IIAs (Date of signature)	Missing Text	Missing Article	Missing Reservation List	Missing or Unspecified Measures
ASEAN-Hong Kong, China FTA (2017)		O	O	
ASEAN–India CEC (2014)			O	
ASEAN–China FTA (2009)			O	
ASEAN–Korea FTA (2009)		O	O	
ASEAN–Australia–New Zealand FTA (2009)		O	O	
ASEAN Comprehensive			O	

[281] This examination excludes framework agreements because, by nature, they are already incomplete treaties. A framework agreement is an agreement between two parties that recognizes that the parties have not come to a final agreement on all matters but have come to an agreement on enough to move forward with the relationship, with further details to be agreed upon in the future. It is more detailed than a mere declaration of principles, but is less detailed than a full-fledged treaty. Its purpose is to establish the fundamental compromises necessary to enable the parties to then flesh out and complete a comprehensive agreement in the near future. Thus, it does not contain investment protection articles or a reservation list. The agreement is simply a commitment that the parties will negotiate a comprehensive IIA in the future. For more information on the framework agreement, see Torsten Müller, Hans-Wolfgang Platzer, and Stefan Rüb, International Framework Agreements – Opportunities and Limitations of a New Tool of Global Trade Union Policy (available at http://library.fes.de/pdf-files/iez/05814.pdf) (last visited March 21 2017).

[282] Apparently, Asian countries IIA practice is bewilderingly complex. Alschner, supra note 78, at 279("ASEAN members concluded 26 BITs among themselves in addition to the regional ASEAN CIA. Moreover, each ASEAN member has BITs with countries in neighboring regions such as China, South Korea, and Australia. These BITs, in turn, overlap with PTIAs concluded by individual ASEAN members as well as PTAs concluded by ASEAN as a whole (so-called 'ASEAN'). Finally, negotiations are on-going on the interregional level to create a Regional Comprehensive Economic Partnership (RCEP) and a TPP adding a third or even fourth layer of investment protection.").

[283] This dissertation only looks at the PTAs concluded by ASEAN as a whole, not the PTAs concluded by individual ASEAN members. Individual members of ASEAN members face difficulties to sign PTAs by themselves due to lack of bargaining power and legal expertise, thus they tend to move as a group. For instance, Cambodia, Laos, or Myanmar never signed PTAs by themselves. Philippine or Indonesia signed a single PTA with Japan but has a missing article problem (i.e. no ISDS provisions).

Investment Agreement (2009)				
ASEAN–Japan EPA (2008)	O[284]			

None of the PTAs included a reservation list. Worse still, the missing text problem appears in the PTAs with Japan. The ASEAN countries miss both articles and reservation lists in the ASEAN-Hong Kong-China FTA, ASEAN–Korea FTA, and ASEAN–Australia–New Zealand FTA. For instance, the ASEAN–Korea FTA does not contain articles on performance requirements, ISDS provisions, or MFN provisions, among others. The ASEAN–India FTA and the ASEAN–China FTA have complete articles, but do not have reservation lists. India also ratified several incomplete IIAs in all of their recently enacted PTAs. Table 2 illustrates this.

Table 2: Incomplete Indian IIAs

	Incomplete Main Text		**Incomplete Reservation List**	
India's Investment IIAs (date of signature)	Missing Text	Missing Article	Missing Reservation List	Missing or Unspecified Measures
India–ASEAN CEC (2014)			O	
India–Malaysia FTA (2011)		O		O
India–Japan EPA (2011)				O
India–Korea CEPA (2009)				O
India–Singapore CECA (2005)				O

Unlike the ASEAN countries, India has no missing text, but has from missing articles and missing or unspecified measures. The India–ASEAN CEC has a missing reservation list and the India–Malaysia FTA has both missing articles and missing or unspecified measures. In the PTAs with Japan, Korea, and Singapore, India concluded the main text, but still has missing or unspecified measures.

[284] Missing text automatically assumes the missing reservation list. But the chart will not have a circle in both the missing text and the missing reservation list. When the chart has a circle in the missing reservation list, it means the text is available.

China is another major developing country that concludes incomplete IIAs. Unlike ASEAN countries or India, China has actively executed PTAs with many countries but the level of incompleteness is still high. Table 3 illustrates this.

Table 3: Incomplete Chinese IIAs

	Incomplete Main Text		**Incomplete Reservation List**	
China's IIAs (date of signature)	Missing Text	Missing Article	Missing Reservation List	Missing or Unspecified Measures
China–Hong Kong CEPA (2017)				O[285]
China-Georgia FTA (2017)	O			
China–Australia FTA (2015)		O	O	
China–Korea FTA (2015)		O	O	
China–Switzerland FTA (2013)	O			
China–Iceland FTA (2013)	O			
China–Japan–Korea Trilateral Agreement (2012)			O	
China–Costa Rica FTA (2010)	O			
China–ASEAN Investment Agreement (2009)		O	O	
China–Peru FTA (2009)			O	
China–Singapore FTA (2008)	O			
China–New Zealand FTA (2008)			O	
China–Pakistan FTA (2006)	None			
China–Chile FTA (2005)	O			
China–Macao CEP (2003)	O			

[285] With no negotiation clause.

China failed to complete any articles in its PTAs with Georgia, Switzerland, Iceland, Costa Rica, Singapore, Chile, and Macao. China also suffers from missing articles and reservation lists in its PTAs with Australia, Korea and ASEAN. Its trilateral agreement with Korea and Japan, and its FTAs with New Zealand, ASEAN, and Peru have no reservation lists.

2. EXCEPTIONS: ARE THERE NO INCOMPLETE IIAS BETWEEN DEVELOPED COUNTRIES?

All IIAs are not incomplete. Australia and New Zealand have completed IIAs without renegotiation clauses. An IIA without a renegotiation clause does not necessarily achieve the optimum level of incompleteness. However, it at least shows that the parties have concluded the IIA without the necessity of undergoing a formal renegotiation process. Australia's PTAs indicate that complete IIAs are also concluded, as seen in Table 4.

Table 4: Incomplete Australian IIAs

	Incomplete Main Text		**Incomplete Reservation List**	
Australia's IIAs (Date of Signature)	Missing Text	Missing Article	Missing Reservation List	Missing or Unspecified Measures
Australia-Peru FTA (2018)	None[286]			
Pacer Plus (Cook Islands, Kiribati, Marshall Islands, Micronesia, Federated States of, Nauru, New Zealand, Niue, Palau, Samoa, Solomon Island, Tonga, Tuvalu, Vanuatu) (2017)				O
Australia–China FTA (2015)		O	O	
Australia–Japan FTA (2014)	None			
Australia–Korea FTA (2014)	None			
Australia–Malaysia FTA (2012)			O	
Australia–New Zealand	None			

[286] However, the Australia's reservation list excludes regional government's measures. Australia and Peru exchanged the letter to confirm that Australia will review their Regional government's non-conforming measure and report to Peru within 12 months from the date of ratification.

Investment Protocol (2011)				
Australia–ASEAN–New Zealand FTA (2009)		o	o	
Australia–Chile FTA (2008)	None			
Australia–Thailand FTA (2004)				o
Australia–United States FTA (2004)		o		
Australia–Singapore FTA (2003)				o

Australia has concluded complete IIAs with, Peru, Japan, Korea, New Zealand, and Chile without any renegotiation clause. Pacer Plus and the FTAs with Thailand and Singapore either have missing or unspecified measures. Australia's FTAs with China, and trilateral agreement with ASEAN and New Zealand do not have articles and reservation lists. Australia completed all its articles with Malaysia but did not complete a reservation list.

In the case of the Australia–US FTA, the two parties agreed on the main text with highly liberalized investment protection articles, but omitted the ISDS provisions.[287]

We can see that the negotiating partners of the completed IIAs are either developed countries or countries with significant experience in concluding IIAs. As of 2018, though Chile is still a developing country, it has concluded more than 70 IIAs, which makes it the country with the most IIAs concluded in Latin America. Globally, it is placed between Canada's 59 and the US's 113. South Korea also has significant experience in concluding IIAs, with 112 thus far. In contrast, though Australia and New Zealand are developed countries, they do not appear to have extensive

[287] The missing ISD provision problem in the case of Australia and the US seems to be an exception to the general trend in negotiation in developed countries.

experience in negotiating IIAs, with Australia having concluded 39 and New Zealand 18.[288] Table 5 presents all of New Zealand's incomplete IIAs.

Table 5: New Zealand's Incomplete IIAs

	Incomplete Main Text		**Incomplete Reservation List**	
New Zealand's Investment Treaties (Date of Signature)	Missing Text	Missing Article	Missing Reservation List	Missing or Unspecified Measures
Pacer Plus (Cook Islands, Kiribati, Marshall Islands, Micronesia, Federated States of, Nauru, New Zealand, Niue, Palau, Samoa, Solomon Island, Tonga, Tuvalu, Vanuatu)(2017)				O
New Zealand–Korea FTA (2015)	None			
New Zealand – Taiwan Province of China ECA (2013)	None			
New Zealand–Australia Investment Protocol (2011)	None			
New Zealand–Hong Kong FTA (2010)	None			
New Zealand–Malaysia FTA (2009)			O	
New Zealand–Australia–ASEAN FTA (2009)		O	O	
New Zealand–China FTA (2009)			O	
New Zealand, Brunei Darussalam, Chile, Singapore P4 Agreement (2005)	O			
New Zealand–Singapore FTA (2000)				O

New Zealand concluded complete PTAs with Australia, Taiwan, Hong Kong, and Korea. Pacer plus and its FTA with Singapore have either missing or unspecified measures. FTAs with Malaysia and New Zealand do not have reservation lists. PTAs with Australia and ASEAN do not have articles and reservation lists. The P4 Agreement with Brunei, Chile, and Singapore has no articles at all.

[288] *See* http://investmentpolicyhub.unctad.org/IIA (last visited on October 13, 2018).

What are the reasons for completing IIAs in both Australia and New Zealand? The rest of the dissertation discusses various reasons, such as a strong preference for liberalization, better cooperation between line ministries, and a high level of legal expertise. Based upon the author's negotiation experiences, the third factor, a high level of legal expertise, is perhaps the most contributing factor for reducing transaction costs of the completion of IIAs. Both countries almost always bring legal experts to the negotiating table. These lawyers analyze previously concluded IIAs and present them as model templates to persuade opposing parties. The third round of RCEP negotiations was held in Kuala Lumpur on the 20 – 24 January 2014.[289] At the meeting, the RCEP members continued technical work on trade in services and investment. On investment, participating countries exchanged views on investment modalities (i.e., a choice between a negative or a positive list approach) and deliberated further on the elements for the RCEP Investment Chapter. New Zealand and Australia organized a seminar on the cross-cutting areas of Services and Investment.[290] Australia, for instance, explained details about the positive and negative list approaches. Many RCEP-participating countries had never experienced drafting a negative list and the seminar became useful guidance to many developing nations. In sum, due to their sufficient legal capacity, these countries frequently lead bilateral IIA negotiations and tend to complete IIAs with developing nations.

So far, we defined incompleteness in IIAs and illustrated the types of incomplete provisions. We also analyzed chapters on investment in recent PTAs of China, India, and ASEAN countries to illustrate unnecessarily incomplete provisions. We then illustrated some of Australia's and New Zealand's IIAs to present exceptions.

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[289] See New Zealand government report noting that New Zealand and Australia held a seminar for RCEP participating members. available at https://www.mfat.govt.nz/assets/FTAs-in-negotiations/RCEP/Regional-Comprehensive-Economic-Partnership-Round-3.pdf (last visited Feb 29 2019).

[290] *Id.*

Before analyzing the causes and solutions to these incomplete IIAs, we first examine the negative consequences associated with these incomplete IIAs. The following section describes this in detail.

V. THE COST OF INCOMPLETE PROVISIONS

Section III reconciled IIAs and FDI, trade liberalization, and economic development and found that IIAs are generally positively correlated to attracting FDI. FDI tends to result in a positive technology spillover, which enhances the trade flow of host countries. The magnitude and type of spillovers vary according to factors such as technology and education levels, the characteristics of the host country's industries, and the level of competition in the host country's local market. The section also found that developing countries as host countries require Appropriate Economic and Legal Policies (AELP) to continue their economic growth. Further, the section examined the development discourse on IIAs.

Based upon these findings, this section examines the negative consequences of incomplete IIAs in: 1) attracting FDI and achieving trade liberalization; 2) establishing AELP for continuing economic growth; and 3) decreasing the credibility of IIAs.

This section first examines how different kinds of incomplete provisions may hinder the parties in attracting FDI and achieving trade liberalization. In practice, many countries establish an Investment Promotion Agency (IPA) to sort out the targeting sectors to attract foreign investments. This section looks at the literature on investment targeting and identifies how targeting activities can be reconciled with IIAs to attract more FDI. Then, the section shows how different types of incomplete provisions may negatively affect FDI and trade flows.

Second, the section examines how incomplete provisions may hinder parties in carving out AELP for further growth. The section reviews the literature on various methods used to carve out provisions in IIAs and argues that these arguments fail to

say anything about AELP and further growth. The section further argues that, depending on the insertion or modification of the articles or a reservation list, one could secure AELP for further growth. The section then presents treaties as examples of how missing articles or missing reservation lists may prevent the parties from protecting AELP.

Lastly, the section cautions against incomplete IIAs by showing that they can reduce the credibility of IIAs among members of the international community. As more countries leave their IIAs incomplete, they may begin to distrust each other and may not only believe that such behavior is common, but also that it attracts no pressure or penalty from the international community.

It is important to note that the optimum level of incompleteness for IIAs determines the amount of lost FDI and AELP. As noted, the optimum level of incompleteness reflects a maximized ability to attract FDI and secure AELP from the IIA. Therefore, the amount of lost FDI and AELP equals the difference between the amount of FDI and AELP that can be expected from a respective incomplete IIA and its optimum level.

A. OPPORTUNITIES MISSED IN ATTRACTING FDI AND ACHIEVING TRADE LIBERALIZATION

1. IIAS AND INVESTMENT TARGETING

INVESTMENT TARGETING AND IPA

Investment targeting is widely used to attract FDI. IPAs[291] play a major role in

[291] The IPA's activities can be classified as falling into four different areas: national image building, investment generation, investor servicing, and policy advocacy. Image-building activities are designed to build a perception of the country as an attractive place for FDI. Investment generation identifies potential investors who could make aggressive investments, developing a strategy to contact them and encouraging them commit to an investment project. Investor servicing involves assisting committed investors analyzing business opportunities, obtaining permits and approvals for establishing a business in the host countries, and maintaining business operation. Policy advocacy improves the quality of the investment climate and identifies the views of the private sector in this area. See Torfinn Harding & Beata S Javorcik, *Roll out Red Carpet and they will come: Investment Promotion and FDI inflows*, 121 ECON. J. 1445, 1445-1476 (2011).

targeting.[292] An IPA is an agency (or occasionally a non-profit organization functioning similar to a chamber of commerce) whose mission is to attract investment to a country, state, region or city. IPAs examine various economic sectors and identify areas where foreign investments should be steered based on market analysis, data on incoming FDI, and comparative advantage. A country may have different strategies and preferences for different sectors or attracting FDI and liberalizing trade further.

Most IPAs are governmental bodies. A survey by UNCTAD showed that 80 percent of the 101 studied IPAs were linked to the government, most often to the Ministry of Economy, Industry, or Development. The other 20 percent were divided between a mix of public and private initiatives, exclusively private initiatives (around 5 percent), and other arrangements.[293]

A national IPA is often the first entity contacted by a potential investor. It serves as an intermediary between the investors and the national government. The absence of an IPA not only increases the investor's search costs but also constitutes a reason for the elimination of a potential location for investments.

A majority of IPAs carries out industry targeting.[294] IPAs focuses on industries with the largest effect on inward FDI flows, such as industries in which the host country has a comparative advantage. IPAs also look for industries where inward FDI can diversify the local economy and attract new skills and technology.

Ireland's targeting of call centers is a good example of how industry targeting by an IPA worked in attracting FDI.[295] The Industrial Development Agency (IDA) of

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[292] Zanattt et al, Investment Promotion Agencies and the World Competition for Foreign Direct Investment: A Survey of Institutional Frameworks (a response paper by OECD global forum, 2008) available at https://www.oecd.org/investment/globalforum/40408250.pdf (last visited Feb 12 2019).
[293] *Id*. at 3
[294] Loewebdahl, Henry, *A framework for FDI promotion,* 10 TRANSNATIONAL CORP., 1, 1-42 (2001). Available at https://www.investmentmap.org/docs/FDI-2547.pdf (last visited Feb 12 2019).
[295] United Nations Conference on Trade and Development, Geneva, ASIT Advisory studies, No. 17, The World of Investment Promotion at a Glance (A Survey of Investment Promotion Practices) 21(2001). Available at https://unctad.org/en/Docs/poiteipcd3.en.pdf (last visited Feb 12 2019).

Ireland, which operates as an IPA, found that call centers 1) showed a high potential to attract international mobile investment; and 2) required an operating environment that was readily available in Ireland. The IDA identified that the main costs involved in operating a call center were derived from telecommunications and labor. These are areas where Ireland has a comparative advantage that can be exploited to promote inward flow of FDI. The IDA received strong governmental support for this plan. Up to USD 5 billion has been invested in Ireland's telecommunication infrastructure over the past 15 years, making it among the most advanced in Europe. Sophisticated technology and international toll-free services were made available to and from every major business center in Europe and the US. The IDA began to actively promote the advantages that Ireland could offer internationally, particularly a modern telecommunication system and a multilingual and flexible labor force. To date, more than 60 companies have chosen Ireland as the base for their call centers in Europe. These global firms employ 6,000 people in Ireland and carry out many of their key business functions there, including handling customer inquiries, taking orders, and providing technical support etc.[296]

IIA AS A REFLECTION OF TARGETING

So far, we have found that countries exercise industry targeting through IPAs to attract FDI and liberalize trade. Can IIAs reflect these industry-targeting activities?

Reconciling investment promotion and IIA drafting are yet to be addressed in academic literature even though both activities are significantly interrelated. This issue was first raised at the APEC workshop on "Approaches to implementing

[296] *Id.*

investment commitments," held on November 7 and 8, 2017, in Beijing, China. Many academic experts and government officers from APEC countries emphasized the importance of linking investment promotion activities with the drafting of IIAs. Unfortunately, most participants expressed the view that line ministries did not cooperate and made this practically difficult. Owing to such difficulties, government officers, as individuals, arbitrarily make decisions on market opening.[297] Although they lack sufficient expertise to make such decisions on their own, they proceed anyway, in order to facilitate the IIA negotiation process. The participants suggested that receiving proper and timely support from the investment-promotion division could resolve this problem. Many argued that the IPA should send economic targeting data to the IIA negotiation team so that the team could then sort out the sectors and reflect on the information in the IIA.

Once the sectors to be targeted are sorted out, countries can incorporate information on them into their IIAs, because IIAs can open up or close down particular economic sectors. Let us assume that the negotiating country is taking a positive-list approach in drafting its IIAs. Under this approach, the negotiating party should either put "unbound" (i.e., no market opening) or "none" (i.e., market opening) for the 10 subsectors listed in the schedules of commitment. These 120 subsectors include all different sectors of the economy, such as legal, medical, construction, education, and transportation services, among others. If a country wants to host foreign investments in the call center industry, as Ireland did, it would put "none" in the telecommunications sector to open up the market in that sector. It should follow

[297] The participants drafted the agreed output paper on the last day of the workshop and the first paragraph was as follows: "1. A Key strategy for avoiding investment disputes and encouraging the retention of investment in economies to establish process which address 1) intra-governmental flows of information, 2) flows of information within government and with stakeholders 3) intra-governmental cooperation and decision-making, and 4) the timely provisions of legal advice within government."

MFN or NT rules to protect foreign investment and treat foreign investments the same way it treats domestic investments. On the other hand, if the country believes that it is not ready to open up its telecommunication industry, it would put "unbound" in the sector under the schedule and exercise its regulatory power and policy space in that sector.

If the country takes the negative-list approach, all economic sectors are presumed to comply with the text of the IIA, except for the sectors listed under the reservation list. Therefore, if the negotiating country wants to attract foreign investments in the telecommunication industry, it would liberalize the sector by omitting its mention in the reservation list. Otherwise, it would place the telecommunications industry in the reservation list to carve out its policy space.

We have found that countries exercise industry targeting through IPAs to attract FDI and liberalize trade further. Moreover, we have found that such targeting can be reflected in IIAs.

The one interesting question that remains is what the legal implications of incomplete IIAs are in this context. The following section examines a situation where the IPA sends information on the targeting sector to the negotiation team, but the team fails to conclude the main text or a reservation list accordingly.

2. MISSED OPPORTUNITIES

This section examines how different types of incomplete provisions may negatively affect the attraction of investment and trade liberalization.

Unspecified measures

Unspecified measures in a reservation list may undermine the attraction of FDI and liberalization of trade. In India's reservation list in its EPA with Japan, it carved out regulations for the cigarette and tobacco industry. However, the domestic

legislation was not specified. Unfortunately, the Industries Act of 1951 in India contains a variety of regulations[298] for several different industries. The cigarette and tobacco industry is merely one of the 38 industries listed in the schedule, among others such as the chemical, drug, food, commercial goods, and electronics industries.[299] The failure to specify articles in the Act would allow a reader of the reservation list to interpret the Industries Act, in its entirety, as being carved out of the IIA.

This broad carve-out may harm both India and Japan. India, as a host country, may lose opportunities to engage with Japanese firms. Let us imagine that the chemical industry, which is one of the 38 industries listed in the Act, is a targeted sector and is ready for market opening. India's IPAs, believing that their chemical industry is no longer an industry in its infancy state, determines that the industry is now competitive enough to host foreign investments. The chemical industry has sufficient capacity to absorb a transfer of knowledge to attract FDI and liberalize trade further. It expects Japanese investors to deliver their technical knowhow and run factories in order to produce more chemicals. It believes that foreign investment projects can support their chemical industry to boost their exports and liberalize trade further to continue economic growth.

However, due to the broad reference to the Industries Act under the reservation list, the chemical industry is entirely carved out and India reserves full discretion to exercise discriminatory measures against foreign investments. The EPA allows the Indian government to discriminate against Japanese investors and to expropriate investment infrastructure without proper compensation.

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[298] The Industries Act has several regulations that include specific ones addressing direct management, liquidation, supply, and distribution. The text of the Industrial Act is available at http://dipp.nic.in/sites/default/files/IndustriesAct_1951_11June2018.pdf (last visited October 13, 2018).
[299] *Id.* (The scheduled list is attached in the last part of the text of the Industries Act of 1951)

Japanese investors are, to some certain extent, worse off as well. Japanese investors who originally planned to invest in India's chemical industry may be discouraged by lack of protection from the EPA. The Indian government could violate either MFN or NT clauses, or both, because the Indian government has full discretion to take any discriminatory measures against the chemical industry. The investors neither have the rights nor the means of recourse to seek compensation against discriminatory measures or unequal treatment.

It is possible that Japanese investors may withdraw or withhold their investment projects in India if the cost of legal uncertainty is too high due to these incomplete provisions. The costs of legal uncertainty depend on the level of institutional capacity and coordination failure within the Indian ministries. For instance, due to the broad carve-out provision, Japanese investors would have to ask India's IPA if their investment projects were within the boundaries of the investment attraction area. The IPA would have to ask the Ministry of Industry what domestic law actually falls under India's reservation list in determine the exact boundaries of India's regulatory power. All these processes may require tremendous time and effort, which could impede Japanese investors' abilities to develop timely and proper investment projects.

Interestingly, this broad carve-out may benefit India to some certain extent because it allows India to maintain its rights over protection measures. The benefit will depend on the degree to which India requires strong protectionism in the 38 industries listed in the schedule. The industries may still require discriminatory subsidies from the government to remain competitive enough in the international market.

All these arguments assume that India has improper domestic legal protections, and, therefore, Japanese investors would expect investor protection solely from the IIA. An IIA becomes a substitute for domestic institutions because the act of signing the IIA is, at least on behalf of one of the parties, a sign of weak institutions and inadequate substantive laws.[300] Signing the IIA is supposed to remedy deficiencies in governmental institutions and the enforcement of the rule of law. The underlying rationale is that the authorities and institutions of the developing countries that have signed the IIA to prevent themselves from acting in an arbitrary and abusive manner toward foreign investors will also avoid arbitrary and abusive actions toward their own domestic investors.

At this point, the question to be asked is how clarity in domestic measures would affect the attraction of FDI and further liberalization of trade. Theoretically, it would help Japanese investors because lesser uncertainty and ambiguity may enable them to ascertain the boundaries of India's regulatory power and predict the extent of protection. India can then attract additional FDI and attain further trade liberalization. However, the amount of additional FDI and degree of trade liberalization that would arise remains an empirical issue that depends on India's capacity to absorb the knowledge transferred, such as education, technology, characteristics of markets, and trade policies.

Missing measures

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[300] See Generally, Paul B. Stephan, *International Investment Law and Municipal Law: Substitutes or Complements?* 9 CAPITAL. MKT. L. J. 354, 354 (2014) (The article explains that international investment arbitration could function either as a substitute for domestic judicial review of governmental action or as a complement. For instance, the author argues that to complement domestic judicial review, international investment must include a review of issues of domestic law). See also Richard Chen, *Bilateral Investment Treaties and Domestic Institutional Reform.* 55 COL. J. TRANS.L. (2017) (The article argues that the BIT could be drafted to help host countries' institutional reforms). T. Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,* 25 INT'L REV. L & ECON. 1-7-23 (2005).

Singapore's reservation list in its FTA with New Zealand does not include domestic measures in three areas that it has carved out: printing and publishing, manufacture and repair of transport equipment, and power and energy.[301] The scope of the three sectors that have been carved out are vague. Does "power and energy" refer to hydroelectric, thermal, or nuclear power, or all of them? If Singapore meant to carve out all three, then an additional question arises regarding their intentions surrounding pipe companies, which provide different types of pipes for running the hydroelectric power plants. It is possible that pipe companies fall within the boundaries of the power and energy industry because piping is critical to hydroelectric plants. Similarly, paper industries may fall under the scope of the areas that are carved out because they are so intrinsically related to the printing and publishing industries.

The missing measures may harm both Singapore and New Zealand. Singapore may lose opportunities to attract FDI and liberalize trade further. In the previous case of unspecified measures, foreign investors at least know the name of the act they should refer to. However, in this instance, the investors do not even know which domestic laws fall under the carve-out. These uncertainties create an unpredictable atmosphere that may discourage the aggressive and confident investments from New Zealand investors and Singapore may face significant difficulties in attracting FDI in

[301] The Singapore's reservation list is available at https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/Singapore-FTA/CEPUpgrade-Protocol-all-chapters-and-annexes/P07A2-2-Annex-7.2.2-Limitations-of-Singapore.pdf (last visited Jan 6 2019). The reservation reads

Types of Limitation. Legal Citation	Printing & Publishing Manufacture & Repair of Transport Equipment, Power/Energy National Treatment (Article 7.4)
Description	More favourable treatment may be accorded to Singapore nationals and permanent residents in the above sectors.

specific areas. For instance, let us assume that the pipe or paper industry is ready for liberalization because the Singaporean IPA concluded that its pipe or paper industries have a comparative advantage over other industries and that Singapore has the capacity to absorb foreign investments to attract skills and transfers. However, the pipe or paper industries are substantially interconnected to other carved-out industries, and investors in the pipe or paper industry may not be able to tell whether the IIA applies to these sectors or not.

Because of no domestic measures in the reservation list, the investors absolutely have no clue as to what domestic law they should look up to. They don't know in what circumstances the Singapore government may intervene their investment project. All these uncertainties may discourage the investment from the investors.

Missing articles or missing text

Similarly, incomplete text may also impede the ability of host countries to attract FDI and liberalize trade further. For instance, in the case of missing text, host countries have not technically committed to any investment protections and foreign investors are not protected unless domestic legal protections exist. No MFN or NT clauses mean that the host countries retain full sovereign power to discriminate against foreign investors. Investors find it difficult to predict the host country's interest in opening up the market and in understanding the extent of investor protection. All these issues impede the host country's ability to attract FDI and may discourage investors from making aggressive investments.

The ASEAN–Japan FTA has a single comprehensive renegotiation clause without any articles addressing investment protection. For some ASEAN members, such as Cambodia and Myanmar, this was the first investment treaty with Japan. Countries such as Cambodia and Myanmar may have presumably had industry-

targeted sectors that were ready for market opening to attract FDI and liberalize trade further. Accordingly, Japanese investors would have planned to invest in the targeted sector. However, the missing text frustrates Cambodian, Myanmarese, and Japanese investors simultaneously.

Missing articles may also discourage foreign investors. Even if the text includes some articles addressing investment protection, like MFN or NT, other articles may affect foreign investors' decisions regarding investments. In the Australia–China FTA, the parties agreed upon many articles like the MFN and NT. However, they failed to conclude an article on expropriation, minimum standard of treatment, and prohibition on performance requirements. China may have presumably listed out several industry-targeted sectors to attract Australian investors. However, Australian investors may still lack confidence in making investments, given China's remaining unrestricted powers. China can also impose local content requirements on investors due to the absence of an article on the PPR. Trade-distorting local content requirements such as those relating to local employment, although arguably violating the intent and sprit of the GATT, are still permitted by the TRIMS under the WTO.[302]

In cases involving incomplete provisions, developing countries may lose opportunities to attract FDI and liberalize trade further, to some certain extent. Unspecified or missing measures and missing articles or texts give host countries full discretion to exercise regulatory power over specific sectors. Foreign investors may hesitate to invest in such sectors aggressively.

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[302] David Collins, Performance Requirements and Investment Incentives under International Economic Law, 82 (2015) (The author states as follows: "The WTO TRIMS controls only those performance requirements that might be of interest to an industrialized economy. Nor does it control the use of export requirements –one of the most trade distorting types of measure- except to the extent that it prohibits restrictions on quantities of exports that are tied to a proportion of local contents. This is why some IIAs tended to expand upon the TRIMS through performance requirements prohibitions of a more generalized nature.")

Again, the optimum level of incompleteness of an IIA determines the amount of lost FDI. The optimum level of incompleteness reflects a maximized ability to attract FDI from the IIA. Therefore, the amount of lost FDI equals the difference between the amount of FDI that can be expected from a respective incomplete IIA and its optimum level.

B. MISSED OPPORTUNITIES TO ESTABLISH AELP

1. IIAS AND AELP

Over the past few decades, IIAs have been considered as instruments suited to the Washington Consensus and neo-liberalist ideas.[303] The assumption behind this characterization was that foreign investment is so crucial to economic development that its flow should be facilitated through strong protection.[304] To do so, arbitrators should take an expansionary approach to, for instance, defining investments or legitimate expectation.[305] Many arbitral tribunals do not fully consider country-specific environments and stages of development.

The wisdom of this proposition is currently facing major criticism because some developing states that adopted the Washington Consensus and neo-liberal policies through investment treaties have experienced low levels of economic development.[306] Signed IIAs ultimately caused developing countries to lose their

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[303] Neo-liberalism refers to the revival of market fundamentalism in the post-Cold war period as a result of the failure of Communism system in the Soviet Union. See generally, M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law* 3 TRADE L. & DEV. 203, 210-215(2011) (The article classifies the four stages of international investment law and defines the third stage as an era with a preference for market-based solutions. The ascendancy of neo-liberalism in the 1990s led to the development of secure norms of investment protection on the ground that investment flows would be promoted through neo-liberal philosophy that came to dominate in this period. This is probably rooted in the dissolution of the Soviet Union, which signaled the end of Communism and left democracy and free-market fundamentalism as the prevailing philosophy at the end of the Cold War)

[304] Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties,* 41 HARV. INT'L. J. 469, 471(2000).

[305] See generally, M. Sornarajah, Developing Countries in the investment treaty system: A Law for need or law for greed? in International Investment Law and Development-Bridging the Gap, 60(2015).

[306] Sornarajah, Supra note 303 at 203 (The article explains how signing investment treaties resulted in an economic failure. Argentina, for instance, had signed several investment treaties including one with the US. The neo-liberal policies led to an economic crisis and thus the government used devaluation,

policy space, which in turn, substantially reduced the ability to address their economic and social needs.[307] This is because arbitral tribunals interpret many vague legal terms to restrict state policy with respect to the environment and human rights, in exchange for the protection of investors. Some even view "IIAs and development as two irreconcilable antagonists."[308] The gap cannot be bridged because of the power structure between developed and developing countries, wherein the contents of the rules benefit investors to the detriment of competing regulatory powers.[309]

Could IIAs become balanced treaties with sufficient consideration of host states' economic growth? Furthermore, could IIAs consider the policy space of developing countries as host countries to carve out AELP to further their economic growth?

The literature has already introduced various ways to carve out regulatory power of host countries. For instance, general exceptions clauses[310] and new preambular language[311] could be useful in securing policy space. The literature

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which affected foreign investors. This measure resulted in 46 claims for investment treaty violations, which incurred billions of dollars.)

[307] Schill, supra note 18, at 29.

[308] *Id.*

[309] *Id.*

[310] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1037 (2010), (The article suggests utilizing general exception clauses for securing policy space). For IIAs that incorporate general exceptions provisions based on all or portions of Article XX of the GATT, see Singapore-Australia FTA, Article 19(2003); Singapore-Japan FTA, Article 83 (2007); Singapore-Jordan BIT, Article 18 (2004), Singapore-India FTA, Article 6.11(2005); Japan-Malaysia FTA, Article 10(2005); ASEAN FTA, Article 17(2009); China-ASEAN FTA, Article 16 (2009); India-Korea FTA, Article 10.18(2009), For IIAs that incorporate general exception provisions based on all or portion of Article XIV of the GATS, see Taiwan-Panama FTA, Article 20.02(2003); Singapore-Korea FTA, Article 21.2(2005); ASEAN-Australia-New Zealand FTA, Chapter 15, Article 1-5(2009)

[311] Some preambles indicate that while investment protection and liberalization are the principle objectives of the IIA, these objectives are not an end in and of themselves that must be achieved at any cost. For instance, the preamble to the 2004 Model BIT indicates that the parties 'desire to achieve objectives in a manner consistent with the protection of health, safety, and the environments, and the promotion of internationally recognized labor rights. See also preambles to the US-Uruguay BIT(2005); Singapore-India FTA(2005); Canada-Columbia FTA(2008); Canada-Peru FTA(2009); and Australia-Chile FTA(2009); Some other preambles indicate that the treaty objective must follow in a manner in accordance with the spirit of sustainable development. For instance, Korea- Turkey FTA even included a chapter on sustainable development. See also Preambles to Panama-Taiwan FTA(2003); US-Australia FTA(2004); India-Singapore CECA(2005); US-Peru TPA(2006); China-ASEAN FTA (2009);

especially suggests using preambular language, which includes some non-investment policy objectives such as labor or environment protection. A revised expropriation article is another instrument to secure policy space and AELP.[312] While the WTO has been more adept at incorporating health or environmental concerns, modifying the expropriation provision in IIAs could secure policy space over health and environmental issues. Adding an escape clause for unforeseen external shocks, such as an essential security clause, could result in more flexibility in IIAs.[313] These clauses can cover circumstances such as internal or external security treaties, economic crises, natural disasters, etc. Recently some argue that preparing the reservation list is probably the most realistic alternative for securing policy space.[314]

The extant literature, however, has not explored whether IIAs could or should carve out AELP for host countries. The arguments found in the literature only offer various ways to secure sovereignty power, but fail to say anything about AELP and further growth. This dissertation argues that, depending on the insertion or modification of the articles or a reservation list, one could secure AELP for further growth. The following discussion illustrates how an IIA could secure AELP and how incomplete provisions in IIAs may prevent parties from achieving that objective.

2. MISSED OPPORTUNITIES

Some preambles indicate that the parties do not intend to give up their right to regulate issues relating to public interest. For instance, the India-Singapore FTA (2005) reaffirmed 'their right to regulate activities to realize their national policy objective'. See also preambles to Panama-Taiwan FTA(2003); US-Peru TPA(2006); Canada-Peru FTA (2009); China-ASEAN Investment Agreement (2009).

[312] Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 26 U.PA.J. INT'L.1, 35-53(2014).

[313] Anne van Aaken, *International Investment Law between Commitment and Flexibility: A Contract Theory*, 12 J. INT'L ECON. L. 507, 523(2009) (IIAs have an explicit escape clause for unforeseen external shocks: essential security clauses or non -precluded measures. Such clauses can cover circumstances such as exceptional threats to internal and external security, economic crisis, terrorism threats, public health emergencies, or natural disasters. The author applies contract theory to IIAs, and argues that soft terms such as these escape clauses should be inserted to avoid suboptimal treaties)

[314] Tae Jung Park, *Reservation List in International Investment Law*, 43 N.C. J. INT'L L. 1, 85 (2018).

Modifying an article or inserting a reservation list could effectively carve out AELP. For instance, a modification of PPR provision may protect an export subsidy program. Many developing countries consider export subsidy programs, such as tax incentive policies, an AELP. Korea took this approach. The Korean government passed the "Foreign Capital and Investment Law" in the 1960s to provide tax exemptions for export-oriented investors. It eliminated the ceiling on capital transfers.[315] This capital was targeted at expanding export production, which increased foreign exchange. Moreover, the government effectively bargained with transnational corporations (TNCs)[316] to establish local content requirements so that investments would be permitted only if they used local infrastructure or inputs. These requirements included hiring and training local employees, which steered the TNCs' technological knowhow toward the domestic market. Hiring requirements clearly helped address employment issues in the labor market.

Then, how to modify a PPR to secure such tax incentive policies?[317] Let's take as an example the Korea-US FTA.[318] Paragraph 1 of the Art 11.8 (Performance

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[315] Kyttak Hong, *Foreign Capital and Economic Growth in Korea*: 1970~1990, 22. J. ECON. DEV.1 79 (1997).

[316] TNCs are companies operating in two or more countries with a significant equity investment of at least 10 percent in a foreign plant, subsidiary, or affiliate. After the Second World War, many less developed countries adopted ISI as a means to initiate structural transformation. ISI effectively locked the products of many manufacturing companies from advanced industrial countries out of the market. These companies found it more difficult to export to less developed countries because ISI relied on protective tariffs to encourage domestic manufacturing. In response, many TNCs set up standalone brand plants in less developed countries with large domestic markets.

[317] David Collins & Tae Jung Park, *Interaction of Tax incentives and Performance Requirements in Bilateral Investment Treaties: Its Role in Implementing Right Institutions in Developing Countries,* 41 FORDHAM INT'L L.J. (2017) (The article describes the way in which countries can carve out subsidy programs by modifying the prohibition on the performance requirement provisions).

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ARTICLE 11.8: PERFORMANCE REQUIREMENTS

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking:

   (a) to export a given level or percentage of goods or services;
   (b) to achieve a given level or percentage of domestic content;

Requirements) restricts host countries from imposing any PR requirements listed in sections (a) through (g). Paragraph 2 prohibits a host country from imposing the PR listed in sections (a) through (d) of Paragraph 2, even if the host country provides the investor with an "advantage" in exchange for agreeing to the obligations. The text does not specifically define what "advantage" means, but an investment arbitral tribunal has stated that an advantage may include tax incentives, including tax holidays and the reduction of corporate income taxes.[319] This prohibits host country from requiring foreign investors to use domestic suppliers for a certain amount of production as indicted in section (a) or any of the other performance requirements listed in sections (b) through (d), even if the host country provide tax incentives such as tax holiday in return.

> (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
> (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
> (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
> (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
> (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

> (a) to achieve a given level or percentage of domestic content;
> (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
> (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings. […]

[319] *See* SUZY H. NIKIEMA, INT'L INST. FOR SUSTAINABLE DEV., PERFORMANCE REQUIREMENTS IN INVESTMENT TREATIES 2 (2014) (explaining that tax incentives can constitute an "advantage" under the performance requirements); *see also* Pope & Talbot Inc. v. Government of Canada, Interim Award, ¶ 73 (Arb. Trib. 2000), https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf [https://perma.cc/5E9W-DNYQ] (last visited Nov. 1, 2017) ("It is common ground between the disputing parties herein, and the Tribunal agrees, that the granting and maintaining of EB [Established Base] and/or LFB [Lower Fee Base] quotas to exporters under the provisions of the ECR [Export Control Regime] is an 'advantage' within the meaning of Article 1106(3).").

The PR listed in section (a) through (d) of Paragraph 2 are identical to those listed in section (b) through (e) of Paragraph 1. Paragraph 2 is silent on whether host country can impose the PR listed in section (a), (f), (g) of Paragraph 1 on foreign investors in exchange for tax incentives. Consequently, we can argue that this treaty allows host country to impose the PR listed in (a), (f), (g) of Paragraph 1 *as long as they provide tax incentives to foreign investors in return*, meaning that the right to establish PR is conditioned on their connection to tax incentives.

In sum, host country has full discretion to impose the PR listed in sections (a), (f), (g) of Paragraph 1 in exchange for tax incentives for foreign investors. Many other developing countries may have different types of AELP with different combination of tax incentives and PRs. Once they determine what types of tax incentives fit their local economy and identify appropriate PRs that may be lawfully attached to the incentive measures, they can arrange the elements of PPR provision and carve out their AELP.

All articles in the main text, not just the PPR provision, are potential candidates for modification to secure AELP. The expropriation article, for instance, could do this. Section VI.B.1 of this dissertation shows how Korea continuously has carved out one particular AELP, its real estate price stabilization policy,[320] from the annex of expropriation articles. Parties to an IIA could, for example, draft a MFN exemption list to carve out AELP.[321]

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[320] Jeong Ho Kim- Housing Price Hike and Price Stabilization Policy in Korea (The article reviews the seriousness of Korea's real estate price rises and the importance of real estate price stabilization policies), at http://www.kdi.re.kr/upload/7837/2_3.pdf (last visited Oct 15, 2018).

[321] See. e.g. Vietnam's MFN exemption list in ASEAN investment agreement. Available at http://investasean.asean.org/files/upload/04%20VN%20AFAS%205%20FS%20MFN.pdf (last visited Dec 17 2018).

In addition to the PPR, developing host nations frequently utilize a reservation list to protect AELP.[322] Once the host countries find a certain AELP, they can simply add it to the reservation list. In practice, developed countries also prefer developing host countries to use the reservation list because carving out policy space in the main text (e.g., modifying a scope provision) dramatically deviates from the Model BIT template. As Sec. VI.B.2 illustrates later, developing host nations seriously lack legal expertise and therefore developed countries negotiate with their model BIT templates, aiming at a high level of liberalization and seeking to persuade developing nations not to deviate from any terms of the Model BIT. Developing host nations tend to merely accept most of the terms and it is well known that most ratified IIAs have an extremely similar appearance.[323] If any deviation occurs in the main text, negotiation teams in developed countries face heavy burdens to explain the rationale for the deviation to their legislative bodies for ratification approval. Therefore, they strongly prefer to stick to the Model BIT terms. Therefore, in practice, when developing host nations want policy space, developed countries tend to recommend using the reservation list to avoid any "obvious" concession in the main text. In that way, both parties achieve their goals: a Model BIT text for developed countries and successfully carving out in the reservation list for developing host nations.

Now we can ask following question: What if a PPR article is missing? What if a reservation list is absent? Without these provisions, the parties will have difficulty carving out AELP. Leaving out a provision or a list means missing an opportunity to protect AELP. Once the parties ratify a treaty, a liberalization article such as MFN or NT may force the parties to eliminate domestic laws or programs that might implement AELP.

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[322] Park, supra note 314 at 102.
[323] Huaqun, supra note 22, at 302.

Even if the parties subject a PPR article or a reservation list to a renegotiation clause, the parties would be obligated to abandon AELP until the renegotiation is completed. In the Korea–ASEAN FTA, for instance, the NT is in a ratified text. However, the PPR and a reservation list are subject to renegotiation.[324] Since the NT is in force, the parties must suspend any export subsidy program that favors export-oriented investors until they complete the renegotiation. A similar logic would apply to any tax incentives offered by ASEAN countries to domestic or foreign exporters.

In the Australia–China FTA, the parties ratified the text with NT and MFN clauses, but delayed acting on the provision PPR and a reservation list pending a renegotiation.[325] As a result, China is obligated to withdraw export subsidies programs

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[324] A renegotiation clause in the Korea-ASEAN FTA reads.

ARTICLE 27 WORK PROGRAMME

1. The Parties shall enter into discussions on:
   (a) Article 4 (Most-Favoured-Nation Treatment);
   (b) TRIMs-plus elements to Article 6 (Performance Requirements);
   (c) Schedules of Reservations to this Agreement;
   (d) Procedures for modification of Schedules of Reservations that will apply at the date of entry into force of the Schedules of Reservations to this Agreement;
   (e) Annex on Expropriation and Compensation;
   (f) Annex on Taxation and Expropriation; and
   (g) Article 18 (Investment Dispute Settlement between a Party and an Investor of any other Party).
2. The Parties shall conclude the discussions referred to in paragraph 1, within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Implementing Committee established under Article 5.3 of the Framework Agreement.

[325] A renegotiation clause in the Australia -China FTA reads.

ARTICLE 9.9: FUTURE WORK PROGRAM

1. Unless the Parties otherwise agree, the Parties shall conduct a review of the investment legal framework between them no later than three years after the date of entry into force of this Agreement.
2. The review shall include consideration of this Chapter and the Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments.
3. Unless the Parties otherwise agree, the Parties shall commence negotiations on a comprehensive Investment Chapter, reflecting outcomes of the review referred to in paragraphs 1 and 2, immediately after such review is completed. The negotiations shall include, but are not limited to, the following:

   (a) amendments to Articles included in this Chapter;

   (b) the inclusion of additional Articles in this Chapter, including Articles addressing:
      (i) Minimum Standard of Treatment;
      (ii) Expropriation;
      (iii) Transfers;

for domestic investors or third party investors because the treaty's MFN and NT provisions are in force and have not carved out these subsidies.

So far, the section examined how a PPR provision or a reservation list could carve out AELP. Moreover, we saw how incomplete provisions of these could impede parties to establish AELP.

The argument, however, that greater specification of the limits of commitments can promote AELP holds good only under two assumptions. First, one must assume that the parties have a pre-existing conception of AELP before the negotiation phase. It is always possible that the parties will start to identify and establish AELP after the ratification process has begun. The ratification of an IIA typically requires significant domestic reforms to comply with the obligations enumerated in the text.[326] Many liberalization articles may force the parties to rework their existing rules and policies, which gives them an opportunity to devise AELP. A reform does not guarantee the implementation of AELP, but it at least can provide the parties an opportunity to frame it. The ultimate result depends on their willingness and capacity to agree on AELP. The argument presented so far assumes that AELPs are known at the time of negotiation phase, in which case an article such as PPR could effectively secure such AELPs.

Second, other types of incomplete provisions may not disadvantage the parties, but could rather help them secure their AELP. We have examined missing-article and missing-reservation-list cases only, but a missing text or unspecified/missing

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(iv) Performance Requirements;
(v) Senior Management and Board of Directors;
(vi) Investment-specific State to State Dispute Settlement; and
(vii) The application of investment protections and ISDS to services supplied through commercial presence; and […]

[326] Chen, supra note 300, at 550 (The article explains how BITs affect institutional reforms of host countries, and argues that BITs should be redesigned to focus on improving domestic institutions as the optimal means of achieving the ultimate goal of increasing FDI).

measures in a reservation list may help parties maintain their pre-existing policies. Under the China-Swiss FTA, the parties are able to maintain their pre-existing policies because they failed to conclude any articles at all. If they have currently have an export subsidy, they may continue to use it until they initiate and complete a whole new IIA negotiation. The same argument applies to unspecified or missing measures in a reservation list. For instance, India's failure to indicate the scope of the reference to the "Industrial Act" may provide India sufficient time to sort out AELP in the 38 sectors in advance of completing the renegotiation.

Likewise, the optimum level of incompleteness of an IIA determines the amount of lost AELP. As noted, the optimum level of incompleteness reflects a maximized ability to secure AELP from the IIA. Therefore, the amount of lost AELP equals the difference between the amount of AELP that can be expected from the respective incomplete IIA and its optimum level.

C. DECREASED CREDIBILITY OF IIAS

This section explains how incomplete provisions lower the credibility of IIAs, as illustrated by China's inconsistent IIAs and the India-Singapore CECA.

China's inconsistent IIAs

China's inconsistent IIAs are good examples of how incomplete IIAs become less credible to foreign investors.[327] Some of China's IIAs have a provision explaining what the reservation list is and how it works, but it has failed to attach an actual list. Investors know that China has protected industries, but do not know which trade sectors fall under the ambit of that policy. The article providing for the reservation list strongly indicates that the parties did agree to the necessity of such a list. But because

[327] Only four concluded BITs mentioned non-conforming measures in the text, and none of them actually attached the reservation list. The four IIAs are the China-Slovakia BIT, China-Swiss BIT, China-Korea-Japan Investment Agreement, and China-Canada BIT.

the list has not yet been agreed to, they cannot predict whether their investment projects will fall within the scope of China's permitted regulatory power or not. Investors might conclude that neither party is committed to ensuring strong investment protection and furthering the liberalization of trade.

The absence of a renegotiation clause undermines the credibility of the IIA in other ways as well. If China found it difficult to develop a reservation list, they could have at least inserted a renegotiation clause. However, they did not.

India's non-compliance with its obligation to renegotiate

A failure to fix incomplete provisions also reduces the credibility of the IIAs. The CECA between India and Singapore is a good example of this problem.

India signed the CECA with Singapore on June 9, 2005. The investment chapter in the CECA includes a renegotiation clause, with a view to specify the domestic measures in the reservation list. However, the parties are yet to complete their renegotiations, although more than ten years have lapsed. Similarly, India signed an EPA with Japan in 2011, and the same problem occurred. For the past five years, India has not updated the reservation list in its IIA with Japan.

Allowing measures to remain unspecified for several years leads investors to conclude that India is no longer interested in the project. Had India been fully committed to protecting investment to attract FDI, it would have actively participated in the renegotiations and would have successfully narrowed down the measures in its IIA. Its failure to do so discourages investors from investing aggressively, with a cost to India in terms of lost opportunities.

Cheap talk: Reasons for less credible IIAs

Why would China conclude self-contradictory IIAs and a nation like India fail to fulfill a promise to renegotiate with Singapore? More interestingly, why would

Japan willingly sign another incomplete IIA with India, knowing that India had failed to update its prior IIA?

This raises a question of compliance with international law.[328] According to Guzman, "3 Rs" (i.e. reputation, reciprocity, and retaliation)[329] play an important role in encouraging compliance with international law. With respect to reputation, a state that complies with international law will developed a good reputation and be regarded as a good partner, while a state that does not comply with international law will have a poor reputation and be viewed as an unreliable partner. "A state that is known to honor its commitments will find more partners when it tries to enter into future cooperative arrangement, will be able to extract more generous concessions in exchange for its promises, and will be able to solve more problems of cooperation than will a state has a less favorable reputation."[330] "Reciprocity" also encourages compliance. This is taken without the intent to sanction a violator. In response to a violation, states may withdraw their own compliance with an international agreement since once the violation takes place the agreement stops to serve their interests. This is

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[328] See generally, Andrew Guzman, *A Compliance-Based Theory of International law*, 90 CAL. L. REV. 1825, 1830 (2002) (introduces a general literature reviews on the compliance theory. He introduces managerial Model, consent and Treaties, Legitimacy Theory, and Transnational legal process); For more reference on managerial model, See Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with international regulatory agreement(1995)(author argues that the enforcement model of compliance, in which compliance is achieved through coercive mechanism such as sanctions, should be replaced with a managerial model that relies on a cooperative, problem-solving approach.); For more reference on consent and treaties, See John K. Setear, *An Iterative perspective on treaties: A Synthesis of international relations theory and international law,* HARV. INT'L L. J. 139, 156(1996)(argues that states are not subject to any obligation to which they did not consent and state's consent generates a legal obligations which leads to compliance); For more reference on Legitimacy theory, Thomas Franck, Fairness in International law and institutions (1995)(argues that states obey rule perceived to have "come into being in accordance with the right process."); For more reference on transnational legal process, Harold Hongju Koh, *Why do nations obey international law,* 106 YALE INT'L L. 1,28(1999)(the theory focuses on how public and private actors interact in both domestic and international levels, to make interpret, enforce and internalize rules of transnational law. The theory looks to wide set of decision makers to explain conduct. Author argues that transnational entities interact, patterns of behavior and norms emerge and are internalized, leading to their incorporation within the domestic legal institutions and in turn, compliance).

[329] Andrew Guzman, How international law works (A rational choice theory) 33-48 (2008) (Reciprocity and Retaliation rely on reputation in order to serve as effective enforcement mechanisms. "To be effective, the threat of a retaliatory sanction must be credible, and that credibility depends, in part, on the threatening states' reputation for punishing violators.")

[330] *Id*. at 34.

not costly to the reciprocating state. It is instead an adjustment in a state's behavior motivated by a desire to maximize the state's payoff in terms of new circumstances.[331] Unlike reciprocity, "Retaliation" is actions that are costly to the retaliating states and intended to punish the violating actor. This may include economic, diplomatic or even military sanctions. The WTO dispute resolution system is an example. When a state refuses to comply with a ruling of the WTO dispute resolution body, the complaining state is given the authority to impose sanction to encourage the violator to comply with the ruling.[332]

Based upon this, we know that 3 Rs were not sufficiently influential to motivate India to comply with the renegotiation clause. India may not have taken seriously about their reputation in the international community or the potential for retaliatory actions by Singapore.

In fact, the real reason for India's non-compliance is their unreadiness of market opening. India's negotiators in the RCEP stated that their country recognizes the global pressures for the liberalization of investment and that therefore concluded FTAs for political and economic reasons. But they are not ready to conclude a complete IIA due to ongoing legal reforms. So they conclude the IIAs to maintain their reputation and to signal to the international community that they are moving toward liberalization. Moreover, conveying to the FTA counterparts the reasons for this inability was enough to postpone the renegotiation.

In other words, their reputation in the international community was sufficient for India to initiate the FTA but was not sufficient for India to actually comply with the renegotiation clause. If the joint committee governed India's renegotiation, the committee could have threatened India by saying, "If you don't comply renegotiation

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[331] *Id.* at 33.
[332] *Id.* at 48.

of the investment chapter, we will withdraw the previously agreed concession in other chapter or take certain retaliatory measures." However, India's unreadiness, due to domestic legal reforms, was a good enough excuse for non-compliance with renegotiation and the FTA counterparts can take no further action but wait until India completes their domestic reforms.

Perhaps India's promises are a form of "cheap talk."[333] India may intend to have limited engagement with international law, but the cost of negotiating is minimal and other countries could view this behavior as cooperative.[334] As India's officer explained, the purpose of concluding the FTA is to show that they are cooperative with the international community in terms of market opening and liberalization. But at the same time, India knew that the economic and legal consequences of non-compliance (i.e., postponing renegotiation) were insignificant. An inexpensive renegotiation clause may produce this effect.[335] They simply concluded an incomplete IIA with a cheap renegotiation clause and continue to emphasize their unreadiness to their counterparts.

There are, however, other costs to this approach. Cheap talk may influence other countries' compliance with international law. Many host countries may think that postponing renegotiations for incomplete IIAs can easily be done at any time without incurring international pressure or penalties. Many international participants will begin to distrust each other and the credibility of IIAs will be seriously weakened.

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[333] "Cheap talk" was first analyzed by Vincent P. Crawford and Joel Sober, *Strategic Information Transmissions*, 50 ECONOMETRICA 1345, 1431 (1982). In the bargaining context, *see* Joseph Farrell and Robert Gibbons, *Cheap Talk Can Matter in Bargaining*, 48 J. ECON. THEORY 221 (1989).

[334] *See* Jason S. Johnston, *Communication and Courtship – Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 385 (1999); Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (2005).

[335] "*One problem with this notion is that there is no reason for states to avoid being seen as non-cooperative in relation to international law if international law has no impact on a nation's behavior. Moreover, engaging in the international law system is, in fact, expensive. Evidence suggests that international law affects a nation's behavior and encourages cooperation among countries." See Andrew* T. Guzman, How International Law Works: A Rational Choice Theory 13 (2008).

Many countries may start to include only renegotiation clauses, believing that it is a good negotiation technique for trade protectionism.

So far, this section has examined how different kinds of incomplete provisions may hinder the parties in attracting FDI and achieving trade liberalization. The section shows how incomplete provisions may prevent parties from carving out AELP for further growth. Lastly, the section identifies the risks associated with incomplete IIAs by showing that they can reduce the credibility of IIAs among members of the international community.

Then, why the parties still conclude such incomplete IIAs? The following section explores this question.

VI. REASONS FOR INCOMPLETE PROVISIONS

This section advances two reasons for incomplete IIAs: strong protectionism and lack of institutional capacity (i.e., failure in intra-government coordination and cooperation and the lack of legal and technical expertise). These substantially increase transaction costs and result in incompleteness far below the optimum level.

First, the section introduces the "infant industry argument" as a rationale for protectionism. In practice, many host countries rely on the infant industry argument to leave incomplete provisions or postpone the renegotiation process. The preference for gradual market opening by legislative bodies may encourage parties to leave provisions incomplete. Ongoing domestic legal reform is another reason why parties do not pinpoint the right domestic laws that interact with IIAs upfront.

The section also argues that a failure in coordination and cooperation among the ministries and the lack of legal expertise in the team negotiating IIAs can induce parties to leave provisions incomplete. The negotiation of IIAs requires domestic approval from different line ministries. The coordination and cooperation among these ministries heavily influences the completeness of IIAs. Moreover, the negotiation of IIAs requires legal and technical expertise in international investment law, along with a tacit knowledge of arbitration practices. The lack of such expertise can discourage parties from facilitating a proper negotiation process.

A. STRONG PROTECTIONISM

1. RATIONALE BEHIND PROTECTIONISM: THE INFANT INDUSTRY ARGUMENT

The "infant industry" argument is a major justification for protectionism.[336] It maintains that developing countries should protect new manufacturing industries

[336] Krugman et al, International Economics, Theory and Policy, 275 (10th ed. Pearson, 2015)

because industries cannot compete with well-established competitors in developed countries while still in their infancy stage.[337] Accordingly, developing countries should use tariffs or import quotas to support new industries temporarily until they become capable of competing with foreign industries. New firms cannot compete head-to-head with established firms in developed countries as the latter have superior technological knowledge of the production process, market characteristics, and their own labor markets. Protections such as import tariffs can raise the domestic price of a product and reduce foreign imports. These higher domestic prices can cover higher production costs, thereby allowing firms to remain in business. Over time, these new firms will gain the necessary management experience that can result in lower production costs for them. They will follow the same path as firms in developed countries, and while the domestic market size increases as a result of greater production, the gaps in technology will also shrink.[338]

The infant industry argument provides a theoretical basis for import-substituting industrialization(ISI), which encourages the development of the domestic industry by limiting the importation of manufactured goods. Developing countries should initially substitute previously imported simple consumer goods with goods produced domestically and then substitute a wider range of more sophisticated imported manufactured items with items produced domestically, all behind the

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[337] See Friedrich List, The national system of political economy (1841) (argues that protectionism could be justified for an economy trying to develop new manufacturing industries. It argues that countries like Great Britain, which used protectionist policies and then later tried to argue for pure free trade were "kicking away the ladder" for poor countries.) See also, Hajoon Chang, Kicking away the ladder (2002), Bad Samaritans (2007) (makes similar arguments, and updates the arguments on free trade. It argues that there has been a similar situation with developed countries being keener to promote free trade deals, once they have benefitted from protectionism. The article argues that developed countries often want to "kick away the ladder they used to develop." Developing economies are justified in promoting tariffs to develop new industries that offer long-term growth.

[338] Steven M. Suranovic, The Infant Industry Argument and Dynamic Comparative Advantage in International Trade Theory and Policy, Chap 100-4. Available at http://internationalecon.com/index.php (last visited October 13, 2018).

protection of high tariffs and quotas on these imports.[339] By doing so, the benefits of domestic industrial diversification and the ability to export protected manufactured goods generate more globally competitive domestic prices.[340]

Many scholars, however, have criticized import-substituting industrialization, claiming that it is inefficient.[341] An import quota can help an inefficient manufacturing sector survive, but it cannot guarantee that the sector will become competitive.[342] A protection period will not create a competitive manufacturing sector if there are fundamental reasons why a country lacks comparative advantage in manufacturing. It may not be simply a lack of manufacturing experience. Developing countries may lack skilled labor, entrepreneurs, and managerial competence in maintaining reliable supplies of everything from spare parts to electricity.

Rent-seeking activities are also to blame for the failure of ISI. To enforce an import quota, a government has to issue import licenses. Economic rents accrue to whoever receives these licenses. Individuals and companies incur substantial costs (e.g., lobbying) in an effort to secure import licenses. For instance, in India in the 1950s and 1960s, Indian companies were allocated the right to buy imported inputs proportionate to their installed capacity. This created an incentive to overinvest—for example, a steel company might build more boilers than required because this would give the company a larger number of import licenses—resulting in the waste of productive resources.[343]

Empirical evidence suggests that developing countries with relatively free trade policies grew more rapidly than those that followed protection policies and that

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[339] MICHAEL P. TODARO & STEPHEN C. SMITH, ECONOMIC DEVELOPMENT 621 (9th ed. 2006).
[340] *Id.*
[341] *Id.* at 629-31 (introduces various arguments for anti-import substitution policies).
[342] *Id.*
[343] Krugman et al., *supra* note 336, at 271.

the import substitution policies aggravated income inequality and unemployment rates.[344]

2. PROTECTIONIST MOTIVES: PREFERENCE OF LEGISLATIVE BODY FOR GRADUAL MARKET OPENING AND ONGOING LEGAL REFORM

A primary reason for incompleteness in an IIA is the presence of strong protectionism. In particular, many developing countries use the infant industry rationale to avoid highly liberalized IIAs. In practice, negotiators from developing countries explain their stage of economic development and emphasize the necessity of various subsidy programs to protect their industries. "Our market is not ready yet and we still need a subsidy program" is probably the most commonly heard declaration during IIA negotiations.

The Korea–Vietnam FTA negotiation is a good example of how Vietnam used the infant industry argument and concluded its missing reservation list. Vietnam wanted an additional negotiation because it wanted time to examine its domestic sectors and carefully carve out the infant industry sector in the reservation list. Vietnam did not want the "performance requirement[345] provision" (a provision that prohibits various subsidies) to affect all its economic sectors. Both parties decided to insert a renegotiation clause to postpone the drafting of the reservation list.[346]

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[344] For more references, see Francisco Rodriguez & Dani Rodrik, *Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence*, *in* 15 NBER MACROECONOMICS ANNUAL 2000 (Ben Bernanke & Kenneth S. Rogoff eds., 2001).

[345] Detailed explanations are in Section II.A.2.a.

[346] Paragraph 5, Article 9.12 (Non-conforming measures) in the investment chapter of the Korea–Vietnam FTA. The paragraph reads as follows:

> 5. The Parties shall begin negotiations on Annexes I and II immediately after the entry into force of this Agreement with a view to concluding them within one year from the date of entry into force of this Agreement:
>
> (a) Articles 9.3, 9.4, 9.9, and 9.10 shall not apply until Annexes I and II have entered into force; and
>
> (b) The Parties shall make best endeavor to reflect the most advanced level of liberalization commitments in the Schedules of their agreements on investment at the time of the...

Vietnam could maintain its subsidy program for infant industries until the renegotiations concluded because the parties agreed that Article 9.9 (performance requirement) was not applicable until the reservation list was concluded and ratified.[347]

Similarly, many other developing countries prefer to carve out various subsidy programs. They either postpone the completion of the "performance requirement" or modify the scope of the ISDS provisions to carve out performance requirement provisions. The case study of the Korea–Turkey FTA below illustrates how Turkey modified the scope of the ISDS to maintain its subsidy program.

We have examined only how negotiators from developing countries directly employ a protectionism rationale to bring about an incomplete IIA. However, protectionism can also generate incomplete IIAs indirectly, and in different ways. For instance, the legislative body may advocate a protectionism rationale and encourage the executive body to exclude certain articles in the IIAs. Moreover, a preference for gradual liberalization—through ongoing domestic legal reforms—makes it difficult for the negotiation team to identify domestic measures to complete the IIAs. These two factors—the legislative body's preference for gradual market opening and the ongoing domestic legal reforms—are described in depth below.

A) Preference of The Legislative Body for Gradual Market Opening

The legislative body also has a role to play in treaty modification and in leaving provisions incomplete. Although the literature has not touched upon this specific issue of incomplete IIA so far, scholars have been recently examining the relationship between executive and legislative bodies. One study questioned what

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[347] *Id.*

drives US legislators to grant FTA .[348] It was the first attempt to examine—both theoretically and empirically—the legislative members' voting behavior on FTA .[349] They found that a legislative member is more likely to support a FTA if his district was more export-oriented when compared to the US as a whole and the voting behavior of representatives of non-specialized constituencies depends on the degree of protectionism of the majority in Congress.[350] Others argue that "election, because of the uncertainty they create, make the ratification of international agreements by legislatures problematic. If the outcome of elections could be perfectly foreseen, then ratification would never be an issue; the executive would always anticipate the legislature's preferences correctly, and ratification would be a certainty. Because election outcomes are usually not completely foreseeable, executives during the international negotiation must guess what agreements will be acceptable to the median legislator when ratification occurs. This leads them to negotiate more protectionist agreements than otherwise."[351]

With respect to IIAs, scholars have only just begun to examine how the levels of democracy and political constraints within those levels affect the duration of the BIT ratification process.[352] These studies control for various political and legal constraints that may influence duration. These studies have revealed that the greater the number of veto players (e.g., degree of legislative body hurdles such as the number of voting threshold) in the ratification process, the longer the process will be.

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[348] Conconi et al., *Fast Track Authority and International Trade Agreements*, 4 AM. ECON. J.: ECON. POL. 146-189 (2012).
[349] For more on the Fast track authority see L. Brainard & H. Shapiro, Fast track Trade Promotion Authority, Brookings Policy Brief No. 91 (2001); Margaret M. Kim, *Trade Promotion Authority: Evaluating the Necessity of Congressional Oversight and Accountability*, 40 SETON HALL LEG. J. 317 (2016)
[350] *Id*. at 177
[351] Helen V. Milner & Peter Rosendorff, *Democratic Politics and International Trade Negotiations*, 41 J. CONFLICT RES. 117, 140 (1997).
[352] Yoram Z. Haftel & Alexander Thompson, *Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties*, 67 INT'L ORG. 355, 355 (2013).

Simply put, greater legislative "hurdles" slow the IIA ratification process down. They further find that more open and predictable political systems, particularly, those associated with democracy, stable political institutions, and a good track record of ratification, can ratify BITs more quickly. It was also found that governments with higher capacity ratify BITs more quickly. Moreover, countries that share a common language, especially those with close political ties, are able to ratify their treaties faster.[353]

This section asserts that a legislative body's protectionist motives in conjunction with its constraints on ratification may cause incomplete IIAs. Even if the acceptance of the IIA is economically desirable, politicians may remain opposed to its acceptance if it would reduce their popularity among protectionist groups and citizens. Anti-trade-liberalism politicians may pass laws to renegotiate IIAs to exclude or modify certain provisions. This is explained through a case study below.

The IIA negotiators, well aware of the protectionist motives of the legislative body, know that their legislative body will strictly scrutinize the IIA, once concluded.[354]Negotiators know that even minor changes from previously concluded IIAs may require detailed explanations and justifications in the ratification process. Thus, negotiators leave incomplete provisions. This is readily observable in practice. Many developing countries prefer leaving provisions incomplete, such as detailed ISDS provisions. In these circumstances, the negotiators firmly refuse to insert such clauses due to the legislative body's strong protectionism.

Sometimes, leaving IIAs incomplete has the opposite effect. For instance, the negotiator may prefer to insert certain terms or articles that avoid incomplete provisions due to the legislative body's scrutiny during ratification. As seen in the

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[353] *Id.* at 378.
[354] Haftel & Thompson , *supra* note 352 at 362.

Korea–Turkey FTA, Korea is extraordinarily sensitive to the real estate price stabilization policies in the expropriation article since the government regards it as AELP. Accordingly, the negotiators try their best to protect terms addressing this area, while the other party may prefer to renegotiate the expropriation article. Korean negotiators frequently tell their negotiating partners that omitting such a carve-out would mean no ratification, and emphasize that their legislative body would not ratify the IIA without the carve-out.

In sum, depending on the degree of scrutiny by the legislative body and its preferences for market liberalization as well as the current market circumstances, the level of incompleteness may shift in either direction. The Korea–US (KORUS) FTA is a good example of how the National Assembly opposed the ratification of a treaty and recommended revisions of the treaty.

Case Study: Korea–US FTA (KORUS FTA)[355]

The heated national debate over ISDS in the Investment chapter of KORUS FTA surged in 2007, when the Korean government concluded the KORUS FTA. Politicians, labor unions, industry associations, and NGOs, known for anti-American stances, organized a nation-wide coalition to jointly oppose the KORUS FTA. One politician even conducted a hunger strike in front of the National Assembly building in March 2007, to show his opposition to the KORUS FTA.[356]

The opposition, the Democratic Party, identified "10 poison pills" and recommended that they be removed from the FTA or revised through

[355] See generally, Hi Taek Shin & Liz Chung, *Korea's experience with International Investment Agreements and Investor-State Dispute Settlement,* 16 J. WORLD INVESTMENT & TRADE, 952-980 (2015).
[356] Kyung Yang Shin Mun, "Chun Jung Bae, Hunger Strike for blocking KORUS FTA" http://news.khan.co.kr/kh_news/khan_art_view.html?art_id=200703261521521 (last visited Dec 24 2018).

renegotiations.[357] Among the 10 items, three (ratchet, the negative list approach, and investor-state dispute settlement ["ISDS"]) were related to the chapter on investment. A ratchet clause prohibits countries from implementing more stringent regulatory provisions or from reverting to restrictive measures. The Democratic Party did not like this because the ratchet prohibited Korea from experimenting with its laws and regulations. They did not like the negative list approach[358] because it allows rapid liberalization that may hurt domestic industries.

ISDS was the most controversial issue of the three items.[359] Their criticism centered on the political risks.[360] The opposition argued that the ISDS mechanism constituted a serious infringement of Korean sovereignty as it would deprive the Korean judiciary of its jurisdiction over disputes. They questioned the neutrality and fairness of the arbitration procedure itself.

The incumbent government defended the ISDS provisions on the following grounds.[361] First, ISDS had become a standard feature in the global regimes of IIAs. It had already been included in more than 80 IIAs that Korea had concluded in the past. They argued that ISDS was critical in attracting FDI and in reassuring the international community that Korea had an accountable and transparent environment

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[357] Ser Myo-ja, *DP sets out its "10+2" objections to US FTA*, KOREA JOONGANG DAILY, July 20, 2011, http://mengnews.joins.com/view.aspx?aId=2939113 (last visited October 13, 2018).
[358] See detailed explanation of the negative list approach in Sec II.
[359] For more information, see Benjamin Hughes & Seung Min Lee, *What's all the fuss about? The Investor-State Dispute Resolution Provisions of the KORUS FTA*, 10 KOREA UNIV. L. REV. 161 (2011).
[360] *See e.g.*, Kim Do Hyung, "ISDS is unconstitutional and KORUS is invalid," Chamsesang (April 2007), http://www.newscham.net/news/view.php?board=news&id=39141 (last visited on October 13, 2018).
[361] "The Ministry of Foreign Affairs and Trade, KORUS FTA, it is time to wrap up," (October 2011), available at http://okfta.kita.net/board.do?method=boardView&idx=22460&pageNo=28&column=&field=&mainNum=060512&fta_type=X&menu_id=060512 (last visited on October 13, 2017).

for investment protection. They also claimed that ISDS was necessary to protect Korean investors overseas, particularly in the US.[362]

Due to the fierce opposition, the government organized a special task force consisting of legal experts and government officers in July 2006. The task force evaluated the potential risks of the ISDS objectively and affirmed the government's position that ISDS should be included in the chapter on investment.[363] The task force recommended that the government develop capacity to monitor and defend potential disputes effectively.[364]

Korea and the US finally signed the FTA on June 30, 2007, and the government submitted it to the National Assembly for ratification in June 2011. A heated national debate followed.[365]The opposition to the ISDS escalated through extensive media coverage, making the ISDS clause the most controversial clause in the entire KORUS FTA.

To facilitate ratification, the ruling Grand National Party (GNP), which favored ISDS, and President Lee Myung Bak proposed a renegotiation of the ISDS provision within three months of ratification of the KORUS.[366] However, the Democratic Party continued to oppose ratification because it wanted to exclude ISDS entirely. They asked President Lee, who was about to participate in the G-20 Meeting

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[362] In 2013, the volume of Korea's outbound investment to the US amounted to USD 5,657 million, while its inbound foreign investment from the US amounted to USD 3,525 million. For statistics on inbound and outbound investment volume.

[363] Chosun ilbo interview, "Against the ISDS? Alike closing the main gate after opening 81 slide doors," (November 2011), available at http://news.chosun.com/site/data/html_dir/2011/11/02/2011110200199.html?Dep0=twitter&d=2011110200199 (last visited on October 13, 2018).

[364] See Hyun Suk Oh, *Practical Review of Core Issues in Investor-State Arbitration in the KORUS FTA*, 37 ANAM L. REV. 873, 900 (2012).

[365] For more information, see Benjamin Hughes & Seung Min Lee, *What's all the fuss about? The Investor-State Dispute Resolution Provisions of the KORUS FTA*, 10 KOREA UNIV. L. REV. 161 (2011).

[366] Lee Ji-eun, *Doubt over ISDS revision pushes KORUS FTA toward GNP railroading*, HANKYOREH, Nov. 17, 2011, http://www.hani.co.kr/arti/english_edition/e_business/505880.html (last visited on October 13, 2017).

at the time, to secure a commitment from President Obama to exclude ISDS during the renegotiation process after a ratification of KORUS FTA.[367]

Unfortunately for the Democratic Party, during a surprise plenary session of the South Korean National Assembly on November 22, 2011, the ruling GNP pushed through the ratification of the KORUS FTA. Chaos broke out in the National Assembly. This incited strong disapproval from the opposing parties and led to the detonation of a tear gas canister by the opposition lawmaker, Kim Sun-dong.

About a month later, both ruling GNP and the Democratic Party passed a National Assembly resolution demanding that the negotiation team either remove or amend the ISDS provisions.[368] The resolution stated that the ISDS posed significant risks that would limit Korean sovereignty and argued that the provisions had to be removed, or suspended, or modified.

The Ministry of Trade, Industry and Energy accepted the resolution and started to renegotiate the ISDS provisions in November 2014.[369] Three years after the first ISDS renegotiation, both Korea and the US decided to conduct formal renegotiations of entire chapters of the KORUS FTA, including those on the ISDS provisions. On April 27, 2017, President Trump announced his intention to either renegotiate or terminate the treaty, describing it as a "one-way street." During the 2016 US presidential campaign, Donald Trump described the KORUS FTA as a "job-killing trade deal." The following year, on July 12, Ambassador Lighthizer initiated the formal renegotiation process to review the KORUS FTA by calling for a meeting

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[367] Bae Sung Jun, *Difficulties in reaching agreement on the KORUS ratification*, YTN, Nov. 1, 2011, http://www.ytn.co.kr/_ln/0101_201111010036227538 (last visited on October 13, 2018).

[368] "The National Assembly Approved the Resolution of Renegotiation on KORUS FTA," Chosun Ilbo (December 30, 2011), available at http://news.chosun.com/site/data/html_dir/2011/12/30/2011123001869.html (last visited October 13, 2018).

[369] http://www.etoday.co.kr/news/section/newsview.php?idxno=1014806 (last visited on October 13 2018).

of a joint committee that was established under Article 22.2 of the agreement.[370] On March 28, 2018, after eight months of the formal renegotiations facilitated by the joint committee, Ambassador Robert Lighthizer and Korean Minister for Trade Hyun Chong Kim announced that the two countries had reached an agreement in principle. The renegotiation covered such areas as automobiles, customs processes, and ISDS, as well as the recently imposed US steel and aluminum tariffs. This agreement made it clear that ongoing ISDS renegotiations were merged into the formal renegotiation process conducted by the joint committee.

Save for minor revisions, there were no significant modifications of the ISDS provisions.[371] For example, the parties agreed "to clarify rules aimed at ensuring 'frivolous claims are deterred' and to prevent parallel claims from being filed."[372] This renegotiated text was to be scrutinized by the Korean legislature body during ratification, on the lines of the process followed in the original version.

Although the 10 supposed "poison pills," including the ISDS, survived in the renegotiated agreement, this episode shows how a legislative body may use protectionist pressure to influence the negotiation process in drafting treaty texts to dispense with incomplete provisions and to initiate renegotiations.

B) Ongoing domestic legal reforms

Ongoing domestic legal reforms in developing countries generate additional challenges to finalizing treaties. Such reforms create problems in identifying relevant domestic measures that are to be carved out from the treaty. As stated in the

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[370] The committee "supervises the implementation of the Agreement and... seeks to resolve disputes concerning the interpretation and application of KORUS." In addition to these functions, "the joint committee may consider amendments to KORUS or make modifications to the commitments therein."

[371] Analyzing the renegotiated US-Korea Free Trade Agreement, Heritage Foundation Report, available at https://www.heritage.org/trade/report/analyzing-the-renegotiated-us-korea-free-trade-agreement-korus (last visited on October 13, 2018).

[372] Jack Caporal, "KORUS Currency Deal Will Be Non-Binding, Lays 'Groundwork' for NAFTA," Inside Trade, March 29, 2018, https://insidetrade.com/inside-us-trade/korus-currency-deal-will-be-non-binding-lays-groundwork-nafta (last visited June 6, 2018).

background section. following the failure of the Washington Consensus policies many developing countries learned that strong institutional capacities are a prerequisite for liberalization policies. They realized that reforming and establishing Appropriate Economic Legal Policies (AELP)[373] are critical for the success of further economic development.[374] For instance, while government officers, practitioners, and academic experts participate in extensive discussions to draft a reform proposal, the content and articles of the proposal change over time. They share the draft with line ministries, presidential cabinet members, various interest groups and the public for additional feedback and comments. The Ministry of Government Legislation that is responsible for reviewing the new legislative proposal examines the draft for grammar and appropriate wording, and recommends the addition, removal, or modification of certain articles or switching the order of the chapters. All these procedures require a constant modification of the draft. Once all these voices are reflected in the proposal, it goes to the legislative body for ratification and approval.

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[373] Appropriate economic and legal policies refer to institutions that are tailored to local environments or to the culture of a society. Since developing countries are different from advanced countries in that they face many constraints and challenges, institutions that performed well in the advanced countries may not work as well in developing countries. Developing countries do not require an extensive set of institutional reforms. Rather, they need to diagnose their institutional levels and find "appropriate" institutional arrangements to further their growth. By doing so, the developing countries can find their own country-specific development paths based on their institutional capacities. *See generally* DANI RODRIK, ONE ECONOMICS MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 229 (2008) (arguing that "appropriate economic and legal policies" are critical elements for developing countries to achieve further economic growth). *See also*, Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100, 100-104 (2008); DANI RODRICK, THE GLOBALIZATION PARADOX 171 (2011); JOSEPH, E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004).

[374] *See* David Trubek, *Law and Development 50 Years On*, University of Wisconsin Legal Studies Research Paper No. 1212 (October 2012), available at http://ssrn.com/abstract=2161899 (last visited Jan. 2, 2017)). *See also,* DAVID TRUBEK & ALVAROS SANTOS (EDS.), THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (2006). (This study classifies two groups of law and development scholars: those that see law as an instrument of promoting development *(law in development)* and those that see law as an end in itself and thus, pursue development reforms (*law as development)*). *See also*, Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 54 AM. J. COMP. L. (2008); Yong Shik Lee, *Call for a New Analytical Model for Law and Development*. L & DEV. REV. (2015). (The latter study establishes a foundation for the development or the analytical law and development model, or "ADM.") *See also*, MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT (2014).

Based on this, the ministries tend either to leave the section on domestic measures in the reservation list blank or to include unspecified measures and then wait for the domestic laws to be reformed and ratified completely. If the ministries do not provide a list, observers would be unable to pinpoint the exact laws that should be protected from the IIAs. The next section illustrates how China failed to complete an IIA due to ongoing legal reforms.

CASE STUDY: KOREA-CHINA FTA

Korea and China initiated FTA negotiations on May 2, 2012. After 14 rounds of negotiations over 30 months, they concluded the FTA, including a chapter on investment, on November 10, 2014. During the negotiation period, the working group focusing on the chapter on investment spent over 26 months negotiating the framework of the reservation list alone,[375] without agreeing on anything. Korea had a strong preference for the negative list approach, while China preferred the positive list approach. During the 12th round of negotiations on July 14, 2014, just a few months before the conclusion of the FTA, the parties finally agreed on the framework, and chose the negative list approach. Although they arrived at this agreement, they did not begin drafting immediately. Instead, they incorporated a renegotiation clause into the contract, promising to begin drafting the reservation list on a later date.

The extended period of time that the parties spent on the reservation list framework demonstrates how important the framework is to the negotiating parties.[376]

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[375] There are two approaches for preparing reservation lists. One is the negative list approach ("top-down" approach) which lists exceptions to the general obligation of a main text of a treaty; the other is the positive list approach ("bottom-up" approach or "GATS" approach), which lists the specific sectors to which the general obligation applies. An advantage of the positive list approach is that it gives a great level of discretion over what to include and when. Politically sensitive industries can be kept outside the scope of the agreement. The negative list approach can automatically include new types of investment, while the positive list approach cannot.

[376] In practice, negotiating the modality of the reservation list takes up two-thirds of the total negotiation period. Many negotiating countries, including China and Korea, devote meticulous care to negotiating a reservation list. The Regional Comprehensive Economic Partnership (RCEP) is another good example. It is a proposed FTA among the 10 ASEAN member states and the six states with which

In principle, both positive and negative frameworks should yield the same legal consequences as long as all domestic measures are completely addressed.

Why do developing countries prefer the positive list approach, while home states prefer the negative list approach?[377] The negative list approach aims at greater liberalization and more rapid market opening, while the positive list approach seeks to preserve regulatory power and policy space for developing countries.[378] Although, theoretically, each framework yields the same legal consequences, the negative list approach requires the parties to examine their domestic laws and regulations thoroughly to sort out the laws that have to be placed on the negative list. Otherwise, the unexamined or unlisted laws must automatically conform to the obligation of the main text of the treaty. In contrast, the parties could still maintain their regulatory power on the unexamined and unlisted domestic laws under the positive list approach, which requires the parties to include only those measures that conform to the main

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the ASEAN has existing FTAs (Australia, China, India, Japan, South Korea, and New Zealand). The RCEP negotiations were formally launched in November 2012 at the ASEAN Summit in Cambodia, and the 10th round of negotiations ended in South Korea in early October 2015. RCEP members originally agreed to conclude all the negotiations by the end of 2015, but failed to do so. They scheduled another five rounds of negotiation through the end of 2016 to conclude the process. Among the many working groups involved in the negotiations, the working group on investments showed the slowest progress. Its members simply debated the framework to list the reservations of the investment treaty for four years, without agreeing on anything.

[377] United Nations Conference on Trade and Development, *Preserving Flexibility in IIAs: The Use of Reservation, UNCTAD series on International Investment Policies for Development* 28 (2006) (The document explains that the flexibility of policy space is readily available in the positive list approach, and this is why most host developing countries prefer the positive list approach); Tomer Broude & Shai Moses, *The Behavior Dynamics of Positive and Negative Listing in Services Trade Liberalizations: A Look at the Trade in Services Agreement (TiSA) Negotiations*, in RESEARCH HANDBOOK ON TRADE IN SERVICES (Martin Roy & Pierre Sauve, eds., 2015). (This chapter uses the concept of the framing effect in behavioral economics to explain the different preferences for the modality of the reservation list. It uses the example of TiSA to illustrate how developing countries as host countries prefer the positive list approach).

[378] For more information, see OCED, *The interaction between Investment and Services Chapters in Selected Regional Trade Agreements: Chapter 4 in Understanding Concepts and Tracking Innovations* (2008) (The document introduces various arguments for why the negative list approach aims at liberalization more than does the positive list approach. For instance, when the negotiations failed to foresee the new evolving industries and exclude them from the negative list approach, such new investment areas were then subject to IIAs. To draft a complete negative list, the parties not only need to examine the existing laws but should also foresee what industries should be carved out.); *see also*, PATRICK LOW & AADITYA MATTOO, IS THERE A BETTER WAY? ALTERNATIVE APPROACHES TO LIBERALIZATION UNDER THE GATS (2001).

text. If they fail to find and insert such measures, the unlisted measures do not have to conform to the highly liberalized text.

Home countries display the opposite behavior. They prefer the negative list because they are aware of the host countries' lack of capacity. They know that all of the host countries' unexamined and unlisted measures have to conform to the highly liberalized main text, resulting in uncertain market openings for different sectors of the economy.

Throughout the Korea-China FTA negotiation, China preferred gradual market liberalization because its ongoing domestic legal reform made it extremely difficult to analyze and pinpoint their domestic laws to draft the reservation list.[379] China confessed that the IIAs it had concluded previously suffered from this missing reservation list problem. Only four concluded BITs mentioned the reservation list in the text, and none of them actually attached the reservation list.[380]

During the negotiation, China explained how its domestic environment created obstacles that hindered its ability to draft the unified reservation list. First, China's domestic law on foreign investment, the Foreign Investment Industry Guidance Catalogue (hereinafter "Catalogue"),[381] had been modified and amended frequently, making it difficult for China to sort out and transfer those domestic laws into the reservation list. The Catalogue was first published in 1995 and then amended in 1997, 2002, 2004, 2007, 2011, and 2015.[382] The Catalogue divides Chinese domestic

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[379] It is argued that domestic legal reform in China is the major hurdle keeping it from drafting the reservation list. *See* Jie Huang, *Challenges and Solutions for the China-U.S. BIT negotiations: Insights from the Recent Development of FTZs in China*, 18 J. INT'L ECON. L. 307, 309 (2015). For more information on China's legal reforms, see Monika Heymann, *International law and Settlement of Investment Disputes Relating to China*, 11 J. INT'L ECON. L. 507 (2008).

[380] The four IIAs are the China-Slovakia BIT, China-Swiss BIT, China-Korea-Japan Investment Agreement, and China-Canada BIT.

[381] The 2015 Catalogue is available at http://www.minterellison.com/files/Uploads/Documents/Publications/Alerts/Alert%20-%20China%20New%20FDI%20Catalogue%20-%20March2015.pdf (last visited October 13, 2018).

[382] Huang, *supra* note 379, at 9.

industries into three categories: "encouraged," "restricted," and "prohibited." The "encouraged" category covers industries in which foreign investments are eligible to receive benefits. The "restricted" category is for industries that are subject to government scrutiny and restrictions such as ceilings on foreign ownership. The industries under the "prohibited" category are barred from foreign investment. The problem is that the Catalogue is fundamentally different from the negative reservation list because industries that are not expressly listed in the Catalogue are not completely open to foreign investment, whereas the measures that are not listed in the negative reservation list are automatically open to foreign investment and governed by the main text of the IIA. Under the Catalogue, the "encouraged" category also includes restrictions on and prohibitions against foreign investment. For example, accounting and auditing services fall under the "encouraged" category, but are still subject to a rule requiring the chief partner to have Chinese nationality.[383] Therefore, simply transferring the "restricted" category into the reservation list does not sufficiently encapsulate all the restrictions and prohibitions, as the government would also need to comb through the "encouraged" category to find measures that should be inserted into the reservation list. China emphasized that drafting the negative list would be a burdensome task not only because of the abundance of rules and regulations listed in the Catalogue, but also because these rules and regulations are constantly being amended.

In addition, China emphasized the practical hurdles in drafting a unified reservation list arising from the differing treatment of foreign investment among different regions. Different regions in the Free Trade Zone frequently publish their own restrictions on foreign investment, and these rules often come in conflict with

[383] *See* 2015 Catalogue, *supra* note 381, at Article 318 of the encouraged category.

each other. For instance, the Shanghai and Pingtan regions have different restrictions on foreign investment in construction. The Shanghai Free Trade Zone published its restriction rules in 2013 and amended them in 2014.[384] The Pingtan Free Trade Zone published its rules in 2014.[385] Pingtan sets no limitations or restrictions on inward foreign investment in the construction sector, while Shanghai sets restrictions ranging from limiting the amount of equity shares available to foreign investors while establishing a joint venture to requiring that the majority shareholder be a Chinese person.

Ultimately, both Korea and China decided to commence the renegotiation of the reservation list no later than two years after the ratification of the FTA, indicating that they shall endeavor to conclude the renegotiations within two years from the date on which they begin.[386]

B. LACK OF INSTITUTIONAL CAPACITY

1. FAILURE IN INTRA-GOVERNMENT COORDINATION AND COOPERATION

Limited coordination and cooperation between a negotiation team and the line ministries can result in incomplete IIAs. Negotiations are conducted simultaneously at both the international (i.e., between governments) and the intra-national levels (i.e.,

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[384] *See* Shanghai negative list, available at http://www.shanghaifreetradezone.org/en/Negative_List.pdf (last visited October 13, 2018). In the June 2017 Catalogue of Industries for Guiding Foreign Investment ("2017 Catalogue") restrictions were set out for FDI in 63 economic sectors, as opposed to 93 in the 2015 Catalogue. Twenty-six of these set maximum foreign investor equity percentages in invested Chinese entities. These requirements are now to be reduced or removed for certain sectors, with details due in September 2017. Sectors currently covered by the restrictions, with potential for liberalization, are the manufacturing of automobiles, vessels, and planes, transportation services, telecommunication services, financial services, and culture and entertainment services. See https://home.kpmg.com/cn/en/home/insights/2017/08/china-tax-alert-23.html (last visited on October 13, 2017).

[385] Sun Li, *Pingtan Pilot Zone release negative list*, CHINA DAILY, June 5, 2014, http://fujian.chinadaily.com.cn/2014-06/05/content_17565017.htm (last visited on October 13, 2017).

[386] The parties set a proposed deadline for the renegotiation in the paragraph on "Timeframe" in Annex 22-A (Guidelines for Subsequent Negotiation) in the FTA. The text is available at http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf (last visited Jan 5, 2019).

between domestic entities).[387] The negotiation team gathers all the requests from various entities, including the line ministries, the legislative body, and citizens, and attempts to persuade negotiating partners as to why these requests should be reflected in the IIA. If the negotiating partner does not accept, the negotiation team repeats the domestic consulting phase.

A negotiation team leaves incomplete provisions when it fails to receive an immediate response from the line ministries. Suppose the negotiation team requests, for instance, the Ministry of Land to review the draft of an IIA and to send a reservation list on land measures, and the Ministry frequently postpones its feedback, delaying the negotiation process. The negotiation team likely has no expertise in respective areas and may have no choice but to conclude the incomplete IIA.

Line ministries may be uncooperative because the interests of the ministries are often at odds with those of the negotiation team.[388] If the team fails to persuade the negotiating partner and withdraws a certain policy carve-out requested by the line ministry, then, the ministry would rather prefer to leave incomplete provisions by postponing seeking approval.

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[387] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 427 (1988) **(** This article stated that this model considers international negotiations to consist of simultaneous negotiations at both the intra-national (i.e., domestic) and the international levels (i.e., between governments). In domestic negotiations, the chief negotiator hears the concerns of social actors and builds a coalition with them. At the international level, the chief negotiator seeks an agreement that maximizes the benefits of the states and is likely to be accepted by domestic interest groups**).**

[388] Senar, supra note 21; Bouzans; supra note 21, Bilal; supra note at 21; There is a debate as to which entity from between a ministry such as a ministry of trade (or foreign affairs) or a part of the executive office of the president is the right entity to manage trade representative offices. Many argue that developing countries should make a structured reform of the trade representative office so that it becomes an independent entity under the executive office of the president. See, for example, Gi Hong Kim, *The Change to the Trade Negotiation Agency and Negotiation Power in Korea*, 37 KOREA TRADE REV. 69 (2012), arguing that Korea's current negotiation agency under the Ministry of Trade lacks the following: (1) a mechanism through which the opinions of interested parties may be transmitted to the agency; 2) a mechanism of checks and balances between the parliament and the agency; and 3) harmonization of different opinions of governmental departments because of the absence of a horizontal decision-making process. The article ultimately argues that the Korean negotiation agency should follow the US model by establishing a "Korean Trade Representative."

Moreover, each line ministry has its own prioritized tasks, and assisting a negotiation team is not any of their primary responsibility. The primary function of the Ministry of Land is not to modify a sentence or add one more reservation to the reservation list of an IIA.

Lastly, the line ministries face difficulties in complying with all the requested tasks within the deadlines in many ongoing negotiations. For instance, they lack time to draft reservation lists because these are addressed only at the very last stage (i.e., after the main text and all of the substantive obligations of the IIA have been concluded). This burden becomes especially heavy in a multilateral negotiation format, where they have to come up with a different reservation list for each of the negotiating partners. The following case illustrates how Turkey's line ministry, the Ministry of Economy, failed to cooperate with their negotiation team.

Case Study: Korea–Turkey FTA

Korea and Turkey initiated their negotiations on April 26, 2010. After seven rounds of negotiation, they concluded the chapter on investments in their FTA on July 4, 2014. The official signing and ratification took place on February 26, 2015, and July 31, 2018, respectively.

By the very last round of negotiations, the parties had completed all the articles except the PPR provision. Both parties knew that a failure to arrive at a consensus would result in an incomplete provision and would require a renegotiation clause. Turkey was strongly opposed to inserting the PPR provisions since they were implementing various export subsidy programs for further economic growth. It believed that its export subsidy program was the AELP for continuing economic growth. In contrast, Korea was in favor of the PPR provision to protect investors from discriminatory subsidy programs. To persuade Turkey, Korea used various data and

examples to show how the excessive use of export subsidies results in long-term negative consequences for domestic markets. Korea also shared its first experience with the insertion of high-standard PPR in the KORUS FTA and emphasized that the benefits of inserting PPR would outweigh the costs.

Korea came up with an idea to use a reservation list to avoid an incomplete PPR provision. Turkey was asked to introduce an actual name and article number for the export subsidy law so that it could be inserted into the reservation list. Thus, both parties could maintain the PPR provision in the text and Turkey could secure its export subsidy law in the reservation list. While Turkey agreed, its Ministry of Economy postponed sending feedback and the list of domestic laws. Both parties resumed the discussion in the seventh round of negotiations, where Korea continued to pressure the Turkish negotiation team to come up with the measure.

Unfortunately, Turkey's Ministry of Economy failed to cooperate with its own negotiation team. They sent information on the types of export subsidies, but did not send specifics such as the actual name of or article number in the law. During the seventh round of negotiations, a chief negotiator for Turkey called the officer of the Ministry of Economy in the middle of the negotiations to request the information urgently. However, the officer repeatedly emphasized practical difficulties in identifying the appropriate laws.

The parties needed an exit plan to avoid an incomplete reservation list. At the very last stage of the seventh round, the Korean negotiation team came up with a creative solution. In exchange for inserting the standard PPR provisions in the text, Korea offered to create a new article, namely "Article 1.17: Investor-State Dispute Settlement" under "Section C: Settlement of Disputes between Investor and the

Disputing Party."[389] This article describes the scope of the ISDS provision and lists the articles that should be subject to the ISDS. The parties carved out paragraphs 2(a)–(c) and 3 of 1.8 (Performance Requirement) by including "paragraphs 1[390] and 2[391](d) of 1.8 (Performance Requirements)." Apparently, the carved out provisions are the types of export subsidy that Turkey's Ministry of Economy wanted to carve out. Turkey would be able to condition the receipt, or continued receipt, of an advantage (e.g. tax incentive) on the imposition of requirements such as: 1) achieving a given percentage of domestic content; 2) purchasing, using, or according a preference to goods produced in its territory, or purchasing goods from persons in its territory; and 3) relating the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investments.

The only information available on the export subsidy related to the types and forms of export subsidies. Turkey analyzed the types of law that constituted the provisions of 1.8 (Performance Requirement) carefully and finally teased out a

[389] Article 1.17 reads as follows:

> ARTICLE 1.17: INVESTOR-STATE DISPUTE SETTLEMENT
>
> 1. This Article applies to investment disputes between a Party and an investor of the other Party concerning an alleged breach of Articles 1.4 (National Treatment), 1.5 (Most- Favored-Nation Treatment), 1.6 (Minimum Standard of Treatment), 1.7 (Compensation for Losses), paragraphs 1 and 2(d) of 1.8 (Performance Requirements), […]

[390] Paragraph 1 of Article 1.8 prohibits imposing any requirement a) to achieve a given level of percentage of domestic content; 2) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; 3) to relate in any way the volume or value of imports to the volume of value of exports or to the amount of foreign exchange inflows associated with such investment; d) to restrict sale of goods in its territory that such investment produces by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; e) to export a given level or percentage of goods; f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or g) to supply to a specific regional market or to the world market exclusively from its territory, one or more of the goods that such investment produces. See the text available at http://www.fta.go.kr/webmodule/_PSD_FTA/tr/1/13_Agreement_on_Investment_Annexes_eg.pdf (last visited Jan 6 2019).

[391] Paragraph 2 of Art 1.8 prohibits the parties from conditioning the receipt or continued receipt of an advantage on compliance with sections a), b), c), or d) of paragraph 1 of Art 1.8.

precise carve-out provision from 1.8. The treaty was completed because of both parties' creative ideas and enthusiastic efforts to avoid incomplete provisions.

2. LACK OF LEGAL AND TECHNICAL EXPERTISE

The lack of legal and technical expertise also results in incomplete IIAs. Most home countries negotiate with a Model BIT template, aiming at a high level of investment liberalization. They seek to dissuade host countries from deviating from the terms of the model but the host countries, for their part, often lack the legal competence required to modify the terms of a Model BIT.[392]

The fact that expert negotiators from home countries frequently hold Q&A sessions in conjunction with the main negotiations illustrates the dramatic inequality in legal expertise between home and host countries. The Q&A sessions typically cover the meanings of provisions or articles and the consequences of adopting them.

In this context, host countries struggle to reach a consensus on the articles of the IIAs because they are ignorant of the legal consequences of the articles and are not aware of how those articles would interact with their domestic institutions and markets. For instance, negotiating an expropriation article requires thorough knowledge of concepts such as the "Hull formula" and "commercially reasonable rates." However, many host nation negotiation teams lack such knowledge and, as a result, reach agreements on only a few articles and end up concluding incomplete IIAs.

ISDS is another example. Host countries lack legal expertise in ISDS provisions and tackle billion dollar claims because they have little or no experience in

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[392] Lei Cai, Where Does China Stand? The Evolving National Treatment Standard in BITs, 13 J. World Investment & Trade, 373, 384 (2012) (states how developing countries accept BITs when they have low bargaining power.). *See also*, Huaqun, *supra* note 22, 302.

managing ISDS proceedings.[393] They may want to face their first few investor-state disputes before negotiating the terms so that they can accumulate expertise from ISDS proceedings and then draft their preferred ISDS articles.

As a result of these difficulties, they prefer to conclude IIAs similar those they have previously concluded. Negotiators simply copy and paste the treaty from the previously concluded text because they have no expertise in modifying the terms.[394] They know that any modification would mean facing the domestic hurdles of explaining and justifying the rationale behind the modification to the legislative body and the public.

Among many factors, job turnover[395] is a major reason for low expertise. Many host countries' treaty negotiators serve only one or two years before leaving their positions, which is not sufficient to accumulate the expertise needed. Worse, negotiators also fail to transfer their expertise related to specific negotiations to their successors, making it difficult for their successors to grasp the settings of ongoing negotiations fully.

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[393] Lauge N. Skovgaard Poulson, Bounded Rationality and the Diffusion of Modern Investment Treaties, 58 INT'L STUD. Q. 1, 12 (2014) (The article argues that developing countries adopted BITs because they were presented with these BITs by developed countries. They included all the readily available policies to attract FDI. This is because developing countries overestimated the economic benefits of BITs irrationally and ignored the costs. They finally realized the costs when they saw their first ISDS claims).

[394] Huaqun, *supra* note 22 at 302, (This article stated that BITs looked remarkably similar across countries. This similarity, based on the "innate" priority of developed countries, also reflects the historically weak and passive position of developing countries as contracting parties in IIAs. Additionally, the author explains why the US does not deviate from the terms of the model BIT in the following words: "1) if a potential BIT partner were unwilling to accept the substance of the agreement as proposed, then the USA did not regard that country as having the foreign investment policy that the BITs were intended to reflect; 2) any substantive concession raised the risk that future BIT partners would demand the same concession; 3) to compromise on a longstanding principle could even be counterproductive, resulting in a less favorable situation than if no BIT at all had been concluded; 4) if the concessions were mistakenly interpreted as a clarification of the model rather than a concession, it risked undermining the strength of the BITs already concluded.").

[395] Errikson & Ortega, The adoption of job rotation: Testing the theories, 59 IND. LAB. REL. REV. 653. 653 (2006) .

The lack of human resources is another factor. Many countries lack the ability to hire legal counsel.[396] The domestic non-governmental sector pool that could potentially be used to supplement the governmental pool may itself be limited to only a few academics, industry lawyers, and economists.[397] On the other hand, developed countries tend to have a deep and sophisticated pool of technical experts from the government, academia, and the legal profession who can be called upon to provide technical support and advice for the country's trade negotiators. In these developed countries, the trade negotiators themselves often tend to be specialists, or have had some special training in trade and economic law and policy. Developed countries can also assign relatively larger teams to handle negotiations than most developing countries.[398]

The following case study illustrates how the lack of legal expertise in host countries causes incomplete provisions.

Case Study: India–Japan EPA

The reservation list in the India–Japan EPA demonstrates India's lack of legal and technical expertise in drafting such a list. India did successfully carve out state government and local government measures. However,[399] the "measure" section

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[396] For more information on the lack of human resources in host developing countries, see Office of the Chairman of the Group of 77 New York, *Strengthening Developing Countries' Capacity for Trade Negotiations: Matching Technical Assistance to Negotiating Capacity Constraint*s, Background Paper prepared by the South Centre (2004), available at http://www.g77.org/doha/Doha-BP04%20-Strengthening_Southern_trade-related_negotiating_capacity.pdf (last visited Jan. 6 2019).
[397] *Id.* at 6.
[398] *Id.* at 7.

[399] The reservation in the EPA reads as follows:

Sector:	All Sectors
Sub-Sector:	
Industry Classification:	
Type of Reservation:	National Treatment (Article 85) Most-Favoured-Nation Treatment (Article 86) Prohibition of Performance Requirement (Article 89)
Measures:	Article 73 of the Constitution of India read with Article 246 of the Constitution of India

included two articles—Articles 73 and 246 of the Constitution of India—which did not correspond to the "description" on the reservation list.[400] Article 73 lists executive powers including the treaty-making power and Article 246 lists the legislative power to make laws in general.[401]

India placed two articles of the Constitution on the reservation list—as it did on every single reservation list in the Japan–India EPA–because they did not have a complete grasp of what was required for drafting the reservation list. The "measure" section should include a specific domestic law that reflects the respective carve-out accurately. Therefore, the laws or regulations listed in the "measures" section should correspond to the "description" section of the reservation list. However, India put two articles of the Constitution that lack any direct relation to the contents of the carve-out on the list.

This became an issue between a Korean and an Indian negotiator in the sixth round of the RCEP negotiations held in India from December 1 to 4, 2014. India's IIA negotiator requested an informal Q&A session from Korea's negotiator regarding the detailed process for drafting the reservation list. This was a few years after India had ratified the CEPA (2009) and EPA (2011) with many incomplete reservation lists. The Indian negotiator did not know that the "measure" section should include laws that reflect the "description" section of the reservation list for transparency purposes.

	Any existing or current regulations or measures in force on. the date of entry of this Agreement.
Description:	
	Any existing measures framed by the state governments/Union territories/local governments are not subject to either National Treatment, Most-Favoured-Nation Treatment or Prohibition of Performance Requirement obligations derived from the Articles in Chapter 8.

[400] See INDIA CONST. (1950), available at http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf (last visited at February 11, 2017).
[401] *Id.*

She wrongly believed that she could include any list of domestic laws in the "measure" section that had any relation to the carve-out. This incorrect assumption was why India included the constitutional articles in the reservation list.

Several other host countries have also placed unrelated laws under the "measure" section in their reservation lists. In Q&A sessions, many ASEAN negotiators have asked for the exact measures that should be placed under domestic measures. For instance, the Philippines placed a single constitutional provision—Article 12—under its reservation list, specifically under the category "utilization of maritime resources," just like India.[402] The reservation list in question placed a maximum limit of 40% foreign equity on corporations, associations, or partnerships wishing to engage in deep-sea fishing agreements with the government of the Philippines, which was not stipulated under Article 12 of the Constitution.[403]

Some negotiators list several unspecified domestic laws under the "measure" section laboring under the belief that all those laws are, to some extent, related to the reservation. In the above EPA between Japan and India, for example, not only did India insert a constitutional provision into every reservation list, but they also added

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[402] The Philippines' reservation list reads as follows:

Sector:	Fisheries
Sub-Sector:	Utilization of Marine Resource
Industry Classification:	
Type of Reservation:	National Treatment (Article 89)
Measures:	The Constitution of the Republic of the Philippines, Article XII
Description:	1. No foreign participation is allowed for small-scale utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zones. 2. For deep-sea fishing, corporations, associations or partnerships with maximum 40 percent foreign equity can enter into co- production, joint venture or production sharing agreement with the Philippine Government.

[403] Article 12 (National Economy and Patrimony) generally describes nationality requirements in the context of various industries. The text is available at http://www.gov.ph/constitutions/1987-constitution/ (last visited March 24, 2017).

various domestic laws in each case hoping that they were related to the carve-out. One carve-out in the financial area stipulated 14 domestic laws on the reservation list,[404] which the Indian negotiators believed were indirectly related to the finance industry.

Similarly, in the Australia and Singapore FTA, the Singaporean negotiator also listed five domestic laws under their reservation list, namely the Insurance Act, Banking Act, Finance Company Act, Monetary Authority of Singapore Act, and Securities and Futures Act. The negotiator did this to prohibit their financial institutions from extending Singapore dollar credit facilities to non-resident financial entities to avoid currency speculation.[405] In the Q&A session, Singaporean negotiators stated that it was their routine practice to place a series of related laws to make sure the policy was well carved out.

To resolve a situation of this sort, Korean negotiators and other home countries' negotiators frequently emphasize the negative consequences of such routine practices. They emphasize that these practices reduce the transparency and predictability of domestic law, thereby making it difficult for investors to both identify the permissible boundaries of investment targets.

So far, this section explained two reasons for incomplete IIAs: strong protectionism and lack of institutional capacity (i.e., failure in intra-government coordination and cooperation and the lack of legal and technical expertise). The section introduced the "infant industry argument" as a rationale for protectionism and showed how countries rely on the infant industry argument to leave incomplete provisions or postpone the renegotiation process. The preference for gradual market

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[404] The reservation list is about the central government's policy space in foreign exchange. The text is available at https://www.mofa.go.jp/region/asia-paci/india/epa201102/pdfs/ijcepa_x08_e.pdf (last visited Jan 6, 2019).

[405] The reservation list in the Australia-Singapore FTA is available at https://dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default.aspx (last visited Dec 24, 2018).

opening by legislative bodies and ongoing domestic legal reform are another reason for leaving incomplete IIA.

The section also argues that a failure in coordination and cooperation among the ministries and the lack of legal expertise in the team negotiating IIAs can induce parties to leave incomplete IIA. The negotiation of IIAs requires domestic approval from different line ministries and the failure of cooperation among these ministries induce the parties to leave incomplete IIA. Moreover, the negotiation of IIAs requires legal and technical expertise in international investment law, along with a tacit knowledge of arbitration practices. The lack of such expertise can discourage parties from facilitating a proper negotiation process. The following section will offer various solutions to these incomplete IIAs.

VII. SOLUTIONS TO INCOMPLETE PROVISIONS

This section introduces both legal and institutional remedies to tackle the problem of incomplete IIAs. The section starts by detailing the determinants of the choice between a renegotiation clause and a side letter, and then examines the detailed procedures involved in and the logic underlying each device. The section ends by suggesting institutional remedies to address failure in the coordination of line ministries and the lack of legal and technical expertise. The suggested remedies could substantially reduce transaction costs and achieve greater completeness, moving toward the optimum level of incompleteness.

A. LEGAL REMEDIES

1. A CHOICE BETWEEN A SIDE LETTER AND A RENEGOTIATION CLAUSE

Parties can resolve an incomplete IIA either in the domestic implementation phase (i.e., after the conclusion and before the official signing of an IIA) by exchanging a side letter,[406] or after ratification through a renegotiation clause.

The US and Singapore, for instance, used a side letter to complete their IIA.[407] The negotiation of the US-Singapore FTA was concluded on January 16, 2003, with the official signing taking place on May 6, 2003. The article in the concluded chapter on investment stated that both the US and Singapore would exchange letters to

[406] The Plot, "Legal scrubbing or renegotiation? A text-as-data analysis of how the EU smuggled an investment court into its trade agreement with Canada" (The article shows that the concluded treaties were negotiated in the domestic implementation phase. In the case of the CETA investment chapter, the article found that the text released at the end of negotiations in 2014 and the version that came out of legal scrubbing in February 2016 diverged by 19%. A vast majority of changes consisted of material alterations of the treaty text – a de facto renegotiation.) http://www.the-plot.org/2016/03/24/legal-scrubbing-or-renegotiation/ (Last visited July 30, 2018).

[407] The article in the US-Singapore FTA reads as follows:

> Article 15.26: Status of Letter Exchanges.
> The following letters exchanged […]
> (a) Customary International Law;
> (b) Expropriation;
> (c) Land Expropriation; and
> (d) Appellate Mechanism
> shall form an integral part of the Agreement.

resolve the following four missing articles: customary international law, expropriation, land expropriation, and appellate mechanism. Each of the letters exchanged subsequently stated that the parties had agreed on the contents of the letter during their negotiations and that the letters would each become an integral part of the IIA.[408] On the other hand, Hong Kong and the ASEAN inserted a renegotiation clause to complete their IIA.[409] The parties failed to conclude a schedule of reservations, an article on expropriation and compensation, a definition of "natural person of a party," and the Articles on the Settlement of Investment Disputes. The parties were obliged to renegotiate these listed articles and the reservation list once the IIA was ratified.

Many factors affect the choice between a letter exchange and a formal renegotiation. One factor is the host countries' market environment and readiness for the liberalization of investment. If a host country is ready to receive foreign investments, it is best to reduce incomplete provisions during the main negotiation phase by inserting highly liberalized articles. However, if a country believes that it needs more time, then the renegotiation phase may be preferable to reduce the incomplete provisions. There are other institutional reasons why host countries may

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[408] The four letters can be found at https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text (last visited August 01, 2018).

[409] Article 22 (Work Programme) of the Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations reads as follows:

Article 22 Work Programme

1. The Parties shall enter into discussions on:
   (a) Annex 1 (Schedules of Reservations);
   (b) procedures for the modification of Annex 1 (Schedules of Reservations);
   (c) the application of Article 10 (Expropriation and Compensation) to taxation measures that constitute expropriation;
   (d) the definition of "natural person of a Party"; and
   (e) Article 20 (Settlement of Investment Disputes between a Party and an Investor).
2. The Parties shall conclude the discussions referred to in paragraph 1 within one year of the date of entry into force of this Agreement under paragraph 1 or 2 of Article 26 (Entry into Force), unless otherwise agreed by the Parties. The discussions shall be overseen by the AHKFTA Joint Committee.
3. Annex 1 (Schedules of Reservations) shall enter into force on a date to be agreed by the Parties.
4. Article 3 (National Treatment) and Article 4 (Most- Favoured-Nation Treatment) shall not apply until

Annex 1 (Schedules of Reservations) enters into force in accordance with paragraph 3.

choose different timelines. For instance, host countries may leave a provision incomplete due to the lack of legal expertise in the negotiation team or the collapse of intra-governmental coordination and cooperation. In these instances, a domestic implementation phase may provide host countries with extra time to acquire the appropriate legal and technical expertise, and to allow their line ministries to analyze the domestic market and prepare for the completion of the treaty. If the intragovernmental disputes are too entrenched or the legal expertise of the negotiation team is too weak, however, the renegotiation process may present the better option.

In fact, the parties' choices are determined by the transaction costs. If today's transaction costs are low or tomorrow's transaction costs are expected to be high, the parties are more likely to use the letter exchange in the domestic implementation phase. On the other hand, if today's transaction costs are high or tomorrow's transaction costs are expected to be low, the parties will likely prefer a formal renegotiation after ratification of the treaty.

This section explains the background of and administrative procedure involved in each process of side letter and renegotiation clauses and examines the attraction of each as an option to complete the IIA.

2. AN EXCHANGE OF A "SIDE LETTER"

a) BACKGROUND

States may express their consent to be bound by an "exchange of letters or notes."[410] Article 13 of the Vienna Convention on the Law of Treaties states: "the

[410] For a definition of the exchange of letters, see United Nations Treaty Collection Glossary: Exchange of letters or notes, available at https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited Feb. 24, 2017). *See* Oliver Corten & Pierre Klein, *The Vienna Convention of Law of Treaties, a Commentary* 246-86 (Oxford, 2011) (examining the general characteristics (e.g., objective and purpose) and validity problems of exchanging letters); Oliver Dörr & Kirsten Schmalenbach, *The Vienna Convention on the Law of Treaties: A Commentary* 175-79 (Springer, 2012) (examining the negotiation history of Article

consent of states to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when 1) the instruments provide that their exchange shall have that effect; or 2) it is otherwise established that those states agreed that the exchange of instruments shall have that effect."[411]

Generally, the purpose of exchanging letters is to simplify the process of concluding a treaty. The prospect of increased flexibility and efficiency as well as immediate certainty as to the commitments entered into are the main reasons why letter exchanges are so popular.[412]

Exchanged instruments may take a variety of forms, including notes, letters, correspondences, communications, messages, or memoranda. A major characteristic of an exchanged letter is the absence of formality, although it is must be in the form of a written document.

The diplomatic practice of exchanging letters varies by country. On occasions, countries do not require separate ratification procedures. Consequently, the conclusion of a treaty is immediate and in a simplified form. However, most countries require a ratification or approval procedure for the letter to enter into force. In such cases, the exchange of instruments cannot be used as the mode of conclusion. Instead, the treaty is concluded only through ratification or an approval procedure.[413]

A treaty concluded by the exchange of instruments enters into force on the date of exchange of the instrument.[414] However, the parties can also agree to the date of the letter in advance, for this purpose, such as the date of ratification. In practice,

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13 and the legal effect of the letter); *see also*, M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Leiden: Martinus Nijoff, 2009); A. Bolintineanu, *Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention*, 68 AM. J. INT'L. L 672 (1974).

411 Article 13, The Vienna Convention of Law of Treaties.

412 Corten & Klein*, supra* note 410. at 249.

413 *Id*. at 265.

414 *See generally*, J.L. Weinstein, *Exchange of Notes*, 29 BYBIL (1952).

the instrument will contain provisions relating to its entry into force.[415] The treaty itself can provide the date on which it enters into force: on the date of the confirmative note,[416] or on the date of receipt of the confirmative note, or 15 days after the date of receipt of the confirmative note.[417] A treaty concluded by an exchange of instruments can enter into force immediately, retroactively,[418] or on a certain[419] or uncertain[420] date in the future.

In the context of IIAs, parties often use side letters for various purposes such as clarifying terms and arriving at a consensus. For instance, parties can supplement clear and concise meanings for those ambiguous terms through a letter, as seen in the KORUS FTA side letter.[421] The letter confirmed that the term "tangible or intangible property right" used in paragraph 1 of Annex 11-B (Expropriation) in the chapter on investment included rights under the contract and all other property rights in an investment context, as defined in Article 11.20 (Definition) of the chapter on

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[415] H. Blix, *The Requirement of Ratification*, BYBIL 366 (1953) (The article found that the League of Nations Treaties Series contained 4,831 treaties, of which 1,078 were concluded by the exchange of letters. Blix argued that 75 letters (i.e., only 6.9%) did not contain any ratification provisions. That is, the majority of the treaties were concluded with ratification provisions.)

[416] See the exchange of notes dated July 30, 1982 and December 10, 1982, constituting an agreement between the US and Israel, relating to the general security of military information (2001 UNTS 4-11).

[417] See the exchange of notes dated April 19, 1996, and October 6, 1997, constituting an agreement between Austria and the Netherlands concerning the legal status of Austrian employees at the Europol Drugs United (1998 UNTS 80-1).

[418] See the exchange of notes of March 17 and 25, 1949, constituting an agreement between the United States and Peru superseding the Agreement of March 9 and August 4, 1944, relating to a cooperative programme for anthropological research and investigation in Peru (89 UNTS 12-22).

[419] See, for example, the exchange of notes dated December 18, 1996, constituting an agreement between Latvia and Denmark on the readmission of persons entering a country and residing there without authorization (1999 UNTS 388-94).

[420] See, for example, the exchange of notes dated December 16, 1996, constituting an agreement between Spain and Bulgaria on the abolition of visas for holders of diplomatic passports (1996 UNTS 36-7 and 42).

[421] The side letter in the KORUS FTA reads as follows:

> June 30, 2007
> […]For purposes of the Agreement, the term "tangible or intangible property right" in paragraph 1 of Annex 11-B (Expropriation) includes rights under contract and all other property rights in an investment, as that term is defined in Article 11.28 (Definitions).
> […]
> Sincerely,

investment. The letter also states that the parties had a mutual understanding of the meaning of the term during the main negotiation. In other words, the parties, having already reached a consensus on the meaning of the term in the negotiation, decided to exchange the letter to legalize the consensus. Accordingly, this letter constituted an integral part of the FTA.

In the KORUS FTA, the parties decided to exchange letters between the conclusion of the main text and the official signing the FTA. The parties concluded the IIA on March 2, 2007, and organized two additional meetings before the signing. First, they conducted a legal scrubbing process for ten days between May 29 and June 6, 2007, in Washington DC. They held another meeting on June 21-22, 2007, in Seoul, Korea, officially signing the FTA on June 30, 2007. In both meetings, the parties agreed to clarify the term "tangible or intangible property right" by exchanging letters. Letters then were exchanged on June 30, 2007, when the parties officially signed the FTA. Five years later, on March 15, 2012, the KORUS FTA was ratified. The letters were ratified along with the rest of the agreement and thus were incorporated into it.[422]

b) PROCEDURE FOLLOWED IN EXCHANGING SIDE LETTERS

This section addresses the processes by which parties can use side letters to reach agreement after the conclusion of a treaty. Certain types of communication, including informal means such as email, conference calls, or in-person conversations, are used routinely, with the selected type often depending on the level of incompleteness of the IIA. For example, if most of the form and substance of the matter is completed during the main negotiation process, then conference calls or

[422] The KORUS FTA was ratified on March 15, 2012. For more information on the detailed implementation process of the KORUS FTA, see http://www.fta.go.kr/us/info/2/ (last visited July 23, 2018).

email exchanges addressing minor leftover terms can be sufficient to arrive at an agreement. However, if the parties fail to reach a consensus on most of the form and substance of the missing articles, in-person communication is preferred. This can take place in various settings, including the legal scrubbing phase and parallel negotiations in an ongoing PTA.

The legal scrubbing phase typically involves the parties meeting to edit the text of their agreement. However, their work on the text need not be limited to merely editing the grammar and sentence flow. They can use this time as an informal renegotiation to discuss the incomplete terms in the treaty. The parties even can add an entirely new article that the main negotiations did not address. Simply put, the legal scrubbing phase can be considered an additional round of primary negotiations.

Many countries rely on legal scrubbing to modify the text of their treaties in ways that significantly affect the rights and obligations of all parties involved. For instance, a TPP member was recently criticized for changing the term "paragraph" to "subparagraph" in the chapter on intellectual property during a legal scrubbing phase without subsequently updating the text on the treaty's webpage. The changed term dramatically broadened the criminal penalties for copyright infringement, which the public failed to recognize.[423]

Ongoing multilateral PTAs present opportunities for the parties to complete previously concluded bilateral agreements. Given that bilateral and multilateral PTAs are often conducted simultaneously, parties can discuss incomplete provisions in previously concluded treaties during their ongoing multilateral negotiation. This happens so frequently that it is common to meet the same counterparty negotiators in

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[423] *Quiet "legal scrub" of TPP makes massive change to penalties for copyright infringement without telling anyone*, TECH DIRT (February 18, 2016, 9:29 AM), https://www.techdirt.com/articles/20160217/18172633627/quiet-legal-scrub-tpp-makes-massive-change-to-penalties-copyright-infringement-without-telling-anyone.shtml (last visited July 11, 2018).

different contexts. In the RCEP negotiations, many countries, including Australia and China (participating members in the RCEP), met frequently in private to discuss incomplete provisions of their previously concluded bilateral PTAs. Such informal meetings help the parties address leftover issues, and, in turn can result in an exchange of letters.

One question that arises is why a consensus becomes easier to arrive at during a shorter domestic implementation period rather than during the main negotiation period. More succinctly, the question is how all the obstacles that hindered the main negotiations can be overcome so easily through the exchange of letters.

The parties reach a consensus during the domestic implementation phase because they know that it is the last opportunity to complete their IIA before ratification. During the main negotiations, the parties know that they have other opportunities, particularly in the domestic implementation phase, to complete their IIA. Thus, they tend to keep their options open until the end. However, once the negotiation is concluded, the atmosphere around their negotiation process changes. The parties know that a lack of consensus in domestic implementation directly results in a costly renegotiation process, including substantial administrative costs. Therefore, both parties do their best to arrive at a consensus before the treaty is officially signed. If most substantive issues were already discussed in the main negotiation, as it happens in many cases, the parties can quickly exchange letters to complete their IIAs. If incomplete provisions arise from the institutional factors discussed above, the parties may begin to push their line ministries for more timely feedback or hire expensive foreign law firms to compensate their lack of legal expertise.

c) ADVANTAGES OF A SIDE LETTER

Cost efficiency

Exchanging letters is a cost-effective way to reduce the number of incomplete provisions because it lowers transaction costs.[424] The costs associated with exchanging letters are substantially less than proceeding with a formal renegotiation process. E-mailing, conference calls, and in-person meetings are all less expensive in comparison with the costs of establishing a formal joint committee to govern the formal renegotiation process.

The administrative and reporting requirements applicable to a formal renegotiation do not constrain an exchange of letters. Public hearing requirements from media and the legislative body only apply at the time that negotiations are launched. All communication between governments in the domestic implementation process is likely to be confidential. Parties consider domestic implementation as a continuation of the negotiation process, and the exchange of letters occurs within the boundaries of completing the negotiation process.

Internal reporting requirements may exist but are not as extensive as those that apply to a formal renegotiation process. In Korea, the director of a working group on investments needs a confirmation and approval from his/her superior, including the Director-General, Deputy Minister, and Minister for Trade. The minister knows that he/she must sign his/her name on the letter in addition to the main treaty text at the

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[424] Williamson, supra note 249, at 15-32 (Williamson refined the concept of transaction costs. According to him, transaction costs are the costs of negotiating a contract *ex-ante* and monitoring it *ex-post* as opposed to production costs, which are the costs of enacting the contract. To be specific, *ex-post* costs include: "(1) the maladaption costs incurred when transactions drift out of alignment.... (2) the haggling costs incurred if bilateral efforts are made to correct *ex post* misalignments, (3) the setup and running costs associated with the governance structures (often not the courts) to which disputes are referred, and (4) the bonding costs of effecting secure commitments." This view is accepted by many economists, and now, the concept of transaction costs encompasses all the impediments to bargaining, including: 1) search costs; 2) bargaining costs; and 3) enforcement costs. Search costs are required for determining whether one's preferred goods or negotiating partners are available in the market or not. Bargaining costs are those that require one to complete an acceptable agreement with the other negotiating parties to the transaction. The negotiation and legal expertise required for drafting an agreement could be an example of bargaining cost. Enforcement costs are the costs incurred in making sure that the other negotiating partners stick to the terms of the agreement. In general, enforcement costs are low when violations of the agreement are easy to observe and punishment is cheap to administer.).

official signing ceremony. However, the line ministries need not meet, as only some ministries are relevant to the letter. If the letter relates to land measures, for example, only the Ministry of Land must approve it. Once the director gets agreement from the relevant Ministry, he/she reports to the upper level officers and receives their approval.

Last, identifying a place, time, and agenda for the negotiation is not necessary. E-mail or conference calls may allow the relevant officials to stay in their offices and complete the treaty. If a face-to-face meeting is needed, ongoing PTA negotiations or legal scrubbing, which have pre-planned mandatory meetings for both parties, can be used as forums. Since a joint committee need not be established, an agenda fight never takes place. The director of the working group on investment is permitted to exchange letters without reporting to the joint committee.

Simply put, an exchange of letters is easier to carry out than a formal renegotiation process. It is efficient, however, only when the parties have already absorbed the costs associated with negotiation. Once the parties have reached a sufficient level of agreement and confidence in each other, such that they can reduce the agreement to words, the letter becomes an efficient and flexible tool for reducing the number of incomplete provisions and completing the treaty.

This point, however, does not mean that the letter cannot be used to resolve new articles that were not discussed in the primary negotiation. Legal scrubbing or participating in other PTAs may allow the parties sufficient time to discuss these matters. Parties can arrive at a consensus on many substantive questions in these informal meetings. At the same time, resolving problems based on missing text or missing reservation lists presents a challenge that requires more time and resources, as well as the active participation of line ministries. Therefore, informal communications may not work to resolve these particular forms of incompleteness in IIAs.

In the case of missing text in the ASEAN–Japan EPA, none of the articles was concluded in the IIA except for a single renegotiation clause. Given the enormity of this matter, it would have been extremely difficult for the parties to arrive at consensus without formal renegotiations. In such circumstances, renegotiation would likely be the most practical and cost-effective option as it might be cheaper for the parties to actually meet and begin filling up the IIA, especially if the parties have not already agreed on anything.

Flexibility

A letter offers an exit plan for both parties to avoid leaving an incomplete provision. Once the negotiation is concluded, the parties exchange the letter to reflect their last-minute deal. The flexible nature of the letter allows various types of deals. A letter could modify the effective date of a previously concluded article or even include a renegotiation clause. For instance, in the main negotiation of the US-Singapore FTA, the parties knew that they could not complete the four articles and so inserted an article agreeing that they will exchange letters to complete the four articles at the official signing.[425]

Interestingly, the letter modified the effective date of the previously concluded expropriation article. The parties already concluded the expropriation article in the main text, but the letter included ratifying the expropriation article three years after the ratification of the FTA. Paragraph 4 of the letter states that "Article

[425] The article in the US-Singapore FTA reads as follows:

> Article 15.26: Status of Letter Exchanges.
> The following letters exchanged this day on:
> (a) Customary International Law;
> (b) Expropriation;
> (c) Land Expropriation; and
> (d) Appellate Mechanism
> shall form an integral part of the Agreement.

15.6(Expropriation) shall not take effect until three years after the date of entry into force of the Agreement, unless prior to that time Singapore is found to be in breach of the obligation in Paragraph 1 of this letter."[426] Paragraph 1 of the letter states that "Singapore has no plans to expropriate any land of an investor of the United States or a covered investment. Singapore undertakes an obligation not to expropriate any land of U.S. investor or a covered investment for three years after the Agreement enters into force."[427] That is, unless Singapore actually expropriates the land of a US investor or a covered investment, the expropriation article will not be in force until three years after ratification of the treaty.

The letter even includes a renegotiation clause to avoid incomplete provisions. Once the parties failed to reach agreement before officially signing, the parties knew they were left with a costly renegotiation but promised to renegotiate anyway to avoid any possible postponement or delay. The letter in the Australia-China FTA is a good example. The parties failed to reach consensus before officially signing and

[426] The letter of the land expropriation reads as follows:

[…] During the negotiation of the Investment chapter of the Agreement (Chapter 15), Singapore and the United States (Collectively, the "Parties") discussed Article 15.6 (Expropriation) and the Government of Singapore's land acquisition law. Based on those discussions, I have the honor to confirm the Parties' shared understanding that:

1. Singapore has no plans to expropriate any land of an investor of the United States or a covered investment. Singapore undertake an obligation not to expropriate any land of a U.S. investor or a covered investment for three years after the Agreement enters into force.
2. There shall be recourse to the dispute settlement provisions of Chapters 15(Investment) and 20 (Administrative and Dispute Settlement) of the Agreement if an investor of the United States or the United States file a claim that Singapore has breached the obligation in paragraph 1 of this letter. If Singapore is found to be in breach of the obligation in paragraph 1 of this letter, Singapore commits to pay the fair market value of the expropriated land, as provided in Article 15.6(Expropriation)
3. Paragraph 2 of this letter shall not take effect until the date on which the first claim is filed (under Articles 15.15 (submission of a Claim to Arbitration) or 20.4(Additional Dispute Settlement Procedures)) that alleges a beach of the obligation in paragraph 1 of this letter after the Agreement enters into force.
4. In relation to expropriation by Singapore of land of an investor of the United States or a covered investment, Article 15.6(Expropriation) shall not take effect until three years after the date of entry into force of the Agreement, unless prior to that time Singapore is found to be in breach of the obligations in paragraph 1 of this letter.

I have the honor to propose that this understanding to be treated as an integral part of the Agreement.

[427] *Id.*

exchanged the letter to renegotiate after ratification of the treaty. The parties disagreed as to the application of the United Nationals Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (UN Doc A/CN.9/783) (the "UNCITRAL Transparency Rules"). Pursuant to Article 1 of the UNCITRAL Transparency Rules, the UNCITRAL Transparency Rules shall automatically apply to ISDS initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded on or after 1 April 2014, unless the parties have agreed otherwise.[428] The UNCITRAL Arbitration Rules apply to the Australia-China FTA because the FTA was concluded after 1 April 2014,[429] but the Parties agreed not to apply the UNCITRAL Transparency Rule and initiated renegotiation of the application within 12 months of the treaty ratification.[430] Simply put, the letter became a renegotiation clause to complete the treaty.

Transparency and predictability

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[428] Article 1 of the UNCITRAL Rules of Transparency reads.

> The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on. Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

[429] Australia-China FTA is concluded on 17 Nov. 2014. Available at https://dfat.gov.au/trade/agreements/in-force/chafta/negotiations/Pages/conclusion-of-chafta-negotiations.aspx (last visited Feb 09 2019).

[430] The letter in the Australia-China FTA reads as follows:

> "In connection with the signing on this date of the China-Australia Free Trade Agreement (the "Agreement"), I have the honour to confirm the following understandings reached between the delegations of Australia and China during the course of negotiations regarding Chapter 9 (Investment) of the Agreement:
>
> > The Parties shall enter into consultations within 12 months of the date of entry into force of the Agreement on the future application of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (UN Doc A/CN.9/783) (the "UNCITRAL Transparency Rules") to arbitrations initiated pursuant to Section B of Chapter 9 (Investment).
> >
> > Unless the Parties otherwise agree, the UNCITRAL Transparency Rules shall not apply to arbitrations initiated pursuant to Section B of Chapter 9 (Investment).
>
> I have the honour to propose that this letter and your letter in reply confirming that your Government shares these understandings shall constitute an integral part of the Agreement."

Side letters increase the transparency and predictability of domestic law. As noted, ongoing legal reforms or failure of inter-governmental cooperation lead to incomplete IIAs. Line ministries face difficulties identifying the reforming laws or they fail to deliver those laws in time, even if the laws are ready. However, once a negotiation is concluded, the negotiation team begins pushing their line ministries to develop feedback, including a complete version of domestic law. The letter may reflect these last-minute deals to enhance the transparency and predictability of domestic law.

In the KORUS FTA, the parties exchanged a letter stating that Korea's local alcohol act was not subject to the PPR provision.[431] The specifics of the local alcohol act had not been ready at the time of the negotiation phase. However, the line ministry successfully relayed the proper law with a detailed numbering of articles before the treaty was officially signed.

A letter in the US-Peru FTA is another example. The Peruvian line ministries finally gave feedback on the specifics of domestic law before officially signing. The letter states that nothing in the investment chapter prevents Peru from maintaining the "the underwriting by the *Instituto Nacional de Cultura* of costs associated with supervising archaeological research projects and emergency projects led by Peruvian

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[431] Side letter in KORUS FTA reads

I have the honor to confirm the following understandings reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapters Eleven (Investment) and Twelve (Cross-Border Trade in Services) of the Free Trade Agreement between our two Governments signed this day:

> […]
> (5) During the negotiations, the Parties discussed a measure that may establish requirements regarding the types and quantities of raw materials for producing liquor under the Liquors Act (Law No. 7841, Dec. 31, 2005) and its subordinate regulations. The Parties shared the understanding that such measure is not inconsistent with Article 11.8 (Performance Requirement), provided that it is applied in a manner consistent with the WTO Agreement on Trade-Related Investment Measures. […]

I have the honor to propose that this letter and your letter in reply confirming that your Government shares these understandings shall constitute an integral part of the Free Trade Agreement.

archaeologists pursuant to Resolucion *Suprema No. 004-2000-ED, Reglamento de Investigaciones Arqueologicas, Article 20.*" In the same letter, Peru also carved out the "granting of monetary prizes exclusively to Peruvian cinematographic works" and the "granting of tax credits and refunds that provide benefits for publishing activities in Peru" with the specifics of domestic law through the letter.[432]

The letter may include a detailed description of the reform schedule of domestic law, if the law is currently being reformed or revised. For instance, the side letter for the KORUS FTA set out specific commitments pertaining to the supply of express delivery services, and Korea agreed to amend its Postal Services Act to expand the exceptions to the Korean Postal Authority's monopoly over express delivery services.[433] The letter stated that the Korean government promised to reform

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[432] The letter in US-Peru FTA reads

> […] For greater certainty, nothing in Chapters Ten or Eleven prevents Peru from maintain the following. measures:
>
> (a) The underwriting by the *Instituto Nacional de Cultura* of costs associated with supervising archaeological research projects and emergency projects led by Peruvian archaeologists pursuant to Resolucion *Suprema No. 004-2000-ED, Reglamento de Investigaciones Arqueologicas, Article 20*
>
> (b) The granting of monetary prizes exclusively to Peruvian cinematographic works pursuant to *Ley N 26370, Ley de la Cinematografia Peruana, Articles 3, 11, and 12 and Decreto Supremo N, 042-95-ED, Reglamento de la Ley de la Cinematografia Peruana,* Articles 22 and 23; and
>
> (c) The granting of tax credits and refunds that provide benefits for publishing activities in Peru pursuant to *Ley N 28086, Ley de Democratizacion del Libro y de Fomento de la Lectura, Articles 17 and 18, and Decreto Supremo No, 008-2004-ED, Reglamento de la Ley de Democratizacion del Libro y de Fomento de la Lectura,* Articles 24, 25, 37 and Annex A
>
> I would be grateful if you would confirm, by an affirmative letter in response, that these understandings are shared by your government.

[433] KORUS-FTA, Annex 12-B; Exchange of Letters between US Trade Representative Susan C. Schwab and Korean Trade Minister Hyun Chong Kim, June 30, 2007. The letter reads as follows:

> "The delegation of the Republic of Korea and the United States of America discussed the regulatory reform processes that their respective governments are contemplating or currently undertaking with regard to postal services and how those processes might affect competitive express delivery services.
>
> In the context of those discussions, Korea indicated the following aspects, among others, of its postal reform plan:
>
> Korea intends to expand gradually the exceptions to the Korean Postal Authority's monopoly to increase the scope of private delivery services that are permitted and to

the current Postal Service Act within five years of the ratification of the KORUS FTA. The letter specifically detailed the process that the Korean government intended to follow in revising its Postal Services Act. It also stated that the reform would be implemented with due consideration of the prevailing domestic market conditions, while drawing from the experience of countries with postal liberalization.

The commitments detailed in the letter allowed the Korean government five additional years to establish AELP in its postal services market after the ratification of the KORUS FTA. Korea successfully revised its Postal Services Act on March 15, 2012, three months before the deadline.[434]

This letter avoided the problem of incomplete provisions because at the time of the negotiation, Korean negotiators were not able to narrow down the Postal Services Act because it was pending before a legislative body. As a result, they could not pinpoint the exact article that reflected the exceptions to the Korean Postal Authority's monopoly. Had Korea decided to place the entire Postal Services Act in the reservation list, it would have included the name of the Act without focusing on any specific article, thereby having an incomplete reservation list with missing or ambiguous measures. The detailed reform schedules enhanced transparency and the predictability of Korea's domestic laws.

> establish a scheme ensuring the independence of Korea's postal regulatory system. This will be done through amendments to the *Postal Services Act*, related laws, or their subordinate regulations.
>
> […] In determining the nature and extent of such amendments, Korea will consider various factors, including domestic market conditions, experiences of other countries with postal liberalization, and the need to ensure universal service. Korea plans to implement these amendments within the next five years. […]"
>
> In applying these reformed criteria and regulatory system, Korea will provide non-discriminatory opportunities to all postal and express delivery services suppliers in Korea.

[434] Yonggui et al., *Korea-U.S. FTA and its three years of implementation process*, 15 KOREA INST. ECON. POL. (KIEP) 1, 14 (2015).

What if the line ministries fail to deliver feedback and specifics before officially signing? To avoid a costly renegotiation or leaving an incomplete IIA, the letter may require a responsible party for incomplete provisions to complete the treaty after ratification. A side letter in the Australia-Peru FTA is a good example. The reservation list at the Regional level of government states "all existing non-conforming measures at the regional level of government" without any descriptions of domestic law.[435] The parties exchanged the letter to remedy this by requiring Australia to create the complete list within 12 months of the date of the ratification of the treaty.[436] Australian line ministries have an additional year to examine their domestic measures and complete the reservation list.

In sum, a side letter is a cheaper instrument with various advantages. Because it reflects the last-minute deal, it may possess various types of consensus, such as modifying the effective date of a previously concluded article or even functioning as a

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[435] Australia's Incomplete Reservation list reads:

Sector:	All
Obligations Concerned:	National Treatment (Article 8.4 and Article 9.3) Most-Favoured-Nation Treatment (Article 8.5 and Article 9.4) Performance Requirements (Article 8.10) Senior Management and Boards of Directors (Article 8.11) Local Presence (Article 9.6)
Level of Government:	Regional
Measures:	All existing non-conforming measures at the regional level of government.
Description:	Investment and Cross-Border Trade in Services All existing non-conforming measures at the regional level. of government.

[436] The side letter in Australia-Peru reads

> […] In the interests of greater transparency, this is to notify the Government of Peru that upon the entry into force of PAFTA, the Government of Australia will initiate a review of the existing non-conforming measures at the regional level of government in relation to Annex I-Investment and Cross-Border Trade in Services and Annex III-Financial Services of PAFTA. The Government of Australia will inform the Government of Peru of the results of this review, including a list of individual non-conforming measures at the regional level of government, within 12 months of the date of entry into force of PAFTA.
>
> I look forward to your letter in reply confirming that your Government shares this understanding.

renegotiation clause. It may include a description of the domestic law and even allow a party to work on the reservation list after ratification of the treaty to complete the IIA. The next section explains formal renegotiation.

2. THE INSERTION OF A RENEGOTIATION CLAUSE

a) BACKGROUND

A significant strand in the literature on renegotiation in international law argues that states include 'flexibility mechanism' to respond to general uncertainty about how an agreement will play out. Some studies provide a theoretical framework to explain why some treaties contain limited duration and renegotiation provisions, while others do not.[437] Other studies explore why states design flexible agreements that allow obligations to be adjusted over time, either temporarily or permanently.[438] For instance, the studies find that various uncertainties such as future domestic political demands encourage countries to design treaties that "keep future options open." A flexible agreement allows for appropriate adjustments when parties learn more about the state of the world or when they are confronted by changed circumstances.[439]

The study of renegotiation in the field of IIAs is still in an early stage. Haftel and Thompson find that the countries negotiate IIAs after learning how IIAs work, in

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[437] See Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289 289-325 (2001); Barbara Koremenos, *Contracting around International Uncertainty*, 99 AM. POL. SCI. REV. 549, 549-565 (2005) (The article emphasizes the importance of a duration clause. It points out that states negotiate the best agreements possible using information available. However, unpredictable events that are beyond states' control occur after agreements are signed. States may not even commit to an agreement if they anticipate that circumstances will alter their expected benefits. A duration clause might be helpful. Specifically, the use of a finite duration depends positively on the degree of uncertainty and the states' relative risk aversion, and negatively on the cost).

[438] See Laurence R. Helfer, *Flexibility Mechanism in International Agreements*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, Jeffrey Dunoff and Mark A. Pollack (eds.) (2012); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 581-614 (2005).

[439] *Id.*

particular through participating in investor-state dispute settlement.[440] Countries do renegotiate after learning new and relevant information such as when an investor dispute settlement reveals new information about the political and legal consequences of the concluded IIAs. Broude, Haftel and Thompson build on this work. They first categorize IIA renegotiations into three different groups: those that 1) amend old BITs, 2) add a termination clause in a new BIT to replace old BITs, and 3) substitute an old BIT with a new FTA or a multilateral trade agreement. Then, they analyze trends in the substantive provisions in IIA that are changed, asking whether renegotiating expands or contracts the amount of regulatory power states enjoy under ISDS provisions.[441] They found that a renegotiated IIA leaves states with lesser regulatory power than they enjoyed under the initial agreement.

Why do parties insert a renegotiation clause even though they could renegotiate without agreeing to do so in advance? They do this because renegotiation clauses are designed to reduce the transaction costs of renegotiation. States include them when they anticipate that parties may not want to renegotiate. The parties may face new political or economic constraints, continuing protectionism, or continuing failure of intra-governmental cooperation. Then, the parties may start to disagree on how, when, and what to renegotiate to postpone the renegotiation. In this respect, a renegotiation clause with a schedule and agenda reduces transaction costs by avoiding such unnecessary debate. Detailed analysis of the advantages of comprehensive renegotiation clause is found below.

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[440] Yoram Z. Haftel and Alexander Thompson, *When do States renegotiate Investment Agreements? The Effect of Arbitration*, 13 REV. OF INT'L ORG. 1, 1-24(2017).

[441] Broude at al, Who Cares About Regulatory Space in BITs? A Comparative International Approach in COMPARATIVE INTERNATIONAL LAW, Anthea Roberts, Pierre-Hugues Verdier, Mila Versteeg and Paul B. Stephan, eds. (Oxford Press, 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773686 (last visited Feb 14 2019).

This section introduces two types of renegotiation clauses: partial and full commitment. This dissertation, in contrast with Broude et al.'s classification, focuses on both incomplete IIAs and the burgeoning trend of including renegotiation clauses in IIAs. The dissertation does not make a case for the revision of an old treaty or for its replacement by an PTA, but rather, concerns itself with remedying incomplete chapters on investment in PTAs. The two types of renegotiation clauses that require different levels of legal obligations are as follows:

i. Partial Commitment

A partial commitment renegotiation clause has no agenda or schedules of renegotiation. As a result, it imposes few obligations, if any, on the parties.

The EU-Korea FTA[442] is a prime example of this kind of clause. In the body of the agreement, the EU and Korea agreed to review their legal investment frameworks and the investment environment before returning to negotiations at an unspecified date in the future. The clause enabled either party to undertake renegotiation to address obstacles to investment when confronted with them.

The Economic Partnership Agreement between Japan and India is another example.[443] Both governments avoided committing fully to filling in the missing

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[442] The Free Trade Agreement between Korea and the European Union was signed on October 15, 2009 and entered into force from December 13, 2015 onward. The partial commitment renegotiation clause is listed in Chapter 7 (Trade in Services, Establishment and Electronic Commerce), Available at http://www.fta.go.kr/webmodule/_PSD_FTA/eu/doc/eng/k_eu_7.pdf (last visited September 5, 2018). The partial commitment renegotiation clause reads as follows:

> ARTICLE 7.16: REVIEW OF THE INVESTMENT LEGAL FRAMEWORK
>
> 1. With a view to progressively liberalising investments, the Parties shall review the investment legal framework, the investment environment and the flow of investment between them consistently with their commitments in international agreements no later than three years after the entry into force of this Agreement and at regular intervals thereafter.
>
> 2. In the context of the review referred to in paragraph 1, the Parties shall assess any obstacles to investment that have been encountered and shall undertake negotiations to address such obstacles, with a view to deepening the provisions of this Chapter, including with respect to general principles of investment protection.

[443] The renegotiation clause in the Economic Partnership Agreement reads as follows:

> Article 90 Reservation and Exceptions
>
> […]

provisions in their reservation list, and instead agreed to use the phrase "shall endeavor" with respect to filling in the missing provisions later. This phrase merely obligates the governments to do their best to specify and narrow down the measures, without specifying the level of effort required and the schedules of renegotiation.

ii. Full commitment

The ASEAN–Australia–New Zealand FTA (AANZFTA), with its stringent requirements, is a good example of a full commitment renegotiation clause.[444] Its clause required the parties to establish a starting period and deadline for the renegotiations and an agenda for the working group on investment.[445] The three parties also used this clause to establish a working group on investments under a joint committee. Renegotiation should be completed within five years of commencement of

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5. Each Party shall endeavour, where appropriate, to reduce or eliminate the exceptions specified in its Schedules in Annexes 8 and 9 respectively.

[444] The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) was executed on February 27, 2009 and entered into force on January 1, 2010 (available at http://www.thaifta.com/engfta/Home/FTAbyCountry/tabid/53/ctl/detail/id/75/mid/480/usemastercontainer/true/Default.aspx (accessed on August 7, 2018)). The full commitment renegotiation clause reads as follows:

Article 16 Work Programme

1. The Parties shall enter into discussions on:

(a) schedules of reservations to this Chapter; and

(b) treatment of investment in services which does not qualify as commercial presence in Chapter 8 (Trade in Services).

2. The Parties shall also enter into discussions with a view to agreeing on:

(a) the application of most-favoured-nation treatment to this Chapter, including to those schedules of reservations; and

(b) procedures for the modification of schedules of reservations.

3. The Parties shall conclude the discussions referred to in Paragraphs 1 and 2 within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Investment Committee established pursuant to Article 17 (Committee on Investment).

[445] Generally, parties establish an FTA joint committee once the FTA is in force. Both parties meet and review the implementation process of the FTA. Parties follow up and check to see if the other partner is diligently complying with the obligations of the FTA. This joint committee also becomes an opportunity for the parties to renegotiate the incomplete provisions of the FTA. Since an FTA consists of more than 20 chapters, several working groups are established by the parties. Even if, for instance, a working group for the chapter on investments is successfully established, parties differ in their views as to what issues should be discussed in the working group. Sometimes, reaching a consensus on the agenda of the working group takes several meetings. This is why pre-selecting the agenda for the working group reduces the transaction costs of the treaty.

renegotiation. The term "shall enter" and "shall conclude" requires strict compliance with the schedules provided.

The Korea–ASEAN FTA is another example of a full commitment clause.[446] It set a term of five years to complete renegotiation and established a working group on investments under a joint committee. Renegotiation should be completed within five years of commencement of renegotiation. The parties used the terms "shall enter" and "shall conclude" to impose strong legal obligations on each other to initiate and complete their IIA. The clause included the following list of items for renegotiation: 1) MFN; 2) Performance requirements; 3) Schedules of the reservation list; 4) Procedures for the modification of the reservation list; 5) Annex on expropriation and compensation; 6) Taxation and expropriation; 7) Investor dispute settlement provisions.

b) RENEGOTIATION PROCEDURE

Renegotiation requires substantial transaction costs. In Korea, administrative requirements for a main negotiation also apply to a renegotiation. These are governed

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[446] Article 27(Work Programme) in the Investment Chapter of the Korea-ASEAN FTA reads as follows:

1. The Parties shall enter into discussions on:
   (a) Article 4 (Most-Favoured-Nation Treatment);
   (b) TRIMs-plus elements to Article 6 (Performance Requirements);
   (c) Schedules of Reservations to this Agreement;
   (d) Procedures for modification of Schedules of Reservations that will apply at the date of entry into force of the Schedules of Reservations to this Agreement;
   (e) Annex on Expropriation and Compensation;
   (f) Annex on Taxation and Expropriation; and
   (g) Article 18 (Investment Dispute Settlement between a Party and an Investor of any other Party).
2. The Parties shall conclude the discussions referred to in paragraph 1, within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Implementing Committee established under Article 5.3 of the Framework Agreement.
3. Schedules of Reservations to this Agreement referred to in paragraph 1 shall enter into force on a date agreed to by the Parties.
4. Notwithstanding anything to the contrary in this Agreement, Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), Article 9 (Reservations), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), shall not apply until the Parties' Schedules of Reservations to this Agreement have entered into force in accordance with paragraph 3.

by the Act on the Conclusion Procedure and Implementation of Commerce Treaties (No. 14840, July 26, 2017) (hereinafter the "CPICT Act").[447] The CPICT Act requires the parties to complete several steps before the negotiation begins. First, the Ministry of Trade, Industry and Energy, the entity responsible for trade negotiations, must hold a public hearing and take account of the opinions presented there[448] to formulate a plan for concluding a treaty.[449] The Minister of Trade, Industry and Energy must present information on the objectives of the treaty, detailed schedules governing the treaty, and the expected effects of the treaty,[450] and report promptly to the National Assembly.[451] The ministry must also arrange for the heads of relevant administrative agencies or other government-funded research institutes[452] to assess the economic feasibility of the treaty.

The reporting requirements under the CPICT Act continue even after the renegotiation begins. Upon the National Assembly's request, the government must submit reports or documents (e.g., negotiation history, strategies, or concluded texts) on ongoing negotiations. This is mandatory unless the negotiating partner requests non-disclosure on the ground that the information affects its national interests or that the disclosure is likely to infringe upon Korea's national interest or impede the negotiation substantially.[453] At the end of every round of renegotiation, the government must summarize the results and makes them publicly available on its website. Once the treaty is concluded, the Ministry must conduct an impact assessment to examine the overall effect of the treaty on domestic employment and

[447] Enforcement date July 26, 2017.
[448] Article 8 (Presentation of Opinions by Citizens) of the CPICT Act.
[449] Article 7 (Holding Public Hearings) of the CPICT Act.
[450] Paragraph (1) 1-5 of Article 6 (Formulation and Reporting of Plans for Concluding Commerce Treaties) of the CPICT Act.
[451] Paragraph (2) of Article 6 of the CPICT Act. The National Assembly refers to the Trade, Industry, Energy, SMEs, and Startups Committee of the National Assembly.
[452] Article 9 (Assessment of Economic Feasibility and Other Aspects of Concluding Commercial Treaties) of the CPICT Act.
[453] Article 4 (Disclosure of Information)

national finance, specifically describing the domestic industries involved.[454] Following this, the ministry must submit a report detailing the progress of the negotiation and the main terms of the treaty as concluded, to the National Assembly and makes a copy available to the general public.[455]

Internal reporting within the Ministry also raises transaction costs. Before the renegotiation begins, the chief negotiator, usually the Director-General of the FTA negotiation team, must hold a meeting for each director in the working group. For instance, a director of the Trade in Goods division, a director of the Trade in Services and Investment division, and a director of the Trade Remedy division must be called upon to explain their negotiation strategies. After the internal meeting, the Director-General must hold another meeting for line ministries and presents the directors' negotiation strategies to them, and gives them an opportunity to respond. For instance, an officer from the Ministry of Agriculture may offer an opinion on the tariff level in agricultural goods, while an officer from the Ministry of Land, Infrastructure and Transport may express concerns about protecting sovereignty in the expropriation article in the IIA. Once the directors of each division complete the negotiation, they must report the results to the chief negotiator who then reports the results to the Deputy Minister of Trade and Minister of Trade.

In addition to reporting, setting up the renegotiation itself involves substantial transaction costs. First, fixing an appropriate place and time for the renegotiation is difficult because each party has its own priorities. For many parties, renegotiation itself may not be important, as there may be many other ongoing negotiations for other PTAs taking place simultaneously. Agreeing upon a place is a challenging task

[454] Article 11 (Impact Assessment)
[455] Article 12 (Reporting, etc. of Outcome of Negotiation)

because the parties generally prefer to hold renegotiations in their home countries for the sake of convenience or out of financial concerns.

In addition to time and place, establishing and organizing working groups and defining their agendas require a set of negotiations in which parties compromise on their differing priorities with respect to the incomplete provisions. The parties must establish a joint committee to oversee the renegotiation of the PTA, which typically has chapters on many different topics such as goods, investment, services, intellectual property, and trade remedies. The joint committee has to prioritize the chapters for which working groups need to be established for the renegotiation. The joint committee may be called upon to decide whether lowering tariffs on agricultural goods, for example, is more or less important than merely inserting a few terms to address missing articles in the chapter on investment.

Establishing the working group on investment is only one part of the entire process. Members of the working group on investment may have different priorities regarding the incomplete provisions. The home country may want to address the ambiguous reservation list first, while the host country may want to postpone completing the reservation list due to the lack of cooperation from line ministries. The costs of renegotiation begin to rise due to these various disputes and administrative negotiations.

A question then would arise as to whether the parties are able to complete their agreement at all. The answer depends on factors such as readiness to host foreign investment, the scope of the renegotiation clause, the number of negotiating partners

(i.e., bilateral or multilateral), the progress of other ongoing IIA negotiations, the political atmosphere, etc.[456]

The readiness to host investment is a major factor. There is no reason to draw out or postpone the renegotiation if the domestic participants want foreign investment and the line ministries are ready to complete the reservation list. However, if any of the factors listed in Section VI (Reasons for Incomplete Provisions) affect the atmosphere of renegotiation, it may take longer.

A comprehensive renegotiation clause with a detailed renegotiation schedule encourages the parties to complete the IIA. Setting a start date and deadline for the renegotiation discourages procrastination, and listing a renegotiation agenda reduces transaction costs. A partial commitment, in contrast, lacks stringency requirements and does not impose a strong legal obligation to renegotiate the IIA. Under a partial commitment, the parties can always postpone or delay the renegotiation process without violating the provisions of the clause. The next section describes this situation in detail.

The number of negotiating partners also affects whether the renegotiation can be completed or not. Arriving at an agreement is more difficult in a multilateral setting than in a bilateral one. Member states have different levels of ambition when it comes to liberalization, so arriving at an agreement that satisfies every member is extremely difficult. Different countries may have their own model BITs, so it may be difficult to agree upon a template as a starting point. In addition to the main text, drafting a reservation list in a multilateral setting requires more time and effort because the list is necessarily country-specific. The members presumably have

[456] As an example of one such variable, according to the Chinese IIA negotiator, China has postponed drafting its reservation lists with other countries because they planned to draft a reservation list first, in the US-China BIT.

different targeted and protected sectors in various countries, and drafting a list for each negotiating partner delays the renegotiation process.

Often, the timing for the completion of renegotiation depends on the progress of parallel negotiations. ASEAN members, for example, may have a bilateral negotiation with Korea or China while at the same time participating in a RCEP negotiation that includes Korea and China. In such a case, the ASEAN members may want to conclude the multilateral treaty first and the bilateral treaties later. A multilateral treaty tends to achieve less liberalization because the articles agreed upon must satisfy all the member states, including the least developed countries. Accordingly, the ASEAN members may want to see the bottom-line of the multilateral treaty first, and then achieve greater liberalization in a bilateral setting.

c) ADVANTAGES OF A RENEGOTIATION CLAUSE

Comprehensive renegotiation schedules

A full commitment clause with a comprehensive renegotiation schedule encourages the parties to reduce the number of incomplete provisions. First, establishing a starting period and a deadline prevents procrastination. This is different from the partial commitment clause as seen in the EU-Korea FTA, which permits the parties to determine whether to renegotiate after an indefinite period of review of their investment environments.

For example, the AANZFTA's five-year term for the conclusion of renegotiations legally binds the three parties to complete the reservation list within that period. Without a phrase like "shall endeavor" in the renegotiation clause, the ASEAN members cannot simply argue that they did their best to narrow the incomplete provisions.

The requirement to establish an agenda for the working group on investment under the joint committee also affects the completion of the treaty.[457] It prevents unnecessary debate over the establishment of such a group. The joint committee governs different working groups and the parties frequently debate on the working groups that should be established under the joint committee. For example, Australia and New Zealand might believe that a working group for the determination of a chapter on investment is more urgent, while the ASEAN members may prefer a working group on labor.[458] The parties should also agree to the agenda for the working groups. Among the members of the working group on investment, some parties may prioritize missing articles in the main text, while others may prioritize correcting unspecified measures in the reservation list. Deciding on the agenda is typically a lengthy process and the working group sometimes decides nothing except the agenda for the next committee meeting.

To avoid the transaction costs of debating the necessity of establishing a working group on investment and its agenda, Australia and New Zealand stipulated that these must be established.[459]

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[457] The joint committee clause in the AANZFTA is found in Chapter 16, Institutional Provisions. It reads as follows.

FTA Joint Committee

> The Parties hereby establish a free trade agreement joint committee (the FTA Joint Committee) consisting of representatives of the Parties.
> The functions of the FTA Joint Committee shall be to:
> (a) review the implementation and operation of this Agreement;
> (b) consider and recommend to the Parties any amendments to this Agreement;
> (c) supervise and co-ordinate the work of all subsidiary bodies established pursuant to this Agreement;
> (d) adopt, where appropriate, decisions and recommendations of subsidiary bodies established pursuant to this Agreement;
> (e) consider any other matter that may affect the operation of this Agreement or that is entrusted to the FTA Joint Committee by the Parties; and
> (f) carry out any other functions as the Parties may agree.

[458] In practice, parties negotiate to the schedules of renegotiation including agenda of incomplete provisions. Host developing nations frequently disagree with the renegotiation schedule to postpone the renegotiation.

[459] Renegotiation clause in the Australia-ASEAN-New Zealand FTA

Article 16 (Work Programme) of the chapter on investment under the Australia-ASEAN-New Zealand FTA reads as follows:

These benefits, however, are meaningful only when they outweigh the costs of inserting the full commitment clause. The parties' domestic markets and institutional capacities can affect the expected consequences of a full commitment renegotiation clause significantly. Existing systems offering strong protection can influence the costs of full commitment clauses significantly. These countries would want to insert a partial commitment clause to avoid strict deadlines and prefer gradual liberalization.[460] As noted in Section IV, different types of incomplete provisions allow developing countries to maintain the level of liberalization and market opening they had committed to previously. Early replacement of these incomplete provisions with full commitment clauses may result in significant costs to those host countries if their domestic markets are not ready to receive foreign investment. Thus, these countries may opt for an open-ended negotiation schedule in the partial commitment clause, thus allowing them to manage the timing of their investment liberalization.

Similarly, failure in intra-governmental coordination may affect the expected costs of inserting a full commitment clause. To illustrate how the lack of intra-governmental coordination can affect the type of renegotiation clause a party chooses,

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Article 16 (Work Programme)

1. The Parties shall enter into discussions on:
   (a) schedules of reservations to this Chapter; and
   (b) treatment of investment in services which does not qualify as commercial presence in Chapter 8 (Trade in Services).
2. The Parties shall also enter into discussions with a view to agreeing on:
   (a) the application of most-favoured-nation treatment to this Chapter, including to those schedules of reservations; and
   (b) procedures for the modification of schedules of reservations.
3. The Parties shall conclude the discussions referred to in Paragraphs 1 and 2 within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Investment Committee established pursuant to Article 17 (Committee on Investment).
4. Schedules of reservations to this Chapter referred to in Paragraph 1 shall enter into force on a date agreed to by the Parties.
5. Notwithstanding anything to the contrary in this Chapter, Article 4 (National Treatment) and Article 12 (Reservations) shall not apply until the Parties' schedules of reservations to this Chapter have entered into force in accordance with Paragraph 4.

[460] India has been arguing for this in its negotiation process. According to India's negotiator in the RCEP, they placed a partial commitment clause in their IIAs because they still feel that they are not ready to commit to higher liberalization just to complete all the terms in the treaty.

consider, as in China or many ASEAN members, the likelihood that a country's line ministries require an extended length of time (i.e., several years) to analyze their domestic law before they can send feedback or a reservation list to the negotiation team. In such a case, the negotiation team would prefer to insert an open-ended partial commitment clause.

In sum, the full commitment clause reduces transaction costs and encourages the parties to reduce incomplete provisions. However, the clause is economically justified only when the benefits outweigh the costs of applying such a clause.

Modification of the effective date of completed articles

Modifying the effective date of a completed article through a renegotiation clause encourages the parties to reduce incomplete provisions. A treaty may require the parties to complete specified provisions as a condition for the entry into force of previously completed articles. In the Hong Kong-ASEAN FTA, the parties inserted a full commitment clause and agreed to complete a number of provisions such as the schedule of the reservation list, the procedure for the modification of the schedule of the reservation list, the definition of the term "natural person of a party," and an ISDS provision.[461] The parties decided that the MFN and NT obligations would not apply until the parties completed their reservation lists.

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[461] Article 22 (Work Programme) of the chapter on investment in the Hong-Kong and ASEAN FTA reads as follows:
Article 22
Work Programme
1. The Parties shall enter into discussions on:
(a) Annex 1 (Schedules of Reservations);
(b) procedures for the modification of Annex 1 (Schedules of Reservations);
(c) the application of Article 10 (Expropriation and Compensation) to taxation measures that constitute expropriation;
(d) the definition of "natural person of a Party"; and
(e) Article 20 (Settlement of Investment Disputes between a Party and an Investor).
2. The Parties shall conclude the discussions referred to in paragraph 1 within one year of the date

The AANZFTA contains a similar renegotiation clause.[462] The parties agreed to delay the application of the NT provision until after the completion of the reservation list. These triggering provisions could pressure the parties to complete their IIA. Delayed renegotiation means delayed liberalization and market opening. A major purpose of concluding an IIA is to attract foreign investment. Such a delay is expensive for all parties. Although it is an empirical issue, the expected amount of FDI inflow will be disrupted to a certain extent during the renegotiation process. Domestic participants (e.g., interest groups, media, legislative bodies, etc.) who support market opening may criticize the slow renegotiation process.

A delay puts pressure on line ministries as well because those responsible for the completion of the reservation list block the market opening in all economic sectors. The negotiation team can leverage this to motivate the respective line ministries to expedite the process.

Again, the benefits and costs of such a triggering clause are dependent upon the market situation and the institutional capacity of each party. The above argument is justified only when the parties are ready for market opening and are worse off due to a delay. Such an assumption, however, does not always hold if a developing country as a host nation is not ready to receive foreign investors at all. Then, postponing the MFN or NT obligation may be a good strategy to secure the domestic market for a certain period. Five years of renegotiation may give that state sufficient time to examine its targeted sectors and make appropriate institutional arrangements.

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of entry into force of this Agreement under paragraph 1 or 2 of Article 26 (Entry into Force), unless otherwise
agreed by the Parties. The discussions shall be overseen by the AHKFTA Joint Committee.
3. Annex 1 (Schedules of Reservations) shall enter into force on a date to be agreed by the Parties.
4. Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment) shall not apply until Annex 1 (Schedules of Reservations) enters into force in accordance with paragraph 3

[462] Supra note 433, Work Program in the AANZFTA

Last Chance to complete the Treaty

Cross-chapter dealing among different chapters of the PTA, limited to incomplete provisions, encourages the parties to complete the IIA. In the last stage of the primary negotiation of the Australia–US FTA, Australia made a substantial concession in the agricultural sector (Chapter on Trade in Goods) in exchange for omitting the investor-state dispute settlement provisions (Chapter on Investment).[463] Such deals are more actively used in the renegotiation setting, because the parties deal with "leftover" issues. This provides a good "exit plan" for both parties. Depending on the incomplete provisions that are a matter of priority in each chapter, the parties may accelerate the completion of the treaty. In the AANZFTA, Australia and New Zealand could repeatedly put pressure on ASEAN to complete its reservation list. It could do so by either threatening to leave an element in the chapter on the trade in goods incomplete if ASEAN did not complete the reservation list, or, by offering an incentive in the form of lowered tariffs if ASEAN did complete its reservation list.[464]

Offering incentives is another effective way to get the other party to complete the treaty. Overall, the parties are willing to cooperate with and advise each other because they each have a great interest in completing the treaty. Renegotiation deals with incomplete provisions alone. The parties can thoroughly examine why they failed to reach a consensus during the primary negotiations and identify what both parties need to meet their shared goal of completing the treaty. For instance, if a party

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[463] Interview with Ross Garaut, a Distinguished Professor at the Australian National University, available at http://www.ohmynews.com/nws_web/view/at_pg.aspx?CNTN_CD=A0001649580 (last visited September 10, 2018). (Mark Veile, a former Minister for Trade in Australia, noted that omitting the ISD provisions was the first priority for Australia and the exclusion was in exchange of a substantial concession in the agricultural sector.)

[464] Cross-chapter deal is so called "package deal." The package deal is frequently utilized in the last stage of either main negotiation or renegotiation phase. See e.g.' package deal' in the Korea-US FTA renegotiation, available at http://www.hani.co.kr/arti/english_edition/e_business/198712.html (last visited Feb 8 2019).

lacks the legal expertise it needs to complete a provision, renegotiation presents a good opportunity for one state to advise and transfer their legal expertise to the other, such as through a workshop. The primary negotiation allows parties sufficient time to present their position and rationale for each article alone, and does not often give parties the time or occasion to persuade the other parties fully. Primary negotiations with Regional Trade Agreements (RTAs) usually last for 28 months,[465] which can be a challenge for the negotiating parties to examine all the issues thoroughly and still manage to host a workshop.[466]

The third round of negotiations on the interim investment chapter in the Korea–ASEAN FTA is a good example of how such a workshop assisted in addressing incomplete provisions.[467] Both parties signed the IIA on June 2, 2009, and ratified it on January 1, 2010. The parties renegotiated to address the missing articles and reservation list. In the first and second rounds of renegotiation, both parties realized that the reason for their disagreement was mainly due to ASEAN's lack of technical and legal expertise with regard to PPR and drafting skills with respect to the reservation list. At the end of the second round, ASEAN requested a workshop to acquire background knowledge on these topics. Korea conducted the workshop in the third round of renegotiation,[468] spending all three days of the renegotiation period explaining the legal consequences of inserting PPR provisions and imparting drafting skills to support the completion of the reservation list. Korea shared its first

[465] Christoph Moser & Andrew Rose, Why do Trade negotiations Take so long?, KOF Working Paper No. 295 and CEPR Discussion paper No. 8993, (The working paper examines 88 RTAs from 1998 to 2009, and finds that the RTA negotiations last for 28 months, on average).
[466] *Id*.
[467] The interim negotiation to address the chapter on investment was held in Seoul from November 18 to 20, 2014.
[468] Article 27 (Work Programme) lists incomplete provisions that are subject to renegotiation. The missing articles are MFN, PPR, Schedule of reservation, Annex on Expropriation and Compensation, Annex on Taxation and Expropriation, and Investor-Dispute Settlement Provisions. The third round of renegotiations mainly focused on PPRs and the reservation list. See the text of the chapter on investment in the Korea-ASEAN FTA, available at http://www.fta.go.kr/webmodule/_PSD_FTA/asean/1/eng/50-1.pdf (last visited on September 5, 2018).

experience with inserting a PPR into an IIA, which was with the KORUS FTA, and shared information on how that decision affected their domestic markets positively. Korea also addressed each ASEAN country's concerns through separate Q & A sessions.

This workshop was successful. ASEAN ultimately decided to insert PPR provisions and began to push their line ministries to draft the reservation list on the last day of the forum.

B. INSTITUTIONAL REMEDIES

1. MINIMIZING INTRA-GOVERNMENT COORDINATION FAILURE: ENABLING BETTER COORDINATION AND COOPERATION BETWEEN LINE MINISTRIES

Better coordination and cooperation between and among line ministries reduce the number of incomplete IIAs. There is no single model among developing countries to ensure that the coordination among line ministries is effective.[469] While some may lodge responsibility for both trade policymaking and negotiations in one agency, others may assign the responsibility for coordinated policymaking to an inter-agency coordinating body and the task of negotiations to the foreign affairs ministry or to the trade ministry.[470] Regardless of the bureaucratic set-up, the ability of the country's

[469] Senar, supra note 21; Bouzas, supra note 21, Bilal, supra note 21

[470] Many host countries face consequences when they establish a negotiation team under the authority of either the Ministry of Industry (Economy) or the Ministry of Foreign Affairs. Many argue that the negotiation team should be combined with the Ministry of Industry (Economy) and become the Ministry of Trade and Industry. The rationale behind this argument is that the negotiation team should take into account domestic industrial policies and markets to draft optimal negotiation strategies that maximize benefits. However, in most cases, the negotiation team and ministry officers are simply sharing the same ministry building without substantial cooperation. None of the negotiation strategies and priorities is derived from the expertise of domestic industries. Similarly, when the Ministry of Foreign Affairs becomes the Ministry of Foreign Affairs and Trade, many criticize that trade negotiations will become the product of foreign relations. Instead of carefully analyzing the economic costs and benefits of initiating IIA negotiations, ministers, and deputy ministers will make decisions based on the principles of international relations.

political leadership to establish effective ministry coordination is the most critical task.[471]

In this respect, a stronger negotiation team with greater political power can facilitate data collection from the line ministries and solve difficult coordination and decision problems. Instead of placing the negotiation team under the authority of either the Ministry of Trade or the Ministry of Foreign Affairs, the team should be established as a separate and independent entity with strong political power, legal expertise, and heightened priority. They should be placed under the authority of the prime minister or another executive office. An example of this is the USTR who is housed within the US Presidential Office. If different line ministries request different carve-outs that conflict with each other, a strong political power can help prioritize various interests and expedite the decision-making process to facilitate negotiation. Moreover, a team can accumulate its own expertise and data to facilitate negotiation by hiring more legal experts, organizing previously collected datasets, and cooperating with additional outside experts.

The following briefly reviews the history of the structural change in Korea's trade negotiation office and introduces a case study on the recent policy suggestions to fix failures in intra-governmental cooperation.[472]

In March 1998, President Kim Dae Jung established a separate trade negotiation entity, the Office of the Minister for Trade, under the Ministry of Foreign Affairs and Trade. According to the Government Organization Act (8876-2008,

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[471] G-77 and China High-Level Forum on Trade and Investment, supra note 21 at 4.

[472] For general reference on the history of Korea's trade policy and change in the negotiation offices, see Young Min Kwon, *Evaluation of the Korea's market opening policies and direction of the trade policy*, Korea Economic Research Institute (2004); Gi-Hong Kim, *The Change of Trade Negotiation Agency and Negotiation Power in Korea: Focused on the Office of the Minister for Trade*, 37 KOREA TRADE REV. 69, 84 (2012); Ko Bo Min, *Korea's Strategies for Becoming an Advanced Trading Nation- A Focus on Trade Legislation and Trade Administration*, 7 LEG. & POL. 439, 439-458 (2015); Young Gui et al., *A Study on the Decade of Korea's FTAs: Evaluation and Policy Implications*, KOREA INT. ECON. POL. (Research Paper, 14-05, 2014).

revised on February 29, 2008), this Office became responsible for trade negotiation, and coordinating and managing the different interests that arose out of relevant ministries.[473]

Many experts have argued that the coordination function of the Office of the Minister for Trade has failed because the real coordination happens outside the office. Once coordination fails, the issue goes to the External Ministers' Conference, which is a periodic meeting for ministers from all ministries to discuss issues of common interest. In almost all cases so far, the conference has not resolved any of the issues presented before it. As a result, the Presidential Office had to make a final determination. The following words from an anonymous Congressman related to the Korea–Chile FTA describe the reality of the decision-making process concerning trade issues:

> The Office of the Minister for Trade try [sic] and the External Ministers Conference try [sic] to reach consensus, but usually they both fail. This is because all Ministries are opposed to make [sic] any concession due to their own Ministries' [sic] interests. The presidential office is ultimately required to make a final decision, but usually avoid to do so [sic] because of the political pressure and burdens. Because of this, the negotiation [sic] face extreme difficulties to reach consensus with negotiating partners.[474]

To resolve such failures, experts have argued that the Korean government should put the Trade Representative Office under the president's office, on the lines of the US practice with respect to the USTR.[475] By doing so, the Trade Representative Office will have strong political power, and can prioritize interests and expedite the decision-making process.

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[473] For reference on changing the trade negotiation agency in Korea, see Kim, *supra* note 472, at 69-91.
[474] Kim, *supra* note 472, at 84.
[475] Recently, many experts have argued that Korea should establish a Korean version of the USTR. See http://news.joins.com/article/21281441 (last visited Jan. 14, 2019); see also, "Current Ministry fails to deal with internal cooperation failure and Korea Trade Representative should be newly established," at http://www.choicenews.co.kr/news/articleView.html?idxno=2982 (last visited Jan. 14, 2019).

It is, however, unclear whether a Trade Representative Office could actually resolve coordination failures and reduce the number of incomplete IIAs.[476] Reforming various government structures has not been effective so far. The following illustrates Korea's innovative policy to fix the coordination problems and reduce the number of incomplete provisions.

Case Study: Active participation of the line ministries in negotiation (Korea)

In Korea, three Acts, namely the Trade Treaty Conclusion Procedure Act,[477] the Trade Promotion Committee Act,[478] and the Act of Government Representative, regulate the members of the negotiation team. However, they do not explicitly spell out the level of the line ministries' participation in the negotiation process.[479] The Act on Governing Procedures of Conclusion and Implementation of Trade Treaties (the Trade Treaty Conclusion Procedure Act) only introduces a procedural framework for the negotiation, conclusion, and implementation of "Trade Treaties."[480]

Similarly, the Trade Promotion Committee Act does not explicitly regulate this question. Article 13 (Trade Representative) of the Act merely states that the members of the negotiation team should be established in accordance with the Act of the Government Representative.

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[476] For reference on the history of reforms after the failure of Korea's inter-governmental cooperation, see Inha Univ. FTA Research Institute, Korea's reforms to the intragovernmental cooperation failure under FTA (2008)

[477] The full name is "The Act on the Procedure for Concluding Commerce Treaties and the Implementation thereof (No 11717). The text is available at http://www.law.go.kr/lsInfoP.do?lsiSeq=137338#0000 (last visited Jan 14, 2019).

[478] The text is available at http://www.law.go.kr/LSW/lsEfInfoP.do?lsiSeq=144382# (last visited February 26, 2017).

[479] The full name is 'The Act on the Appointment and Power of Government Delegates and Special Envoys.' The text is available at http://www.law.go.kr/LSW/lsEfInfoP.do?lsiSeq=136568# (last visited Jan. 14. 2019).

[480] For general reference on the "Trade Treaty Conclusion Procedure Act," see Jae Min Lee, *Korea`s FTA Drive and Enactment of Trade Treaty Conclusion Procedure Act of 2011 -Its Legal Implications and Practical Consequences*- 19 SEOUL INT'L L. J. 31, 31-62 (2012). (The article introduces the Act and suggests solutions to the ambiguity problems in its key terms and scope). See also, "Trade Treaty Conclusion Procedure Act" and its reform process, Hye Sun Choi, *Reforms in Trade Treaty Conclusion Procedure Act,* 50 HANYANG L. REV. 143, 143-165 (2015).

The Act of the Government Representative regulates government representatives in general. Article 1 classifies and describes the roles of two types of representatives: government delegates and special envoys. The government delegate has the authority to sign the treaty in negotiations with other countries or international organizations. The special envoys have the authority to participate in negotiations with other countries or international organizations. However, the rest of the article does not specify whether the line ministries are qualified to participate in the negotiation.

The negotiation team has no legal grounds to pressure line ministries to cooperate and participate in the negotiation. The ministries do not engage in the negotiation actively unless they have incentive to do so.

To resolve this issue, in 2014, the Korean government implemented an innovative policy at the working group level to reduce the number of incomplete provisions.[481] The Chief Director of the FTA negotiation office encourages the line ministries to engage actively in the negotiation process. The line ministries may now lend their voices to the negotiation to protect their interests.[482] Previously, the negotiation team had the sole authority to negotiate, and the line ministries' role was

[481] The new policy broadened the scope of the discretion of the ministries and allowed them to stay engaged in the negotiation process. This policy has not been legally implemented yet, but is currently being exercised in practice. The Chief Director of the FTA negotiation office innovatively came up with the policy based on his hands-on experience. This is becoming a trend among other developing countries as well. For instance, in service agreement working group negotiations in the 16th round of the RCEP, Korea introduced the effectiveness of the line ministries' participation and many countries agreed and decided to follow the same approach. The chair of the working group encouraged other member states to bring their line ministries' officers and participate in the negotiation. This policy began in early 2014, and influenced the ongoing negotiations significantly, encouraging them to reduce the number of incomplete provisions (e.g., Korea-Turkey FTA, Korea-China FTA, Korea-China-Japan FTA, Korea-Vietnam FTA).

[482] For instance, the International Cooperation and Trade Office under the Ministry of Construction and Transportation cooperates with the negotiation team. However, according to the guidelines for the office, it has to cooperate with the negotiation team, but does not have a mandatory role in the negotiation. For more information on the guidelines of the Office of International Cooperation and Trade, see http://www.molit.go.kr/USR/deptInfo/m_94/lst.jsp?DEPT_ID=1613017&DEPT_NM=국제협력통상담당관 (last visited Jan. 14, 2019).

limited to performing a supportive function to provide information on domestic law. Now, they have been brought in right from the beginning of the negotiation process. To some extent, it can be said that the power to negotiate and bargain is now shared. To understand this further, this section also describes how the participation of the Ministry of Construction and Transportation in Korea helped the negotiation team avoid renegotiation of the expropriation article in a FTA.

Korea had continuously carved out the real estate price stabilization policy[483] from the annex of expropriation articles.[484] The Ministry of Construction and Transportation, has tried to protect this AELP by stipulating thus in the investment chapters in most of its FTAs:

ANNEX II-B
EXPROPRIATION

> (b) […] Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and **real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations**.[485]

Annex II-B 3(b) stipulates a boundary by listing out exceptions to indirect expropriation. The annex allows a party to engage in what would otherwise be prohibited to protect legitimate public welfare. Real estate price stabilization is listed as one of the examples. Inserting the actual name of the policy in the main treaty text

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[483] Jeong Ho Kim- Housing Price Hike and Price Stabilization Policy in Korea (This paper is summary of a research report titled "A Study on Housing Price Inflation and Housing Bubble." The research was funded by Korea Land Development Corporation in 2003 and the author collaborated on it with Dr. Chung Hee. This reviews the seriousness of Korea's real estate price rises and the importance of real estate price stabilization policies), at http://www.kdi.re.kr/upload/7837/2_3.pdf (last visited Jan. 14, 2019).

[484] S. H. Sim & B. K. Chang, *Stock and Real Estate Markets in Korea: Wealth or Credit-Price Effect* 11 J. ECON. RES. 99, 100 (2006); See Real estate accounted for 90% of South Korea's national wealth in 2013 http://www.ibtimes.co.uk/real-estate-accounted-90-south-koreas-2013-national-wealth-1501100 (last visited Jan. 14, 2019).

[485] KORUS FTA Annex 11-B Ft.19 stating that, "For greater certainty, the list of 'legitimate public welfare objectives' in subparagraph (b) is not exhaustive."

is extraordinary. Korea managed to persuade its negotiating partner that the measure should be secured for its continued growth.

This carve-out, however, was not achieved easily. Many negotiating partners preferred to leave the annex incomplete and renegotiate it on a later date. During the main negotiations, they were extremely reluctant to accept this carve-out, which allowed the Korean government to expropriate foreign investments freely in the name of real estate price stabilization. The negotiating partners frequently requested the renegotiation of this article because they believed that accepting the carve-out was a substantial concession.

The Ministry of Construction and Transportation played a major role in persuading the negotiating partner to avoid renegotiation. They actively participated in the main negotiation and carefully explained both the contents of the real estate price stabilization policy and why Korea's real estate market required such policy. They explained why this policy was never a major hurdle for foreign investments in the past and emphasized that there had never been any dispute regarding this policy measure. They prepared various data and information to prove that such a carve-out would not become a barrier for foreign investors to make an investment. The ministry was in a better position than the negotiation team to explain the policy rationale and to respond to the counterarguments from the negotiating partners. After presentations by the Ministry of Construction and Transportation, the negotiating partners changed their minds and consented to the annex with the carve-out provision.

The Korea–Turkey FTA is another example. Korea and Turkey initiated negotiations on the chapter on investment in April 2010 in Ankara. They conducted seven rounds of negotiation, and finally concluded the chapter in Seoul, South Korea

on July 4, 2014. Until the sixth round of negotiation, the parties could not reach an agreement on several articles, including expropriation and PPR provisions.

Both parties started to discuss the possibility of renegotiation, leaving the provisions incomplete. Korea was strongly opposed to the idea of leaving incomplete provisions, while Turkey preferred to postpone drafting the expropriation article because they were uncertain about the legal consequence of allowing such a carve-out.

To resolve the issue, an officer from the Korean Ministry of Construction and Transportation engaged in the negotiation actively. The officer described why the policy was so important to the real estate market and how the policy would significantly influence the economy. He described the negotiations that took place for the KORUS FTA and explained how Korea successfully persuaded the US to agree to such an extraordinary annex. In addition, he demonstrated that almost all of Turkey's FDIs into Korea were devoted to the food business (e.g., Turkish restaurants) and not the real estate market. Due to the efforts made by the officer, Turkey agreed to insert a carve-out provision in the annex at the end of the sixth round of negotiations.

The officer's resources, rich background in the "real estate price stabilization policy," and readiness to respond to Turkey's inquiries helped the parties avoid incomplete provisions.

2. UPGRADING LEGAL EXPERTISE IN IIAS

The lack of detailed knowledge of particular policies resulting from coordination failures is not the only impediment that trade negotiators face. The lack of detailed knowledge of the IIA leads to a number of provisions being left incomplete. This section introduces three ways to enhance legal expertise in host developing countries.

First, extending the length of the turnaround time under job rotation system is advisable. By this, negotiators can accumulate the legal expertise needed to reduce the number of incomplete provisions. Negotiators have more time to acquire and accumulate expertise and greater opportunities to educate and transfer knowledge to their successors. More experience will strengthen the bargaining power and communication skills of negotiators with respect to managing line ministries, thus preparing them to push back against burdensome carve-outs requested by protected industries.

Second, hiring more legal experts is a solution.[486] These experts can understand the legal consequences of inserting each article, thereby facilitating the negotiation process. As noted, the existence of a national pool of experienced and knowledgeable legal experts is essential for a country to engage in negotiations for IIAs. Unfortunately, most developing countries have a shallow human resource pool and suffer from the lack of technical and legal experts. In many instances, the trade negotiators of developing countries may not even be specialists in trade issues. Many of them are diplomats (without prior training in trade issues) within their foreign ministries, assigned to cover international trade negotiations.

Last, the more practical way is to ask the home states questions during the course of negotiation. In practice, many negotiators take the "learning-by-doing" approach to accumulate legal expertise.[487] This is why Q&A sessions are held in conjunction with the main negotiations of an IIA. Negotiators from the home nation become temporary lecturers and explain the meaning and legal consequences of the

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[486] *G-77 and China High-Level Forum on Trade and Investment*, *supra* note 396, at 10 (The forum explained various factors that constitute the lack of technical expertise in trade negotiations in developing countries).

[487] *Id.* at 12 (Without explicitly mentioning the "learning by doing" approach, the forum recognized the importance of educational interaction between the negotiating partners. For instance, developing countries could receive technical training from developed countries.).

articles, ultimately facilitating the negotiation process. For instance, negotiating a reservation list can be a good opportunity to learn from the knowledge spillover from home states. Unlike articles in the main text, drafting a reservation list requires particular techniques to which many host nation negotiators may be unaccustomed. Home states can teach host countries the detailed procedures involved in drafting a reservation list. The procedures might involve identifying where to include the domestic measures or how to detail the importance of their specificity.

Using the expertise of home countries ultimately benefits both countries because both host and home countries have strong incentives to draft clear and unambiguous IIAs. As expertise accumulates, host countries will be more likely to draft complete IIAs. This course of interaction can substantially reduce incompleteness in IIAs.

Case Study: Establishing an academy inside the ministry and holding a workshop for negotiating partners (South Korea)

Recognizing the negative consequences associated with incomplete provisions, Korea has implemented various regulations to enhance legal expertise in IIAs to avoid incomplete IIAs. Recently, the Ministry took two unconventional approaches that directly and indirectly resolved incompleteness in IIAs.

First, the Ministry of Trade, Industry and Energy in South Korea decided to enhance its legal expertise through internal education.[488] On June 14, 2013, the Ministry initiated four different educational programs for officers in the Ministry, namely International Trade Law Academy;[489] Trade Practice Education;[490] Seminar for

[488] See http://www.newspim.com/news/view/20130614000268 (last visited Jan 14., 2019).
[489] The discussions focused on the rationale behind the FTA, the chapter on investment chapter, the chapter on service agreements, trade remedies, and the chapter on trade in goods.
[490] Marketing in International Trade: The program was initiated in late February 2014. Five different groups of participants engage in study groups and listen to presentations. It involves the discussion of

Trade Experts;[491] and International Trade Law for Commercial Agents.[492] Among these programs, the first contributed significantly to the reduction of the number of incomplete provisions in IIAs. This program, taught by law professors with trade negotiation experience, offered two four-week sessions a year (totaling 64 hours of instructional time). The program consisted of various topics, including IIA issues, the legal consequences of inserting each investment protection article, and detailed procedures for drafting a reservation list. The incomplete provisions were always most significant discussion topic, with the participants sharing experiences and solutions. The participants compared partial and full commitment renegotiation clauses to discuss various legal consequences associated with them.

The participants found this academy extremely helpful. For instance, 38% of the participants rated the academy as "very satisfactory" and 58% as "satisfactory." They also said the program was "extremely useful" (19%), "very useful," (43%) or "minimally useful" (38%).[493] Based on the effectiveness of the program and the satisfaction of the participants, the Ministry decided on April 7, 2014, to extend the program to include negotiation strategies.[494]

Second, given that complete IIAs are attainable only when all parties have the capacity to complete IIAs, the Ministry decided to become an active counselor and

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issues in international trade law, tariffs program in export and import, and marketing in international trade.

[491] This program invites various trade experts, both domestic and foreign, to discuss a variety of trade issues with participants. The program was conducted more than 20 times in 2013.

[492] This program was initiated in March 2014 for commercial agents working abroad. The program involves the discussion of trade in goods, investment and services agreements, and trade remedies. For more on each program, see http://motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=78910&bbs_cd_n=81 (last visited Jan. 14, 2019).

[493] For more information on the satisfaction of the participants, see https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=79020&bbs_cd_n=81 (last visited Jan. 14, 2019).

[494] For more information on program reform, see https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=79020&bbs_cd_n=81 (last visited Jan. 14, 2019).

assistant for developing countries. A good example is the Korea–ASEAN renegotiation process.

Korea conducted a workshop for ASEAN on the renegotiation of the chapter on interim investment chapter in Seoul, from November 18 to 20, 2014, during the ASEAN–Korea FTA joint committee meeting. The renegotiation was intended to address missing articles and reservation list problems.[495] In the primary negotiation, ASEAN was extremely reluctant to insert PPR provisions because ten ASEAN countries were actively implementing various laws on export subsidies. Moreover, those ten ASEAN countries were opposed to drafting a reservation list because the domestic measures were not ready due to the lack of cooperation from line ministries and ongoing domestic legal reforms.

To resolve the issue, Korea's negotiation team decided to conduct a workshop to address various concerns of the ASEAN. The negotiation team, consisting of two lawyers[496] (one Korean attorney and one US attorney) administered the workshop and delivered presentations with respect to the meaning and effect of each PPR provision. They carefully described how each provision can be modified to carve out certain subsidy policies. Korea emphasized that ASEAN need not be concerned about inserting a PPR provision, by sharing their experience of inserting high-standard

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[495] Article 27 (Work Programme) of the chapter on investment in the Korea-ASEAN FTA imposes a duty to renegotiate missing articles and missing reservation lists on both parties. See the chapter on investment in the Korea-ASEAN FTA, available at http://www.fta.go.kr/webmodule/_PSD_FTA/asean/1/eng/50-1.pdf (last visited Jan 14, 2019). This section illustrates how Korea transferred its legal expertise to ASEAN countries to help the parties arrive at a consensus on inserting PPR and drafting a reservation list.

[496] Many developing countries, including Korea, lack the legal expertise to participate in negotiations. For more information on the lack of legal expertise in Korea and the solution to this problem, see Heo Ju Hee & Nam Ho Kim, *The necessity of legal expertise in Korea trade negotiation*, Ministry of Education (2007); The policy history of hiring legal experts in Korea's negotiation team, see http://www.sedaily.com/NewsView/1KZ1XS2ZLQ/ (last visited Feb. 24, 2017); The history of failures to find legal expert in Korean government, see http://news.donga.com/3/all/20111125/42133131/1 (last visited Jan, 14, 2019).

PPRs in the KORUS FTA and discussing how such an insertion ultimately benefited Korea's investment market.

The two legal experts also demonstrated ways to draft reservation lists. They described what to include in the "measure" or "description" section of the reservation list and even offered bad examples. They also described the consequences of the problematic aspects of India's reservation list.

The workshop was successful for both parties. Based on Korea's enthusiastic efforts to advise and instruct the ASEAN, the ASEAN ultimately decided to push its line ministries to draft the reservation list and insert a high standard of PPRs in the IIA at the end of the workshop. Due to these efforts, the parties were able to begin to negotiate the actual provisions of the PPRs and the reservation list in the next round, thereby setting a good example of how legal experts in home countries can advise host countries to enhance their legal expertise and avoid incomplete provisions.

This section has provided analysis of how letters and renegotiation clauses encourage parties to reduce incomplete provisions. It is important to note, however, that these are not perfect solutions. As in India's example in Sec V, the parties may not complete the IIA in time. On-going legal reforms or failure in ministries' cooperation may continuously discourage parties from completing the IIA. In practice, parties sometimes continue negotiating even after a renegotiation expires.

This does not mean that the suggested solutions are meaningless. Based on the author's experiences, the parties' willingness to complete the IIA is heavily influenced by the use of a letter and the type of renegotiation clause. The parties actively utilize the letter to avoid an incomplete IIA before signing. The parties fiercely debate over the comprehensiveness of the renegotiation clause in the main negotiation and, once the treaty is ratified with a comprehensive renegotiation clause,

the parties diligently comply with the clause.[497] The next section concludes the dissertation.

VIII. CONCLUSION

This dissertation has offered a thorough review of the different types of incomplete IIAs and has examined the problems with, causes of, and solutions to incomplete IIAs. A reduction in the number of unnecessarily incomplete IIAs has several policy implications.

First, resolving incompleteness will gradually increase the transparency and predictability of domestic law. More articles will gradually be specified during the renegotiation phase, while unspecified and missing domestic measures will be replaced by specified ones. Foreign investors will have a better understanding of the level of investment protection and permissible boundaries for the regulatory power of a host nation. All these processes in completing an IIA may offer foreign investors the confidence they need to invest in host countries.

Further, the credibility of IIAs will be enhanced in the eyes of international participants. Once host countries update their incomplete IIAs, they will upload the updated versions on their government homepages. Any international participant can thereafter recognize that the host nation did truly renegotiate an IIA to reduce incompleteness. Diligent compliance with renegotiation will send a positive signal to other international participants that incomplete provisions should be resolved. Further,

[497] It is practically difficult to confirm whether countries correct incomplete provisions and upload updated treaties. Incomplete IIAs in Asian developing countries are a very recent phenomenon and most IIAs are currently being renegotiated. Moreover, there is no guarantee that the parties would actually upload an updated treaty once the renegotiation is over. See Lazo et al, *Missing Investment Treaties*, 21 J. INT'L ECON. L. 461, 703 (2018) (explains that Asian countries frequently fail to upload the IIAs on their government homepages, which may negatively influence the attraction of FDI. This study only considered the BIT and excluded the investment chapter of the IIA but, in reality, many countries fail to upload their concluded or renegotiated treaties).

it will also encourage other countries to consider IIAs as credible instruments and to attempt to fix their own incomplete IIAs.

A potential future research topic could be an incomplete provision in other chapters of the FTA. This dissertation focuses on the investment chapter of the FTA, but it is important to note that various solutions for reducing the number of incomplete provisions can be applied to FTAs and other multilateral trade agreements concerning goods, intellectual property rights, labor, the environment, government procurement, investments, and services, such as financial services, telecommunications, and electronic commerce. Parties may fail to complete provisions in chapters on any of the above categories. For instance, the ASEAN and Japan commenced a Comprehensive Economic Partnership Agreement in April 2005. After 11 rounds of negotiations, they failed to include any articles. Instead, they included one renegotiation clause in the chapter on Trade in Services.[498]

The incomplete treaty problem is a widely known phenomenon among many treaty negotiators but has garnered little attention in academic literature. More research should be conducted with respect to understanding the causes and providing solutions to these problems.

[498] The incomplete text is available at http://www.mofa.go.jp/policy/economy/fta/asean.html (last visited September 27, 2018).