Learning and the Precision of International Investment Agreements

The international regime for the promotion and protection of foreign investment consists of a multitude of close to 3000 bilateral investment treaties (BITs) and related international investment agreements (IIAs). Yet despite a growing body of research on IIAs, scholars in political economy have paid little attention to the legal language in the treaties themselves. In this research note, we draw on the conceptual apparatus of the legalization literature (Abbott et al. 2000) and focus on legal precision in BITs. We use a new dataset created through quantitative text analysis to develop an index measuring legal precision. We then investigate the causes of the pronounced increase in precision in BITs and the considerable variation across treaties. We argue that capital-exporting countries are the primary drivers of change, and that they are motivated because they learn the implications of existing legal language from two sources: First, from the growing number of arbitration proceedings, and second, when they themselves are targeted by such claims. We provide statistical tests of our hypotheses and find ample support.

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1 Introduction

Globalization forces states to sacrifice sovereignty and cooperate via various international institutions, which are increasing in complexity, or so a common narrative goes (Stein 1982). A common example is the expansion of international trade commitments beyond just tariffs to phytosanitary measures, intellectual property rights, and professional certification standards in service industries. But not all international institutions fit this pattern of increasing legal complexity. In fact, legalization has taken different forms, even within the relatively narrow set of international economic agreements.

Compared to modern trade agreements, international investment agreements (IIAs) are quite general. IIAs are agreements between sovereign states to promote foreign investment and to protect the rights of investors from one contracting party in the jurisdiction of the other party. Most prominent among them are close to 3000 bilateral investment treaties (BITs), many of which were signed during the 1990s and early 2000s. Early IIAs are short (usually less than 20 pages) treaties with general commitments that depended crucially on interpretation by arbitrators to clarify their meaning. Poulsen and Aisbett (2013) argue that the explosive growth in IIAs during the 1990s was made possible in part by a lack of awareness of developing country negotiators regarding those commitments. In particular, negotiators often did not realize how much compensation states could have to pay to investors via international arbitration.\(^1\)

Investment treaties provide foreign investors with direct access to international tribunals, whose rulings are legally binding on states and enforceable via the New York and Washington Conventions. Once countries experienced an investor-state arbitration, they became aware of the potential consequences, Poulsen and Aisbett argue, and they stopped signing IIAs. Although the

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1 In contrast, Blake (2013) gives more credit to signatories of IIAs. He finds strong evidence that the more far-sighted governments are (in the sense of more institutionalized, longer-lived governing parties), the more they will pay attention to excluding key policy areas from investor protections.
evidence is compelling in many cases, we find this argument incomplete. The addition of new IIAs has definitely slowed, but dozens of new IIAs appear every year, some of them signed by countries that have experienced international arbitration. Clearly, not all countries have stopped signing IIAs. Instead, states are remaking agreements to reflect their preferences more directly, and these treaty revisions are not universally in the direction of greater delegation to international institutions.

In this study, we examine legalization in international investment law via the changing content of IIAs. In contrast to previous work, we focus on the evolution of their content over time, and we evaluate those changes quantitatively with a new database of treaty clauses. Changes in legalization, we argue, have thus far been driven primarily by capital-exporting states, and key constituencies in those countries are unlikely to support significant retreat from this system. More specifically, we submit that capital-exporting states increase the legal precision in the sense of Abbott, et al. (2000) in successive treaties by moving from vague rules to highly elaborated rules. Increased precision is a reaction to rulings by arbitration panels. In other words, capital-exporting states do not simply stop signing treaties; they change the content of treaties to reduce ambiguity in order to avoid outcomes that contradict their interests.

Our findings have implications for both the legalization literature and for the discussion of the current “legitimacy crisis” in international investment law. In particular the negotiations toward the Transatlantic Trade and Investment Partnership (TTIP), a comprehensive trade agreement between the European Union and the United States, have brought previously obscure legal aspects of international law into public scrutiny in the European Union, underlining support in key states such as Germany and France. Similar issues are being raised regarding the TPP, which also includes investment arbitration. International investment agreements and their relationships...
insertion into multilateral trade agreements are politically more salient than ever. What determines their content, however, is not sufficiently understood by scholars. If legal texts are improving, then states clearly have options other than to quit signing treaties.

2 Legalization and International Investment Agreements

Scholarly analysis of international law has increasingly revolved around rationalist explanations of states’ willingness to constrain their sovereignty via international institutions. This research program has coalesced around two distinct but related schools of thought: rational design and legalization. Rational design focuses primarily on the initial design of legal institutions and to a lesser degree on their evolution (Koremenos, Lipson, and Snidal 2001; Koremenos 2005). Legalization encompasses a larger range of research questions, and views the creation of norms and “soft law” as important steps in institutional development in their own right (Goldstein et al. 2000; Abbott et al. 2000; Goldsmith and Posner 2005; Zangl 2008).

Legalization examines the evolution of international legal forms along three dimensions: precision, obligation, and delegation (Goldstein et al. 2000). As institutions such as treaties involve higher levels of each element, they move towards “hard law” or formal restrictions on state discretion, and compliance is more often encouraged by third-party actors. Importantly, such legal evolution need not be unidirectional: states can make precise treaties that they later retract, or they can delegate monitoring to entities that they later refused to be governed by. As such, legalization involves a continuously evolving search for commitments that meet state demands, and it can explain a retrenchment toward soft law/power politics as well as increasing constraints on sovereignty.
**Precision** refers primarily to the specificity of state commitments—precise commitments occur when a treaty “narrows the scope for reasonable interpretation” (Goldstein et al. 2000, 28). Without precision, states can interpret their commitments as they see fit, and at the soft law end of international commitments, states agree to “largely hortatory obligations” (396). Our view is that precision logically precedes the other two dimensions, but that high precision need not create high levels of obligation or delegation. Precise terms regarding circumstances for states to opt-out of their commitments would necessarily reduce the obligations in the treaty, and delegation might be circumscribed by language explaining exactly how third parties should interpret state actions. Precision clearly represents a separate dimension from either of the other two elements of legalization.

**Obligation** revolves around how binding a commitment is in a legal sense. For treaties, *pacta sunt servanda* is the appropriate principle, in which treaty commitments are regarded as obligatory once made. Alongside this principle of international law, certain flexibilities toward such commitments have evolved, allowing for legitimate breach (Abbott et al. 2000, 409). These include state necessity and *rebus sic stantibus*, whereby states can be exempted due to a material change in conditions (ibid.). This dimension of legalization thus examines the rigidity of state commitment, and takes higher values as commitments apply across a broader range of conditions.

**Delegation** in turn is high when states designate third parties to monitor correct observance of the norms of behavior stipulated in the treaty, to implement sanctions for violations, or to interpret state commitment on their own. Of the three dimensions, it is the easiest to observe, and it is the variable that has probably received the most attention of the three. Many scholars have ignored a potential tradeoff between delegation and obligation: some international institutions involve self-interpreted precise commitments, while others involve broader
commitments with judicial interpretation (Goldstein et al. 2000, 413). High levels of delegation often create new, non-state actors that are empowered to monitor, engage, or constrain states directly (ibid, 418).

The legalization framework has been applied broadly to human rights (e.g., Hawkins 2004), environment (von Stein 2008), and trade (Davis 2012), among others. In the analysis of international investment law, the focus has been much narrower and almost exclusively on delegation (Yackee 2008; see Allee and Peinhardt 2010 for delegation; van Aaken 2008, 2009 for broader applications). This is unfortunate, because legalization offers some important perspective to debates in international investment law.

First, although international investment law is primarily codified via bilateral investment treaties (BITs), debates over international investment law often presume a teleological march toward the “multilateralization of investment law” (Schill 2009). This idea is perhaps best illustrated by repeated analyses of the failure of multilateral treaties in this issue area (Kobrin 1998; Walter 2001; Urban 2006). A similar line of thinking is also embodied in Guzman’s (2005) claims regarding investment treaties and their contribution to customary international law. Fundamentally, the question that most analysts have asked of investment law is: why does it take this primarily bilateral form when trade law has had such success with multilateralism (Guzman 1998)?

Second, recent claims of a crisis in international investment law revolve around the inconsistency of investor-state arbitration rulings (Franck 2005; Waibel 2010) and potential bias in the tribunal selection process (Buergenthal 2006). Most solutions that emerge from this debate propose the creation of a better appeals mechanism or a standing investment court to promote more consistency of legal rulings (see UNCTAD 2013). These multilateral options
seem unlikely in the current climate of bilateral and regional economic deal-making, but countries can revise their own agreements at little cost, and such revisions can at least partially solve some of the problems with the current system and have the added advantage of customizing obligations for each state.

Third, many states have begun to rethink their investment treaty commitments after appearing before international tribunals for allegedly violating investor rights. The countries that have received the most attention in this light are the several Latin American states that have repudiated some international commitments, but even capital-exporting states have had similar introspections and have as a result changed their stance toward investment treaties—in particular the United States and Canada, having been targeted in arbitration claims under NAFTA Chapter 11.

Together these developments suggest a legal system that is still evolving, and one that very well may be moving back toward softer forms of state commitment. Rather than assuming identical multilateral commitments, or treaty abrogation and a rejection of investment law in its current form, we view it as an empirical question, and one that can be answered using measures of these three key dimensions of legalization.

3 The Drivers of Legalization in Investment Law

Investment treaties usually pair a capital-exporting country with a capital-importing country, and the deal is made to overcome a common economic dilemma: the hold-up problem, whereby both parties stand to gain from a transaction but neither is willing to trade due to the likelihood of post-transaction cheating. Long-term investors face the dilemma that any host state powerful enough to maintain order and guarantee their future returns is also strong enough to seize their investment (Olson 1993; Haber, Maurer, and Razo 2003). International investment agreements
exist to increase the credibility of potential host states to respect the property rights of foreign investors. The overwhelming majority of research on the FDI effects of BITs has been explicitly based on this interpretation of BITs (see inter alia Büthe and Milner 2008; Elkins, Guzman, and Simmons 2006; Haftel 2010; Kerner 2009; Neumayer and Spess 2005).

The first IIAs regularly involved European countries whose colonial empires were collapsing but who wanted to maintain international economic ties. From this beginning, capital-exporting states, with their dominant economic position vis-à-vis their treaty partners, have driven legalization in the issue area. For example, investment treaties regularly encode what Guzmán (1998) calls the Hull Rule, which requires “prompt, adequate, and effective compensation” if a host state expropriates a foreign investment. Existing studies of legalization in IIAs find that power asymmetries are a key factor in the delegation of authority to third party dispute resolution (Allee and Peinhardt 2010). And yet, many of the substantive issues covered by modern bilateral investment treaties already appear in treaties of Friendship, Commerce and Navigation (FCN), negotiated by the United States well before it became a global power, and often precisely in order to avoid discrimination of its investors compared to those from imperial powers. Finally, the first modern BIT was signed in 1959 between West Germany and Pakistan, and much of the early German literature attributes this innovation in international law to the fact that Germany no longer had the ability to protect the property rights of its investors abroad by means of military force (Alenfeld 1971).

While investment treaties can be traced at least to the late 1950s, they proliferated at much higher rates in the 1990s. As more states signed investment treaties, the classic bargain between capital-exporting and capital-importing state could no longer be seen to be the primary driving force: a growing number of IIAs were signed by countries of similar size and levels of
development (Jandhyala, Henisz, and Mansfield 2011). More treaties and the increasing awareness of such agreements meant more investor-state disputes. Recent research suggests that as the costs of investment treaties became clearer to developing countries, they began to question their participation (Gordon and Pohl 2015). Poulsen and Aisbett (2013) find that once developing countries appear before investor-state tribunals, they display much greater caution in signing IIAs in the future, especially IIAs with more powerful capital exporters. They attribute this to a process of boundedly rationally learning states, and they find evidence for such a process in their data. However, their analysis covers only developing countries, omitting a potentially important source of change. Because IIAs are symmetric, unexpected costs—not just monetary—of international investment arbitration as just as likely to affect capital-exporting countries as well. Whether home countries were directly targeted by investment arbitration claims or not, the prominence of such claims made the potential cost of IIAs increasingly apparent. Moreover, as Simmons (2014: 34) emphasizes, more IIAs signed by a country clearly increases the risk for a state of being targeted by claims, and tribunals that are empaneled by IIAs show a clear tendency towards more investor-friendly decisions.

As evidence of the generality of home state reactions, we highlight two examples of a rich capital-exporter that changed its model treaty after appearing before an investor-state tribunal as respondent: the United States after the Loewen case, and Australia after the Philip Morris case. In each case, capital exporting states did not stop signing investment treaties, although they crafted new language in those treaties in response to their experience with international arbitration tribunals.
For the United States, investment treaties served to protect their investors in other countries. Vandeveld (2008, 285) documents the importance of the US response to its first participation as a respondent to an arbitral claim:

Everything changed on October 30, 1998, when the Loewen Group, a Canadian funeral home company, submitted to investor-state arbitration under the NAFTA a claim against the United States arising out of an adverse $500 [million] jury verdict rendered in a Mississippi state court.

Within a year, the United States halted IIA negotiations on further treaties to foster an internal debate over how to protect the country from future involvement, to ultimately “plot out a more balanced approach (…)” (Simmons 2014, 43, see also Freeman 2013; Williams 2014). Of particular concern was the “uncertain scope” in existing treaties and the “broad discretion” given to arbitration panels (Vandeveld 2008, 309). The resulting 2004 model BIT narrowed the definitions of expropriation, investment, and investor, confining dual nationals to their “dominant” nationality (Vandeveld 2008, 295). Additionally, the U.S. inserted a provision that would allow BIT parties jointly to withdraw a specific issue from consideration by a tribunal and decide it themselves. It clarified the relationship of investor-state dispute settlement (ISDS) to financial regulations and debt instruments, and specified how state parties should increase transparency, reduce performance requirements, and account for both environment and labor standards (Vandeveld 2008). The model treaty simultaneously increased the legitimate exercise of power by host states, clarified the country’s interpretation of particular phrases, imposed greater precision on the norms of host state behavior, and suggested innovations to overcome perceived problems with investor-state tribunals.

These changes were not exclusively aimed at reducing the country’s (or its partners’) obligations under the treaty, or at increasing the protection given to its investors. Instead, the
revisions made the state’s commitments more precise, and in turn clarified its obligations and the powers it was granting to arbitrators. Together these changes sought “a rebalancing of host country and investor interests” but not uniformly in favor of either party (Vandevelde 2008, 289). The U.S. then included these new investment provisions in more trade and investment agreements. For example, the 2005 Uruguay BIT included large portions of the US model BIT verbatim, including its new Chapters 12 (Environment), 13 (Labor), and 20 (Financial Services). For the U.S., a short-term reduction in the signing of IIAs gave way to a long-term process that made its treaty language more precisely reflect the balance between protecting American investors abroad and commitments to foreign investors inside the country.

Australia’s experience has been more recent, and more overtly politicized. In 2011, the Australian government enacted the Tobacco Plain Packaging Act, which dramatically circumscribes the kinds of brand imagery and text on the packaging of tobacco products in an effort to reduce overall tobacco use. In response, American company Philip Morris sued Australia under the 1993 Australia-Hong Kong Bilateral Investment Treaty. The suit argued that Australia had effectively expropriated Philip Morris’s previous investments, that the new law violated fair and equitable treatment promised in the treaty, and that it failed to provide the treaty’s promised full protection and security. Australian governments had already been wary of such investment provisions – their 2005 Free Trade Agreement with the U.S. is the only recent American trade agreement to exclude a commitment to ISDS. However, the Australian government’s hopes for economic gains via the Trans-Pacific Partnership ultimately convinced the government to allow the treaty to proceed with a fully-fledged investment chapter after securing an important exemption. The so-called tobacco carve-out prevents the use of ISDS via

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the TPP to challenge the signatory states’ tobacco control measures. The relevant text is in Article 29.5 of the TPP: “A Party may elect to deny the benefits of [ISDS] with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration … if a Party has made such an election.” Like the U.S., Australia ultimately won its first challenge in an investment tribunal, but it drew lessons from its own experience that translated directly into more precise text in treaties that were signed after the experience.

We maintain that this dynamic is the likely case for most rich-country IIA signatories. The overall treaty adoption rate has certainly dropped, but forty to fifty treaties continue to be signed annually. The ongoing expansion of IIAs is again being driven by capital-exporting states, who are increasingly aware of not only their own experiences with investor-state arbitration, but of broader trends and developments in investment law. For any state that can dedicate legal expertise to follow such events, it is now easier than ever, with several specialized information providers like Kluwer Arbitration, Investment Treaty News, UNCTAD, Transnational Dispute Management, and so on.

Few studies have paid close attention to changes in the context of IIAs over time, especially along the dimensions of precision and obligation. Such evolution, however, is an aspect that rationalist theories have not been particularly strong in predicting, even when uncertainty is involved. Koremenos (2005) bases her theory on the assumption that states agree on an initial distribution of gains based on their relative bargaining power, and then subsequently face persistent uncertainty about future gains. In later time periods, exogenous shocks may result in a different distribution of gains, and these shocks are random, cumulative, and noisily observable. In IIAs, shocks (i.e. being the respondent state in a claim) are unpredictable, but

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4 The article also allows signatory states that have not elected to deny ISDS to tobacco control provisions to do so during the proceedings, and that any such proceeding should then be dismissed.
they are not cumulative and their cost is directly observable, as a monetary award is rendered if a host state loses in a formal arbitration proceeding. This sequence of information revelation makes learning possible.

Based on the preceding discussion, we believe that legal precision may be an alternative to treaty renunciation, but that it shares some of the same underpinnings. States originally signed IIAs to facilitate investment and closer economic ties, and clearly even some of the most advanced countries that signed them underestimated their potential costs. As such, legalization in IIAs should be driven by participating states’ experiences with arbitration tribunals.

_Hypothesis 1: BITs are more precise when the home state has recently appeared as a respondent in an investor-state arbitration._

For many governments, their thinking about legalization may reflect solely their own experience, as Poulsen and Aisbett (2013) find, but they focus exclusively on developing countries. Our contention is that capital-exporting states are more likely to have the legal capacity to follow legal developments in international investment arbitration and are thus more likely to “learn” from the experience of cases in which they are not a participant. Moreover, BIT negotiators, much like other professionals, will probably have incentives to keep up to date with current developments in their field. All of this suggests that cases elsewhere will likely be taken into consideration when drafting treaty language for future negotiations.

_Hypothesis 2: Precision in BITs increases in response to more arbitration cases overall._

Increases in precision are not confined to renegotiation of a single treaty, but are reflected in a country’s overall investment treaty program. Typically, the internal process takes places through the revision of _model treaties_, i.e. the templates that the home countries of FDI take to the negotiating table. BIT negotiations between developed and developing countries almost
always revolve around such templates, and the BITs of the same home country are often remarkably similar. At times, however, model treaties are overhauled, and new legal language enters the universe of BITs (Dolzer and Schreuer 2012). Ideally, we would trace such changes through the model treaties themselves. Unfortunately, the vast majority of them are not published, sometimes the first model BIT is unavailable, and importantly, specific phrasing may enter a model BIT after being incorporated into a signed BIT, having arisen out of the negotiations. For these reasons, we focus on legal precision in signed (but not necessarily ratified) BITs in the public domain. In the next section, we describe how we operationalize our concepts to test these hypotheses.

4 Measuring Precision in IIAs

Our unit of analysis is the treaty dyad, i.e. a treaty signed in a given year between two countries. We focus on the date of signature rather than ratification as the treaty text is fixed at this point, and because some treaties never get ratified, but nonetheless provide evidence of changes in legal language in BITs. Our dependent variable, a measure of legal precision, is an index ranging from zero to one, with a score of one representing the maximally possible degree of precision given the legal language in BITs up to 2012. We collected 1200 BIT texts in English, to our knowledge close to the actual number of English-language investment treaties with publicly available texts, from the Kluwer Arbitration BIT text collection and the UNCTAD Investment Instruments Online search engine. While this is not even half of the universe of BIT texts with close to 3000 treaties in existence, it includes BITs signed by 165 countries. Many countries regularly negotiate BITs in their own official language(s) as well as an English-language version

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that prevails in the event of disagreement. We therefore have reasons to believe that the sample is representative of the language used in BITs.\(^6\)

We constructed the index by assembling a corpus of “standard clauses.” This corpus is derived from the UNCTAD (2007) publication “Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking,” from the commentaries on representative clauses in Brown (2013), and several additional BITs as reference for unusual choices in wording indicated in the previous two sources.\(^7\) Annexes are considered part of the treaty text. For each clause that is present in a particular treaty, we add one to a counter. The total count is normalized by dividing by the total number of possible clauses, so that we arrive at an index that theoretically ranges from zero (a treaty without text) to one (a treaty containing every clause in our corpus). Clearly, no signed treaty can obtain a zero score, and even elaborate treaties do not reach a score of one, but we cannot prejudge this before our analysis. To obtain index scores for the treaties, we used custom text-matching software to measure the presence or absence of specific clauses in each treaty.\(^8\) In robustness checks, we also substitute this index with the (log of the) count of words and the (log of the) count of unique words in each BIT. We provide further details of our methodology in an online appendix that is included with the replication package for this article, available at [insert article DOI here].

We analyze BITs beginning in 1959 (i.e. with the first modern BIT, the Pakistan-West Germany BIT) until 2011 (the India-Lithuania BIT). During this time, we observe considerable variation between BITs, even among those signed by the same developed country. Ranking BITs by precision reveals that the 1968 Denmark-India BIT is the least precise, while the top five

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\(^6\) Missing data on other variables unfortunately limits our statistical analysis to just under 800 cases.


\(^8\) We used the Python package fuzzywuzzy to implement a fuzzy match, calibrated by using hand-scored treaty texts.
treaties by precision are all from the last ten years in our dataset: Japan-Peru, Canada-Jordan, Canada-Peru, USA-Uruguay, and Canada-El Salvador. The precision in the BITs of some developed countries, in particular Germany and the UK, shows a clear upward trend, but this is by no means the case across the board: US and Canadian BITs start out with a high level of average precision and never fall below this level.

The average degree of precision in BITs shows a strong upward trend as well, as shown in Figure 1, in particular since the late 1970s. This trend, we submit, is not merely a general move toward a more investor-friendly public international law. Rather, we aim to explain the driving force of this trend and to endogenize it in our empirical model.
This increase in precision is reflected in the published model BITs of Germany, Canada, and the United States as shown in Figure 2. We focus on these countries because we have access to more “historical” models than in other cases, but it is likely that other countries have gone through a similar number of revisions. Although these models were made publicly available, we cannot ascertain that they were the only templates available to negotiators (in fact in the German case it is highly unlikely that the first formal model BIT was available in 1991). The change in precision in model BITs is therefore suggestive, but not direct evidence.
Figure 2: Precision in Canadian, German and US Model BITs, 1984-2012

Figure 3 shows the measured precision in Germany’s 9 BITs. A particularly striking comparison is the increase in precision from the first BIT with Pakistan in 1959 to its replacement with a “modernized” treaty in 2009 that scores almost six times the precision score in our measure. Over the same time period 1982-2006, the precision score in German BITs increased while that of US BITs stayed on average the same until the revision of its model BIT in 2004 and the subsequent negotiation of the 2006 treaty with Uruguay.

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9 West Germany until 1990. Like the majority of socialist countries, the German Democratic Republic did not negotiate any bilateral investment treaties.
Figure 3: Precision in German BITs, 1959-2009
BIT negotiations tend to take place between an identifiable “home” and “host” country: In nearly all cases of BITs covering any investment flows, the flows are almost exclusively from one country into the other. Nearly all BITs are either treaties between a developed and a developing country or a transition country, or they are agreements between developing countries (note here that there are many that have no practical relevance since they do not cover actual investment). There are very few BITs between developed countries, among them treaties with Singapore and a few countries that have only recently reached (or approached) developed-country status such as Chile, South Korea and Mexico. Nonetheless it is not always easy to clearly identify the “home” and “host” country. We therefore follow a simple rule: We use the World Bank’s high-income country classification (extrapolated backwards to 1959), and keep a country as a home country if it is classified as high-income, and a country as host if it is not. A table listing countries and their frequency of appearance is in the supplementary files.

4.1 Independent Variables

Our principal independent variables are claims against home, a binary variable that equals one if a claim has been brought against the home country, and new claims against other states, a count of the new claims brought against countries other than the home country in question. The former measure allows us to test Hypothesis 1 (that precision increases in response to the home state’s direct involvement in an arbitration). We focus on claims rather than “winning” or “losing” in arbitration procedures since often claims are only partially granted, and even a successful defense by a host country can still trigger a reconsidering of legal clauses that would materialize in greater legal precision in future BITs. A positive coefficient on this variable would indicate that countries learn from being sued and revise BIT language towards greater precision based on their own experience.
However, with few exceptions (especially Argentina and Venezuela) most countries are rarely hit by a claim, so that there are relatively few opportunities to learn about the desired degree of legal precision from such instances. Importantly, according to Poulsen and Aisbett (2013), many developing countries cannot apply the lessons learned when being hit by arbitration claims to new BITs because they stop signing them. In other words, only home countries have the opportunity to learn about the effective legal precision in BIT clauses and to use this knowledge in subsequent BITs.

New claims against other states operationalizes our Hypothesis 2 (that claims make issues related to legal precision salient, and convey useful information about the meaning of specific clauses). We argue that new claims are largely responsible for the individual decisions of countries to revise model BITs and increase legal precision. We lag both variables by one time period to reduce the risk of reverse causality. To recall, we hypothesize that new information about the interpretation and appropriate precision of BIT law largely becomes available through claims.

4.2 Control Variables

We include a number of control variables based on previous research. We divide these into those factors that should affect BIT precision because a country is home to investors and those that affect it because the country is a host of FDI. We expect the legal capacity of countries to influence the precision of treaties. While we do not have data on e.g. the number of practicing lawyers by country, we consider evaluations of the law and order in a country as closely correlated with such interests. The same measure is included for home countries, where it proxies for legal interests, and for host countries, as an effective legal system will be more predictable

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10 Regardless of whether one agrees with the theoretical reasoning in Aisbett and Poulsen (2013), their empirical evidence demonstrates that developing countries do not sign BITs for many years after being hit by the first claim.
and reduce the need for greater precision at the international level. We use the variable with the same name from the PRS/ICRG political risk data.\textsuperscript{11} We also include the \textit{law and order} variable for the host country. A host country with a more developed legal system, including more lawyers, is also more likely to be willing to move towards greater legal precision because the relevant government ministries can tap into greater legal resources.

Independent of such legal capacity, we control for the (log of) \textit{GDP per capita} of both countries, since richer countries can afford to train and educate their bureaucracy better and access legal advice elsewhere. Treating BITs as primarily driven by home-host state negotiation also implies an often stark asymmetry. BITs between powerful home and a relatively weaker host country will likely be more precise. In the vast majority of cases where investment flows in only one direction, greater precision will benefit the more powerful country as host of FDI, since it only puts checks on the behavior of the host country. Nonetheless, there are situations in which the host country may possess bargaining leverage that would allow it to insist on less precision—among them, when the country has a sizable home market to which it controls access. We therefore include the \textit{GDP ratio}, i.e. the ratio of the home state’s GDP to the host state’s GDP. This measure of asymmetry is the most appropriate because our focus is on the ability to provide FDI and to offer an opportunity to earn revenue for investors. Both are from the World Development Indicators database. Descriptive statistics for all variables are shown in the supplementary files.

5 \hspace{1.75cm} \textbf{Estimation and Results}

Our data are pooled cross-sectional in nature, and our dependent variable \textit{precision} is approximately normally distributed. While the index ranges from 0 to 1, none of the BITs reach

\footnote{11 The PRS data only starts in 1984 so that we extrapolate it backwards.}
the extreme values: we neither have a “BIT without words” nor a perfectly precise treaty (as theoretically defined by us) at hand, so that none of the observed data is censored. We thus use OLS for the estimation. As we find evidence of heteroskedasticity of the residual variance, we use robust (Huber-White) standard errors. Importantly, because many (but not all) home countries use “model BITs” as template for negotiations, we have strong reasons to believe that observations involving the same home country are not independent. We therefore allow for correlations within each group of BITs signed by the same home country.

Ideally, we would construct a panel and test for within-country BIT variation over time in response to claims against the country in question. Unfortunately for our analysis, very few countries re-negotiate treaties. Only 21 of 1117 BITs we coded are replacements of earlier treaties. What’s more, of these 21 treaties, five are treaties negotiated by Germany and six by China (PRC), and in fact one is a China-Germany treaty renegotiation. We are therefore left with a cross-section, with the attendant limitation on causal identification.

Even though we do not have panel data, it is important to control for time in our analysis, as our dependent variable trends upwards in later periods. The simplest possibility is to include a time counter \( t \). However this counter is strongly correlated with the variable new claims against other states \( (\rho=0.66) \), and moreover does not capture whether home states have an opportunity to learn and implement new language in subsequent treaties: Even though time passes, they may not sign BITs for wholly unrelated reasons. Instead, we include the count of BITs already signed by each country separately as control variables. The measure includes BITs signed in the same year but on an earlier date. To check if the BIT count

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12 This means that the results from a Tobit model with censoring values set to 0 and 1 would by definition be identical with the OLS estimates.
13 In future research, we hope to broaden our sample to include a sufficient number of renegotiated BITs as well as trade agreement investment chapters. Haftel and Thompson (2013) provide evidence that treaty renegotiations often occur in reaction to investment disputes, an argument that matches our findings nicely.
model is rejected in favor of a simple time trend, we compute the J test and the Cox-Pesaran test for non-nested OLS models, but find no evidence in favor of the latter model.\textsuperscript{14} We take the model with our two variables of interest and the two counters as the base model, to which we add several controls. Since we have to rely on the UNCTAD database for information on BIT signature dates, the two variables constrain our sample to 702 observations in the base model.

Table 1 shows our regression results for a variety of specifications and different operationalizations of legal precision. Column 1 shows the base model with only BIT-count controls. Column 2 shows our preferred specification with our weighted index of precision as dependent variable. To give a sense of the magnitude of the effects, keep in mind that the estimation is a linear model. In case of a recent claim against the home country, the average level of precision moves upwards by 0.077 units in our measure of precision, which is approximately equal to the difference between the 1976 Netherlands-Egypt and the 1991 Netherlands-Slovakia BIT, or the 1991 Canada-Argentina BIT to the 1997 Canada-Armenia BIT. In that same model, each new claim against another state moves the degree of precision by 0.003, suggesting that states pay attention even to cases to which they are not party. Arbitrations that do not involve the home state in question are less influential, and it takes three or four such cases on average to generate an increase in precision that one case against the home state would. Both variables combined explain about a tenth of the observed variation in the data based on $R^2$ comparison between the model with and without these variables, and about half of the variation explained by the model. These first two results show evidence that states respond to arbitrations with greater

\textsuperscript{14} See Greene (2003, 158).
precision in new and renegotiated treaties. In our supplementary files, we show results when including the time trend.

The signs of coefficients on our control variables are broadly in line with our expectations. The coefficient on GDP ratio is positive, which is commensurate with the notion that precision increases more in asymmetric dyads. Across all three models, law and order for the home country is never significant, perhaps because there is less variation in this measure. In Model 1, the coefficient for the host country measure of law and order is positive and statistically significant at the 95% level of confidence, but it surpasses that threshold in neither of the other two models. As the majority of home states benefit from stable rule of law, there is relatively little variation in this measure, so that this parameter cannot be estimated with precision.
Table 1: Regression results

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Constants not shown. * p<0.10, ** p<0.05, *** p<0.01
We also find that home and host states with a higher GDP per capita are typically signing more precise BITs. This effect is the most pronounced, as for a home state, a one percent upward change in GDP per capita is approximately as influential as being hit by a claim. GDP per capita may be a proxy for administrative capacity in our data, which would apply to home and host countries alike.

The principal challenge to these findings is that they are based on our weighted index score. We therefore estimate the same model using four different ways to operationalize precision as robustness checks. Columns 3 and 4 show the result when we include the log of a simple count of words and log of the count of unique words. The substantive effects on the Claim against home are six to ten times larger and significant, while that of New claims against other states remains unchanged, but now only significant at the 10% level. In column 5 we show the results when we interpret our index through the lens of item response theory, where each text clause is seen as having a difficulty parameter and a discrimination parameter and represents an approximation of an ideal point of precision. We use a one-dimensional Monte Carlo Markov Chain model to simulate from the posterior distribution (Albert 1992; Martin et al. 2011). The results do not change in terms of statistical significance, but are considerably larger in substantive terms. Finally, in column 6 we show the results without applying weights to our index, but the findings are nearly unaffected in size and statistical significance.

Ultimately, our most results are therefore in keeping with Poulsen and Aisbett (2013) – countries are influenced primarily by their own experience. In contrast to their findings regarding developing countries, however, we find evidence that home countries are influenced
by broader trends in investor-state dispute settlement. Greater precision of treaty obligations therefore seems to be a natural response to unexpected interpretations by arbitral rulings.

6 Conclusions and Outlook

In this research note, we provide a first attempt to explain changes in legalization in international investment agreements. We focus on the degree of precision enshrined in BITs through the use of more elaborate and less ambiguous language. Using newly constructed measures of BIT precision, we find strong evidence for our hypotheses. Precision is higher for home states that have directly experienced claims, and when arbitration awards accumulate over time. In each of our models, higher levels of precision are associated not just with an initial claim but with each additional claim against home country.

Our results suggest that home countries are driving the increase in legal precision in treaties, and that their interest in greater specificity emanates not just from their direct experiences with investor-state arbitration but also from worldwide trends. Where legal capacity allows, states continue signing IIAs but protect their interests through more precise language. Combining our findings with the logic from Poulsen and Aisbett (2013), IIAs may be increasingly biased in favor of capital-exporting states. If developing countries stop signing treaties and/or repudiate those they have signed in the past, the overall system may be moving in a direction with less balance of interest between home and host states. Our initial results, however, indicate only one dimension of legalization, and as such we treat them as necessarily tentative in terms of policy recommendations.

Although our model goes some way toward explaining variation and evolution in precision in BITs, our findings are clearly only the first step toward a better understanding of the driving
forces of legalization in international investment law. More work remains to be done to better identify how and through what channels developed countries learn. For example, while claims provide information about the “realized” precision of a given BIT, arbitration rulings should be even more important as a source for model treaty revisions. Furthermore, we also hope to collect and identify a sufficient number of model treaties to put their content into context, and to focus on specific clauses and wordings that represent improvements in precision. Finally, we will expand our dataset to include the dimension of obligation. While countries might always want greater legal precision to make sure future arbitration proceedings “go their way,” they also may seek to clarify and in some instances reduce the extent of obligations on host states.

The advantage of this theoretical toolkit is that it might uncover increasing movement toward hard law in one dimension—say precision—while at the same time showing that states are rethinking previous strategies of delegating the interpretation of their commitments to third parties. In other words, examining the legalization of international investment agreements over time may reveal a more accurate and nuanced reality than any of the claims about the crisis in investor-state arbitration currently demonstrate.
7 Bibliography


Web Appendix to:
“Learning and the Precision of International Investment Agreements”

Table 1: Summary Statistics

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<td>0.85</td>
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<td>USA</td>
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<td>JAM</td>
<td>5</td>
<td>0.71</td>
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<td>JOR</td>
<td>11</td>
<td>1.56</td>
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<td></td>
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<td>KAZ</td>
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<td>4</td>
<td>0.57</td>
</tr>
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<td></td>
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<td>KHM</td>
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<td>0.85</td>
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<td>KOR</td>
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<td>LBN</td>
<td>17</td>
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<td>LBR</td>
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<td>0.14</td>
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<td>LBY</td>
<td>1</td>
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<td></td>
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<td>LCA</td>
<td>2</td>
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<td>LSO</td>
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<td></td>
<td></td>
<td>ZWE</td>
<td>7</td>
<td>0.99</td>
</tr>
</tbody>
</table>
Robustness Checks

In table 3 below we show the results of several robustness checks. In Column A1 we replace the BIT count variables with a simple time trend $t$. This variable is too strongly correlated with the Claims against other states variable to include both in the same model, but the coefficient on Claim against home is significant and of comparable magnitude. Column A2 shows the model with the time trend and all our controls, which again leads to similar conclusions.

In the models in column A3 and A4, we include the variable Claim against host that equals 1 if a host state has been hit by a claim in the previous year and zero otherwise, both jointly (A3) and individually (A4) with the Claim against home. Neither specification gives evidence that a recent claim against a host state has an effect on the precision measure in the BITs negotiated subsequently. This suggests that developing (host) countries have little influence of changes in BIT texts, which fits with the findings by Poulsen and Aisbett (2013).

Table 3: Robustness checks

<table>
<thead>
<tr>
<th>Dependent variable: Precision score</th>
<th>(A1)</th>
<th>(A2)</th>
<th>(A3)</th>
<th>(A4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim against home, t-1</td>
<td>0.085</td>
<td>*** 0.102</td>
<td>*** 0.080</td>
<td>***</td>
</tr>
<tr>
<td>Claims against other states, t-1</td>
<td></td>
<td></td>
<td>0.002</td>
<td>** 0.002</td>
</tr>
<tr>
<td>$t$</td>
<td>0.009</td>
<td>***</td>
<td>0.010</td>
<td>***</td>
</tr>
<tr>
<td>Claim against host, t-1</td>
<td>-0.020</td>
<td>-0.020</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed BITs count (home)</td>
<td>-0.000</td>
<td>-0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed BITs count (host)</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law and order (home)</td>
<td>0.000</td>
<td>-0.018</td>
<td>-0.018</td>
<td></td>
</tr>
<tr>
<td>Law and order (host)</td>
<td>0.003</td>
<td>0.014</td>
<td>* 0.014</td>
<td>*</td>
</tr>
<tr>
<td>GDP ratio</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>In GDP per capita (home)</td>
<td>-0.024</td>
<td>0.078</td>
<td>*** 0.078</td>
<td>***</td>
</tr>
<tr>
<td>In GDP per capita (host)</td>
<td>0.012</td>
<td>0.024</td>
<td>** 0.024</td>
<td>***</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.27</td>
<td>0.28</td>
<td>0.23</td>
<td>0.23</td>
</tr>
<tr>
<td>N</td>
<td>704</td>
<td>505</td>
<td>486</td>
<td>486</td>
</tr>
</tbody>
</table>

Constants not shown. * p<0.10, ** p<0.05, *** p<0.01
Extrapolating the World Bank’s High-Income Classification

The World Bank’s high-income classification started in 1987, at which point a country with a per-capita income (GNI) of USD6,000 or higher was determined to be high-income. The threshold is indexed using the average inflation rate in the G5 countries (from 1987 to 2001) and the UK, the US, Japan and the Eurozone inflation in later years. We extrapolate this forward to 1958 using the consumer price index of the US Bureau of Economic Analysis, but set Austria and West Germany to be high-income countries in 1959 and 1960 even though they narrowly undershoot the threshold in those years.

Notes on the Construction of the Precision Index

To construct our index measure of precision in BITs, we use a python program to calculate the Levenshtein (1966) distance between two strings, of which one is the clause we pre-specify, and the other is a sentence in an IIA. Somewhat oversimplifying, the Levenshtein distance is the number of characters that needs to be changed in order to convert one string into another. More specifically, the \( lev_{a,b}(|a|,|b|) \) distance between two strings \( a \) and \( b \) whose length is \(|a|\) and \(|b|\) respectively:

\[
lev_{a,b}(i,j) = \begin{cases} 
  \max(i,j) & \text{if } \min(i,j) = 0 \\
  lev_{a,b}(i-1,j) + 1 & \\
  lev_{a,b}(i,j-1) + 1 & \\
  lev_{a,b}(i-1,j-1) + 1_{(a_i \neq b_j)} & \text{otherwise}
\end{cases}
\]

where \((a_i \neq b_j)\) is the indicator function equal to 0 when \(a_i = b_j\) and equal to 1 otherwise, and \(lev_{a,b}(i,j)\) is the distance between the first \(i\) characters of \(a\) and the first \(j\) characters of \(b\).

We then set a threshold maximum distance that we consider a match (typically 25% of individual characters that can be changed).

The criteria are organized by sections of the treaty, then subcategorized by the subject matter or further subsection, and then by keywords or clauses in the treaty. For the most part, the organization and style mimics that of the UNCTAD (2007) report, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*. The following BITs were used as an additional reference:

Australia and Indonesia
The United Kingdom and Belize
http://www.unctad.org/sections/dite/iaa/docs/bits/uk_belize.pdf
Sri Lanka and Japan
The United States and Cameroun
Definitions of investment that list types of assets are easily matched. More challenging are exclusions. Consider for example a clause that is approximately matched. In our pre-specified list we have:

“A loan to, or a debt security issued by, a party or a state enterprise thereof is not an investment;”

Our program picks this up in the Australia-Mexico BIT (2005), where the wording is as follows:

*but “investment” does not mean:*

(\(\times\))

*a loan to, or a debt security from, a Contracting Party or a state enterprise, regardless of original maturity;*

It likewise picks up the following clause from the Switzerland-Mexico (1995) BIT,

*A payment obligation from, or the granting of a credit to, the State or a state enterprise is not considered an investment.*

Inevitably, we find measurement error introduced by the software, in particular where definitions of investment are re-stated in different form, leading to double-counting. Nonetheless the measurement error (to the extent we can discern clear mismatches) is consistently less than in our attempts at human coding.¹

We then apply weights to different clauses so that a hypothetical treaty with all clauses would obtain a score of 1. Clearly these weights are subjective. We therefore use different measures, including unweighted scores, in our analysis. Table 4 shows the correlation of the different measures.

¹ We also have fewer problems with inter-coder reliability and undergraduate “coder attrition” during the summer months.
Table 4: Correlations of precision measures

<table>
<thead>
<tr>
<th></th>
<th>Precision</th>
<th>Precision unweighted</th>
<th>ln word count</th>
<th>ln count of unique words</th>
<th>IRT estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Precision</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Precision unweighted</td>
<td>0.79</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ln word count</td>
<td>0.42</td>
<td>0.70</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ln count of unique words</td>
<td>0.44</td>
<td>0.71</td>
<td>0.94</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>IRT estimate</td>
<td>0.77</td>
<td>0.93</td>
<td>0.66</td>
<td>0.67</td>
<td>1.00</td>
</tr>
</tbody>
</table>

The complete list of all index clauses begins on the next page.
Index of Relevant Criteria for Precision of BITs

**Goal:** Arrange an index of all the relevant criteria for the legal strictness of the Bilateral Investment Treaty.

**Organization:** The criteria are categorized by sections of the treaty, then subcategorized by the subject matter or further subsection, and then by keywords or clauses in the treaty. Look for approximate matches of the text in italics.

**INDEX**

I. Definitions.
   a. “Investment”.
      i. Asset based definitions.
         1. Keywords/Phrases:
            a. *Every kind of asset.*
            b. *Any kind of asset.*
            c. *Movable and immovable property.*
            d. *Property rights.*
            e. *Mortgages.*
            f. *Liens.*
            g. *Pledges.*
            h. *Shares.*
            i. *Holdings of companies.*
            j. *Stock.*
            k. *Bonds.*
            l. *Debentures.*
            m. *Participation in a company.*
            n. *Claims to money.*
            o. *Contractual obligation of financial value.*
            q. *Intellectual property rights.*
            r. *Know-how.*
            s. *Goodwill.*
            t. *Trade marks.*
            u. *Non-disclosable information.*
            v. *Utility-model patents.*
            w. *Registered Designs.*
            x. *Technical Processes.*
            y. *The organization and operation of business facilities.*
            z. *Concessions conferred by law or under contract.*
            aa. *Business concessions.*
            bb. *Concessions to search for, extract, or exploit natural resources.*
            cc. *Rights to manufacture, use, and sell products.*
            dd. *Rights to engage in agriculture, forestry, fisheries, and animal husbandry.*
ee. Provided that the investment has been made in accordance with the laws and regulations of the contracting party receiving it.

ff. Invested by investors of one contracting party in the territory of the other contracting party.

gg. Owned or controlled by an investor of a contracting party in the territory of the other contracting party.

ii. Tautological Approach.
   1. Key phrases:
      a. Every kind of investment owned or controlled directly or indirectly by the national or company.
      b. Equity, debt, service and investment contracts.

iii. Closed-list definition.
   1. Key words/phrases:
      a. An enterprise.
      b. An equity security of an enterprise.
      c. A debt security of an enterprise:
      d. A loan to an enterprise:
      e. A loan or debt security issued by a financial institution is an investment only when the loan or financial institution is treated as regulatory capital by the party in whose territory the financial institution is located.
      f. A loan to, or a debt security issued by, a party or a state enterprise thereof is not an investment;
      g. A loan granted by or debt security owned by a cross border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article.
      b. An interest in an enterprise that entitles the owner to share in income or profits of the enterprise.
      i. An interest that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded earlier.
      j. Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.
      k. Interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory such as under:
         i. Contracts involving the presence of the investor’s property in the territory of the party, including turnkey or construction contracts, or concessions, or
         ii. Contracts where remuneration depends substantially on the production, revenues, or profits of an enterprise.
      l. Investment does not mean:
         i. Claims to money that arise solely from:
            1. Commercial contracts for the sale of goods or services by a national or an enterprise of a party to an enterprise in the territory of the other party, or
            2. The extension of credit in connection with a commercial transaction, such as trade financing other than loans or claims to money previously covered.
iv. Other Features (Specific Exclusions from BITs)
   1. Assets used for non-business purposes.
      a. Keywords/Phrases:
         i. Every kind of asset invested with connection to economic activities.
         ii. Respective business undertaking.
         iii. Characteristics of an investment.
         iv. The commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.
   2. Financial transactions that do not entail a real acquisition of interests.
      a. Debt instruments with short term maturity periods.
         i. Usually a three year maturity period.
      b. Claims to money arising solely from commercial contracts for sale of goods and services.
      c. Public debt in the form of payment obligations
         i. Loans or securities of the State or State enterprise.
   v. Ownership vs. Control of an Investment
      1. Often investments are very complexly layered. BITs generally seek to cover all nationalities of investors. They do this by distinguishing ownership and control.
         a. Keywords/Phrases:
            i. Own and control.
            ii. Direct and indirect investment.
   b. “Investor”.
      i. Natural Person.
         1. A natural person recognized by that party’s internal law as a national or citizen.
            a. Keywords/Phrases:
               i. Possessing citizenship.
               ii. Permanently residing.
               iii. Physical persons deriving their status as nationals from the law in force in …
               iv. Person reside or be domiciled in the country of nationality.
               v. A dual citizen shall be deemed exclusively a citizen of the state of his or her dominant and effective citizenship.
               vi. Persons who have both … and … citizenship, they shall be considered (citizens of one country in that country and citizens of the other country in the other country).
      ii. Legal Entities.
         1. Place of incorporation, the location of a company’s seat, and the nationality of ownership or control.
            a. Keywords/Phrases:
               i. (Firms, companies, associations, corporations) incorporated or constituted (under law).
               ii. With or without legal personality.
               iii. Legally recognized entity.
               iv. Irrespective of whether or not their activities are directed as profit.
               v. Juridical person constituted in accordance with law.
vi. Properly Organized.
vii. Effectively controlled, directly or indirectly, by nationals of one of the Contracting Parties.
viii. Constituted on the territory of one Contracting Party.
ix. Seat in the territory.

c. “Territory”.
1. Defined as areas over which the Contracting Party has:
   a. Keywords/Phrases:
      i. Sovereignty.
      ii. Jurisdiction.
      iii. Territorial waters.
      iv. Territorial sea.
      v. Internal waters.
      vi. Seabed and subsoil.
      ix. Airspace.
      x. Exclusive Economic Zone.
      xi. Continental shelf.
      xii. Artificial islands.
      xiii. Territory of country recognized by International Law.

d. “Returns”.
1. Keywords/Phrases:
   1. Amounts yielded by an investment for a definite period.
   2. Amount derived directly or indirectly by an investment.
   3. Profit.
   4. Dividends.
   5. Interest.
   6. Royalties.
   7. Fees.
   8. Sums received from … liquidation of an investment.
   11. Other lawful income.
   12. Payment in kind.

e. “Freely Convertible Currency”.
1. Keywords/Phrases:
   1. Convertible currency as classified by the International Monetary Fund.
   2. Any currency that is widely traded in international foreign exchange markets.

II. Promotion and Protection of Investments
a. Keywords/Phrases:
   1. Promotion and Protection of Investments [article title].
   2. Scope of Application [article title].
   3. Most Favored Nation Provision [article title].
   4. National Treatment Provision [article title].

b. There are two approaches to establishment/admission clause:
   1. The “admission clause” (most BITs).
   1. Admission of investments from investor’s of the other contracting party
only if these investments conform to the host party’s laws.
2. There is no obligation for the host country to eliminate discriminatory legislation against foreign investment.
3. Keywords/Phrases:
   a. Admit investments.
   b. Admit such investments in accordance with its laws and regulations.
   c. Specifically approved in writing by.
   d. ... applicable from time to time.
   e. Consistently with national objectives, admit...
   f. Accorded treatment no less favorable than that accorded to investors of any third country.

ii. The “right of establishment” clause (mostly US, Japan, Canada)
   1. In place of an admission clause, some BITs include a right of establishment under most favored nations or national treatment.
   2. A right of establishment clause also allows for the exclusion of the BIT from certain industries. This is usually referred to in the Annex, and may or may not cover investments made before the BIT comes into force.
3. Keywords/Phrases:
   a. With respect to establishment... each Party shall accord treatment no less favorable than it accords ... to investments... of its nationals or companies... or to investments of nationals or companies of a third country.
   b. A Party may adopt or maintain exceptions to the obligations... with respect to the matters specified in the Annex to this treaty.

c. Investment Promotion
   i. Usually a restatement of the language used in the Preamble.
      1. Keywords/Phrases:
         a. Promote.
         b. Encourage.
         c. Create favorable conditions.
   ii. Some aim to facilitate gaining of a work permit, and even establish offices.
      1. Keywords/Phrases:
         a. Granting of appropriate facilities, incentives, and other forms of encouragement.
         b. Grant necessary permits.
         c. Licensing agreement
         d. Contracts for technical, commercial, or administrative agreements.
         e. Including facilitating the establishment of representative offices.

d. General Standards of Treatment.
   i. Two approaches:
      1. Absolute Standards.
         a. Non-contingent; establish treatment to be accorded without referring to the manner in which other investments are treated.
         b. Fair and Equitable Treatment
            i. Keywords/Phrases:
               1. Fair and equitable treatment.
               2. Enjoy protection.
               3. Full protection and security.
               4. Adequate protection and security.
5. Shall not impair, by unreasonable or discriminatory measure.
7. Full legal protection and fair treatment no less favorable than that accorded to its own investors or investors of any third party.
8. In accordance with the principles of International Law.
9. In particular any restriction to free movement, purchase and sale of goods and services, and any other similar measures.
10. Under and subject to national laws and regulations.
11. Obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principal of due process embodied in the principle legal systems of the world.
12. Requires each party to provide the level of police protection required under customary international law.

2. Relative Standards.
   a. National Treatment
      i. Agreements with national treatment applying to established investment.
         1. Keywords/Phrases:
            a. Accord in its territory to investments... treatment no less favorable than that it accords investments of its own investors.
            b. Accord in its territory investors... treatment no less favorable than that it accords its own investors.
            c. [National Treatment does not apply to] an amendment that does not increase the non-conformity of the measure [that was previously in place and is not covered under national treatment].
            d. In terms of access to courts, administrative tribunals, and agencies of any level of jurisdiction for the purpose and exercising their rights.
            e. In like circumstances.
            f. With respect to a subnational government, treatment no less favorable than the treatment accorded... by that subnational government to investors, and to investments of investors, of the party of which it forms a part.
      ii. Agreements with national treatment applying to pre and post-establishment phase.
         1. These have all the provisions stated above but also include clauses excepting certain sectors and industries.
         2. Keywords/Phrases:
a. Investors or perspective investors.

b. Exception to the obligation of paragraph indicating national treatment.

c. A party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective.

b. Most-Favored Nation Treatment
   i. Ensures investments or investors of contracting parties to a BIT receive the best treatment that each of them has granted to the investments or investors of any third country.

1. Keywords/Phrases:
   a. Shall in its territory accord…
   b. Treatment no less favorable that which it accords to investments and returns of its own investors, or to investments and returns of any third state, whichever is more favorable.
   c. Treatment shall be no less favorable than that extended by each party to investments made in its territory by investors of a third country.
   d. In like circumstances.

2. MFN Treatment Only in post-Establishment Phase. Several categories:
   a. MFN treatment to all investments (with perhaps some exceptions).
   b. MFN treatment to established investments permitted by domestic legislation.

   i. Keywords/Phrases:
   ii. In accordance with its laws and regulations, each Contracting Party…treatment no less favorable.
   c. No new non-conforming measures must be taken which did not exist when the BIT went into force (“standstill clause”).

3. MFN dispute settlement mechanisms.
   a. MFN treatment can be used over all of the BIT or only parts of it, the following are restrictions on MFN coverage in dispute settlement.

   b. Keywords/Phrases:
   i. In all matters subject to this agreement.
   ii. In all matters related to their business activity in connection with their investment.
   iii. With means to assure their rights to such investments.
   iv. In the avoidance of doubt is confirmed
that the treatment provided... shall apply to provisions of articles [relevant sections].

v. As regards to establishment, management, conduct, use, acquisition, enjoyment, operation and sale or other disposition.

vi. [applicability only to covered investments].

ii. Exceptions to MFN standard

1. Regional Economic Integration Organizations:
   a. Keywords/Phrases:
      i. Free trade area.
      ii. Customs union.
      iii. Economic union.
      iv. Common market or similar international agreement.
      v. Forms of regional cooperation.

2. Advantages granted from a double taxation treaty.
   a. Keywords/Phrases:
      i. Agreements relating to avoidance of double taxation.
      ii. Any international agreement or arrangement relating wholly or mainly to taxation.

3. Ownership of property.

III. Expropriation.

a. Keywords/Phrases:
   i. Expropriation [article title].
   ii. Compensation [article title].

b. Definition:
   i. Keywords/Phrases:
      1. Expropriations.
      2. Nationalizations.
      3. Effect equivalent to [expropriation].
      4. Subjected to direct or indirect measures.
      5. Having the effect of dispossession.
      6. Deprivation.
      7. Interfering with tangible or intangible property rights.

c. Conditions for lawful expropriation.
   i. Taken for a public purpose, in a non-discriminatory basis, under due process of law, and based on the payment of prompt, adequate, and effective compensation.

ii. Keywords/Phrases:
   1. Public purpose.
   2. Non-discriminatory basis.
   3. Due process of law.
4. Prompt review by a judicial or other independent authority.
5. Payment of prompt, adequate, and effective compensation.
6. In accordance with the procedure established by the laws of the contracting party.
7. Compensation shall amount to the fair market value.
8. (Compensation shall be made) no less favorable than that which the Contracting Party accords to its own investors.
9. Applicable commercial rate or LIBOR rate.
10. Generally recognized principles of valuation.
11. Payment shall be made without undue delay.
12. Paid in the currency in which the investment was originally made.
14. Freely transferable in freely convertible currency.
15. Freely usable currency.
16. (Compensation value equal to that) on the date the measure was taken.
17. Rate of exchange used by the IMF on that date.
18. In the event that payment of compensation is delayed the investor shall receive interest at the prevailing market rate of business transactions at the date of compensation payment.
19. Highest rate of interest for the fixed deposits of the government savings bank.
20. As determined by the civil and commercial code.
22. Shall include interest.
23. Paid in a manner which would place investors in a position no less favorable than the position in which the investors would have been paid immediately on the date of expropriation...

IV. War and Civil Disturbances.
   a. Losses due to situations of war, riot, insurrection, rebellion, or other civil disturbance.
      i. Keywords/Phrases:
         1. Owing to the outbreak of hostilities or a state of national emergency, such as revolution, revolt, insurrection, or riot.
         2. Owing to acts of God, war… [in reference to natural disasters].
         3. Owing to… act of terrorism.
         4. Treatment… no less favorable than that which the Contracting Party accords to investors of any third state.
         5. Treatment no less favorable than that accorded to its own investors.
         6. Or subject to its laws and regulations, to its own investors.
         7. Shall be accorded restitution or reasonable compensation.
         8. Shall be accorded such compensation as may be provided by its laws.

V. Transfer of Funds.
   a. Particularly important for foreign investors, as they see the timely transfer of profits, capital, and other payments as a necessary condition for smooth functioning investments.
   b. Some countries, however, are particularly vulnerable to capital flight, and sudden inflows of capital.
   c. Coverage of inbound and outbound transfer of funds.
      i. Keywords/Phrases:
         1. Each Contracting Party shall in respect to investments guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns
abroad.

2. All payments relating to investments... may freely transferred into and out of.

3. Free transfer of payments in connection with investments.

d. Open-ended versus closed-list of covered transfers.

i. Keywords/Phrases:

1. Guarantee the free transfer of their capital and the returns from any investments...

   such transfer shall include in particular though not exclusively

   a. Profits, capital gains, dividends, royalties, interest and other current income
      accruing from an investment;

   b. The proceeds of the total or partial liquidation of an investment;

   c. Repayments made pursuant to a loan agreement in connection with an
      investment;

   d. License fees in relation to the matters in [relevant section]

   e. Payments in respect of technical assistance, technical service and management
      fees;

   f. Payments in connection with contracting projects;

   g. Earnings of nationals of a Contracting Party who work in connection with
      an investment in the territory of the other Contracting Party.

2. Each Contracting Party shall with respect to investments in its territory by investors of
   the other Contracting Party allow the free transfer in and out of its territory of:

   a. The initial capital and any additional capital for the maintenance and
      development of the investment;

   b. The investment capital or the proceeds from the sale or liquidation of all or
      any part of an investment;

   c. Interests, dividends, profits and other returns realized; payments made for the
      d. Reimbursement of the credits for Investments, and interests due;

   e. Payments derived from rights enumerated in [relevant section], of this
      Agreement;

   f. Unspent earnings and other remunerations of personnel engaged in connection
      with an investment;

   g. Compensation, restitution, indemnification or other settlement pursuant to
      [relevant section].

e. Scope of the agreement is limited by domestic law.

i. Keywords/Phrases:

1. Subject to its laws and regulations, guarantee the transfer of their investments and
   returns.

f. Standards of Protection.

i. Type of Currency.

1. Keywords/Phrases:

   a. The transfers shall be effected without delay, in a freely convertible currency.

   b. Transfers of currency shall be made without delay in the convertible currency
      in which the capital was originally invested or in any other convertible
      currency agreed by the relevant investors of one Contracting Party and the
      other Contracting Party.

   c. Allow without unreasonable delay the transfer in any freely usable currency.

   d. “Freely usable” currency means... currency that is widely used to make
      payments for international transactions and widely traded in the international
      principal exchange market.
ii. Exchange Rate.
   1. Keywords/Phrases:
      a. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.
      b. Market rate of exchange prevailing on the day of the transfer.
      c. Rates of exchange shall be determined according to the quotations on the stock exchanges.
         i. Or on the spot transactions conducted through the respective banking system in the territory of the respective Contracting Party.
      d. In the event that the market exchange rate does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

iii. Timing of Transfer.
   1. Keywords/Phrases:
      a. Unreasonable delay.
      b. In particular no more than [period of time] must elapse from the date on which the investor properly submits the necessary applications in order to make the transfer until the date the transfer actually takes place.

g. Exceptions.
   i. Keywords/Phrases:
      1. Contracting Party may prevent a transfer through the equitable, non-discriminatory and in good faith application of its laws relating to:
         a. Bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;
         b. Issuing, trading or dealing in securities;
         c. Criminal or administrative violations; or
         d. Ensuring the satisfaction of judgements in adjudicatory proceedings.
      2. Capital can only be transferred [period of time] after it has entered the territory of the contracting party unless its legislation provides for a more favourable treatment.
      3. A Contracting Party may adopt or maintain measures not conforming with its obligations under [relevant section] relating to cross-border capital transactions and [relevant section]:
         a. In the event of serious balance-of-payments and external financial difficulties or threat thereof; or
         b. In cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.
      4. A Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.

VI. Other Specific Clauses.
   a. Performance Requirements
      i. WTO has TRIM treaties which prohibit performance requirements inconsistent with national treatment and based on quantitative restrictions.
      ii. Keywords/Phrases:
1. **Performance Requirements** [article title].

2. If the laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Party in addition to this Treaty contain provisions, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such provisions shall to the extent that they are more favourable prevail over this Treaty.

3. Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

4. Neither Contracting Party may impose, in connection with permitting the establishment or acquisition of an investment, or enforce in connection with the subsequent regulation of that investment, any of the requirements set forth in the World Trade Organization Agreement on Trade-Related Investment Measures contained in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakech on April 15, 1994.

5. Each Contracting Party shall not impose mandatory measures on investments by investors of the other Contracting Party concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having unreasonable or discriminatory effects.

6. Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including but not limited to, any commitment or undertaking in connection with the receipt of a governmental permission or authorization):...

7. Neither Contracting Party shall impose or enforce, as a condition for investment activities in its Area of an investor of the other Contracting Party, any of the following requirements:...
   a. The provisions of paragraph above do not preclude either Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities in its Area of an investor of the other Contracting Party, on compliance with any of the requirements set forth in [that] paragraph.

8. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:

   iii. Host countries might use legislation to force participation of their nationals in the management of the investment.
      1. Some BIT’s have clauses curtailing these domestic legislations.
      2. Whatever these clauses are, in the end the host country has the final word.

   iv. **Keywords/Phrases:**
      1. Management, Directors and Entry of Personnel [article title].
      2. Subject to its laws...
      3. Permit investors...key technical and managerial personnel of their choice regardless of citizenship.
      4. Companies which are legally constituted... and which are investments... shall be permitted to engage top managerial personnel of their choice, regardless of nationality.
5. Neither Contracting Party shall impose or enforce, as a condition for investment activities, the following requirements: to appoint, as executives, managers, or members of boards of directors, individuals of any particular nationality.

6. A Contracting Party may not require that an enterprise of that Contracting Party, that is an investment under this Agreement, appoint to senior management positions individuals of any particular nationality. A Contracting Party may require that a majority of the board of directors, or any committee thereof, of an enterprise that is an investment under this Agreement be of a particular nationality, or resident in the territory of the Contracting Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

7. Subject to its laws, regulations and policies relating to the entry of aliens, each Contracting Party shall grant temporary entry to citizens of the other Contracting Party employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial or executive or requires specialized knowledge.

b. “Umbrella” or Respect Clauses.
   i. Host country ought to respect other obligations it has with regard to investments or investors of the other contracting party.
   ii. Keywords/Phrases:
       1. Application of Other Rules [article title].
       2. Shall observe any other obligation.
       3. Shall observe any other obligation it may have entered in writing with regard to a specific investment.
       4. Shall create and maintain a legal framework apt to guarantee the compliance, in good faith, of all other undertakings assumed.
       5. Shall observe any obligation with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations.

c. Denial of Benefits.
   i. The denial-of-benefits clause allows the BIT contracting parties to deny treaty protection to those companies that are controlled by investors of a non-party and have no substantial business activities in the territory of the party under whose laws they are constituted.
   ii. Keywords/Phrases:
       1. May deny benefits of this Agreement
       2. Investors of a non-Party own or control the enterprise
       3. Investor has no substantial business activity in the territory
       4. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party [and to investments of that investor] if persons of a non-Party own or control the enterprise and the denying Party
       5. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

VII. Transparency.
   a. Keywords/Phrases:
       i. Transparency [article title]

VIII. Treaty Exceptions.
   a. Keywords/Phrases:
b. General respect for the laws of the host party.
   i. Keywords/Phrases:
      1. Laws [article title].
      2. For the avoidance of any doubt… all investments shall, subject to this agreement, be
         governed by the laws in force in the territory of the Contracting Party in which such
         investments are made.
      3. If the legislation of either Contracting Party or obligations under international law
         existing at present or established hereafter… in addition to this treaty… entitling
         investments… a treatment more favourable than is provided for by this Treaty, such
         regulation shall to the extent that it is more favourable prevail over this Treaty.
      4. A Contracting Party shall adhere to any other obligation deriving from a written
         commitment undertaken by it in favour of an investor of the other Contracting Party
         with regard to an investment in its territory.
      5. This Treaty shall not supersede, prejudice, or otherwise derogate from laws, regulations,
         administrative practices or procedures, or administrative or adjudicatory decisions of
         either Party.
      6. Nothing in this agreement shall be construed to prevent a Party from adopting or
         enforcing measures necessary for the conservation of living or non-living exhaustible
         natural resources.

c. Taxation
   i. Keywords/Phrases:
      1. Taxation [article title].
      2. The provisions of this treaty shall not apply to matters of taxation in the territory of
         either Contracting Party.
      3. Except as set out in this article, nothing in this agreement shall apply to taxation
         measures.
      4. With respect to its tax policies, each party should strive to accord fairness and equity
         in the treatment of investment of nationals and companies of the other Party.
      5. For further certainty, nothing in this agreement shall affect the rights and obligations of
         the parties under any tax convention.
      6. Nothing in this agreement shall be construed to require a Party to furnish or allow
         access to information the disclosure of which would be contrary to the Party’s law
         protecting information concerning the taxation affairs of a taxpayer.
      7. The provisions in [article considering national and MFN treatment] are not
         binding for… the tax benefits, exemptions, and reductions which according to the tax
         laws are applicable only to natural persons are residents.

d. Essential Security and Public Order
   i. Keywords/Phrases:
      1. Nothing in this agreement shall be construed as preventing a Contracting Party from
         taking any action necessary for the protection of its essential security interests in times
         of war or armed conflict, or other emergency.
      2. Essential Interests.
4. Nothing in this agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order.

5. Nothing in… precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency.

6. Or for the prevention of diseases or pests.

7. This treaty shall not preclude a party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the restoration of international peace or security.

8. Nothing in this agreement shall be construed… to prevent any party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

9. The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting Party which, in accordance with its legislation, and for national security reasons, prohibit or restrict the acquisition by investors of the other Contracting Party.

e. Protection of Health and Natural Resources.
   i. Keywords/Phrases:
      1. Health, Safety, and Environmental Issues [article title].
      2. Nothing in this agreement shall be construed to prevent a Contracting Party from taking any action necessary for reasons of public health or prevention of diseases in animals and plants.
      3. Shall in no way limit the right of the Contracting Party to take any measure… necessary for the protection of natural and physical resources or human health.
      4. Provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.
      5. Provided… do not constitute a disguised restriction on international trade and investment.
      6. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
      7. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

f. Cultural Exceptions.
   i. Keywords/Phrases:
      1. Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity.
      2. Investments in cultural industries are exempt from the provisions of this Agreement. “Cultural industries” means persons engaged in any of the following activities.

g. Prudential Measures for Financial Services.
   i. Keywords/Phrases:
      1. A Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons.

h. MFN Exceptions
   i. Keywords/Phrases:
1. The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:
   a. Any existing or future free trade area, customs union, common market or regional labor market agreement to which one of the Contracting Parties is or may become a party,
   b. Any international agreement or arrangement relating wholly or mainly to taxation,
   c. Any multilateral agreement on investments.

IX. Dispute Resolution.
   a. Investor-State Dispute Settlement.
      i. Keywords/Phrases:
         1. Settlement of Disputes between a Contracting Party and an Investor of the Other Contracting Party [article title].
      ii. Traditional Elements and some Innovations.
         1. Scope of Investor-State Dispute Settlement Procedures.
            a. Keywords/Phrases:
               i. Any dispute between a Contracting Party and an investor of the other Contracting Party.
               ii. Disputes which might arise... concerning the investment of the Investor.
               iii. Disputes... which arise out of an investment covered by this agreement...
               iv. Disputes related to an investment...
               v. Disputes relating to the interpretation or application of the Agreement.
               vi. Any disputes which arise within the terms of this Agreement.
               vii. Dispute involving the amount of compensation resulting from expropriation, nationalization, or other measures having equivalent effect.
               viii. An investment dispute is... arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to covered investment.
               ix. An investment dispute... the claimant has incurred loss or damage by reason of, or arising out of [a breach of the Treaty].
      2. Legal Standing.
         a. Keywords/Phrases:
            i. In case when a legal dispute arises in respect of the capital investments made by a company of each Contracting Party and such a company is controlled by investors of the other Contracting Party as of the date when such a company files a petition addressed to the former Contracting Party claiming the dispute's being referred to the arbitration tribunal, then for the purposes of the provisions of the present article such a company of the former Contracting Party shall be deemed a company of the other Contracting Party.
            ii. A company which is incorporated or constituted under the laws in force in the territory of one Contracting Party and which, before such
a dispute arises, is owned by investors of the other Contracting Party shall in accordance with Article 25(2) (b) of the Convention be treated for the purpose of this Convention as a company of the other Party.

3. Prerequisites for Activating the Dispute Settlement Mechanism.
   a. Keywords/Phrases:
      i. Consultations and negotiation for [some period of time, usually six months].
      ii. In the event of an investment dispute between a Party and a national or company of the other Party, the parties shall first seek to resolve the dispute by consultation and negotiation.
      iii. Contracting Party Consent [article title].
      iv. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part.
      v. Shall consent in writing to the submission of the dispute to the Centre within [period of time] of receiving such a request from an investor.
      vi. In the case where the dispute may involve the responsibility for actions or omissions of sub-sovereign entities of the Contracting Party… the fore mentioned sub-sovereign entity must give their unconditional consent to the use of arbitration of the ICSID.
      vii. If both parties to the dispute agree, arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force.
      viii. If the investor chooses to file for arbitration, the host Contracting Party agrees not to request the exhaustion of local settlement procedures.
      ix. This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted.
      x. Shall have exhausted the domestic administrative review procedure specified by the laws and regulations of that Contracting Party, before submission of the dispute.

   a. Keywords/Phrases:
      i. The dispute may be submitted to arbitration under: The International Centre for the Settlement of Investment Disputes (ICSID), if both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;
      ii. the Additional Facility Rules of ICSID, if either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention;
      iii. Ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in case neither Contracting Party is a member of ICSID, or if ICSID declines jurisdiction.
iv. Submitted to such procedures for settlement as may be agreed between the parties to the dispute.

v. The Arbitration Institute of the Chamber of Commerce in Stockholm.

vi. NAFTA.

vii. Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final.


5. Subrogation of Insurance Claims.
   a. Keywords/Phrases:
      i. Subrogation [article title].
      ii. If one Contracting Party or its designated agency makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment to the former Contracting Party or its designated agency by law or any legal transaction of all the rights and claims of the party indemnified and that former Contracting Party or its designated agency is entitled to exercise such rights and enforce such claims by virtue of its subrogation, to the same extent as the party indemnified.
      iii. During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of its loss.
      iv. If the investment of an investor of one Party is insured against non-commercial risks under a system established by law, any subrogation of the insurer which stems from the terms of the insurance agreement shall be recognized by the other Party.

   a. Keywords/Phrases:
      i. The tribunal shall reach its award by a majority of votes in accordance with the provisions of this Agreement.
      ii. The principles of international law recognized by both Contracting Parties.
      iii. The arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of the Contracting Party.

7. Finality and Enforcement of Arbitral Awards.
   a. Keywords/Phrases:
      i. Place of Arbitration [article title].
      ii. Awards and Enforcement [article title].
      iii. Any arbitration under this Part shall, at the request of any party to the dispute, be held in a state that is party of the New York Convention.
iv. Arbitration awards shall be final and binding upon the parties to the dispute.

v. Each Contracting Party shall make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is party.

vi. Each Contracting Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award in accordance with its relevant laws and regulations.

8. Espousal of Disputes Submitted to Investor-State Arbitration.
   a. Keywords/Phrases:
      i. Once an action referred to in [submission of the dispute to local courts or to conciliation] and [international arbitration] of this article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels.

b. State-State Dispute Resolution.
   i. Keywords/Phrases:
      1. Settlement of Disputes between the Contracting Parties [article title].
   ii. Traditional Features and Innovations.
      1. Keywords/Phrases:
         a. Disputes between the Contracting Parties concerning the interpretation and application of the Agreement should, if possible, be settled through diplomatic channels.
         b. If a dispute between the Contracting Parties cannot be thus settled, it shall be upon the request of either Contracting Party be submitted to an arbitral tribunal.
         c. Such an arbitral tribunal shall be constituted for each individual case in the following way. Within [period of time] of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairperson of the tribunal. The Chairperson shall be appointed within one month from the date of appointment of the other two members.
         d. If within the periods specified the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite...
         e. In the event that an arbitrator resigns or is for any reason unable to perform his duties, a replacement shall be appointed within [period of time].
         f. The Arbitral Tribunal shall reach its decision by a majority of votes.
         g. The Tribunal shall issue its decision on the basis of respect for the law, the provisions of this Agreement, as well as of the universally accepted principles of international law.
         h. Subject to other provisions made by the Contracting Parties, the Tribunal shall determine its procedure.
         i. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties.
         j. The Arbitral Tribunal may make a different regulation concerning the costs.
         k. The tribunal shall determine its own procedure.
1. The decisions of the Tribunal are final and binding for each Contracting Parties.

2. Separate transparency class.

   a. Keywords/Phrases:
      i. Financial Services [article title].
      ii. Each Party shall, in appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice.

4. Enforcement Measures.
   a. Keywords/Phrases:
      i. The Contracting Parties shall, within [period of time] of the decision of a tribunal, reach agreement on the matter in which to resolve their dispute.
      ii. Such agreement shall normally implement the decision of the tribunal. Such agreement shall also be considered part of the arbitral tribunal’s decision.
      iii. If the Contracting Parties fail to reach agreement, the Contracting Party bringing the dispute shall be entitled to compensation or to suspend benefits of equivalent value to those awarded by the panel.
References

