8
Data-Driven Renegotiation

I. Introduction

When states want to go beyond interpretive clarifications and modify or amend old treaties in light of new ones, they have to resort to renegotiation. The renegotiation of individual investment agreements is often viewed as impractical, inefficient, and costly—a piecemeal response to a systemic problem.[1] Indeed, amending or replacing more than three thousand treaties agreement by agreement sounds like a daunting, perhaps impossible task. This perspective, however, misses three significant opportunities for targeted renegotiations below the multilateral level that have systemic impact without requiring systemic reform. In fact, renegotiations done right can be an efficient, practical, and low-cost way to protect innovation in new treaties and to consolidate and harmonize incomplete treaties around the best practices embodied in more complete ones.

First, on the national level, states increasingly deal with a bifurcated treaty network in which older, incomplete treaties coexist with recent, more complete agreements. These older agreements not only pose a problem per se because they lack the substantive and procedural clarifications and additions common to more complete agreements. They also affect the application and interpretation of more complete agreements and thus jeopardize national treaty modernization strategies more broadly. To ensure that a minority of early agreements do not undermine entire national treaty networks, states can target incomplete IIAs for reform and thereby protect the innovation in their more complete agreements.

Second, on the bilateral level, the shift by states across the globe toward more complete agreements creates new opportunities for renegotiating incomplete ones. Contracting parties whose recent practices converge around more complete agreements implicitly share a common vision for how to renegotiate their existing incomplete ones. In addition, the competency transfer over investment treaty negotiations from member states to the European Union has created additional opportunities to replace scores of incomplete treaties that EU members have signed individually with third states with a single more complete EU treaty in bilateral renegotiations as done, for example, between the European Union

[1] K. Gordon & J. Pohl, *Investment Treaties over Time—Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment, 2015/02, at 32.

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and Canada through the Comprehensive Economic and Trade Agreement (CETA). Such bilateral renegotiations can furthermore produce systemic ripple effects when investment powerhouses update their investment relations inspiring corresponding lawmaking and rule-updating elsewhere.

Third, on the regional level, the creation of investment protection rules through supranational organizations like the European Union or through regional agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) create opportunities to consolidate and harmonize IIAs around more complete treaty practices. Some ongoing regional renegotiations promise to be game changing. Efforts to revise the Energy Charter Treaty (ECT) currently underway could, if successful, indirectly affect the reading of more than six hundred overlapping investment treaties involving country pairs as far afield as Japan and Australia or Switzerland and Turkmenistan. Yet not all regional (re)negotiation efforts are used as opportunities to update the outdated stock of agreements. While the assertion of primacy of EU internal marked rules has prompted a termination of outdated intra-EU investment treaties, the CPTPP, for example, coexists and overlaps with highly incomplete agreements.

If states were to seriously pursue renegotiation and consolidation opportunities at the national, bilateral, and regional level, then a small number of transactions—relative to the more than three thousand IIAs in existence—would have significant impact on the global IIA landscape. As in the case of EU agreements with third states, these renegotiations could replace a large percentage of existing older IIAs and entice other countries and regions to follow suit. Similarly, the updating of the ECT could produce an interpretive substantive modernization of a large portion of the global treaty stock. Hence, even absent a grand multilateral bargain, targeted renegotiations could thus reshape the investment law system in profound and systemic ways.

For these efforts to be successful, renegotiations should be data-driven. Existing data on treaty content and treaty overlaps allows states to quickly spot where they get the most bang for their buck. Moreover, data on the normative convergence of national or regional treaty practices enables states to swiftly map commonalities across IIA networks to identify promising targets for renegotiations where states already share similar preferences. Technology can even provide renegotiating states with a first compromise text draft that seeks to consolidate their respective treaty practices. A data-driven approach to renegotiations can thus overcome practical obstacles relating to inefficiency and state capacity that currently hold back more ambitious renegotiation efforts.

This chapter starts by showing that IIA renegotiations are a giant missed opportunity. They are rarely used, employed for the wrong reasons, and concentrated in a few states. While legitimate concerns hold renegotiations back, at least

some of these concerns can be addressed by leveraging data and technology. A data-driven approach can help identify candidates for renegotiations and prepare and structure renegotiations themselves. The final part of the chapter discusses plurilateral IIAs that are all too often layered on top of outdated IIAs rather than used to replace or modernize incomplete treaties. If done right, bilateral, and regional renegotiations can systemically reform old treaties in light of new ones without requiring systemic reform.

II. Missed Opportunities: Why Renegotiations Are Rarely and Poorly Used

The toolbox of states to deal with outdated investment treaties is limited. Interpretive interventions must work within existing wording and, in the past, have sometimes failed to sway subsequent arbitrators.[2] Unilaterally terminating investment treaties is unenticing because so-called survival clauses keep the treaty alive and lock in protection, often for decades.[3] Joint terminations can avoid such surviving effects but remove a treaty's benefits as well as its disadvantages.[4] Renegotiations either through amendments to existing agreements or through new agreements replacing old ones seem the most effective yet nuanced tool short of a multilateral reform that contracting states possess to address the shortcomings of old, incomplete IIAs. Unfortunately, renegotiations are rarely used and when employed they often fall short of producing sweeping reforms.

A. Renegotiations Are Rare, Concentrated, and Driven by the Wrong Reasons

Most negotiation resources are directed toward concluding new treaties rather than replacing old ones. A 2015 survey conducted by UNCTAD found that

[2] *See* Chapters 5 and 7. Developing countries have pointed to a lacking impact of joint interpretation as one of the reasons for their relatively rare usage. *See* Taylor St. John & Geoffrey Gertz, *State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries*, Blavatnik School of Governance Policy Brief, June 2015, p. 4.

[3] *See generally* Tania Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31 ICSID Rev. 413–433 (2016).

[4] *See* UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA Issue Note, Issue 2, June 2017, at 19. While survival clauses are typically only triggered by unilateral denunciation, some scholars have argued that third-party investor rights may also survive joint termination under specific circumstances; *see* James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. World Investment & Trade 928–950 (2012).

"relatively few countries are renegotiating, amending or interpreting existing IIAs."[5] Similarly, a 2015 OECD study concluded that "treaty amendments [and] treaty replacements have not been a major channel used by countries seeking to change the way their treaties are interpreted."[6] As a result, renegotiations remain rare. Broude et al. count a total of 226 renegotiations of BITs up to 2018 either through new a BIT replacing an old one (around 52%), amendments (around 38%) or replacement of a BIT with an FTA with investment chapter (around 10%).[7] Renegotiations became more frequent between 2004 and 2010, reaching around 20 renegotiations per year,[8] but have since slowed down (Figure 8.1). UNCTAD reported only twenty-seven instances where newer IIAs replace older ones between 2012 and 2017.[9]

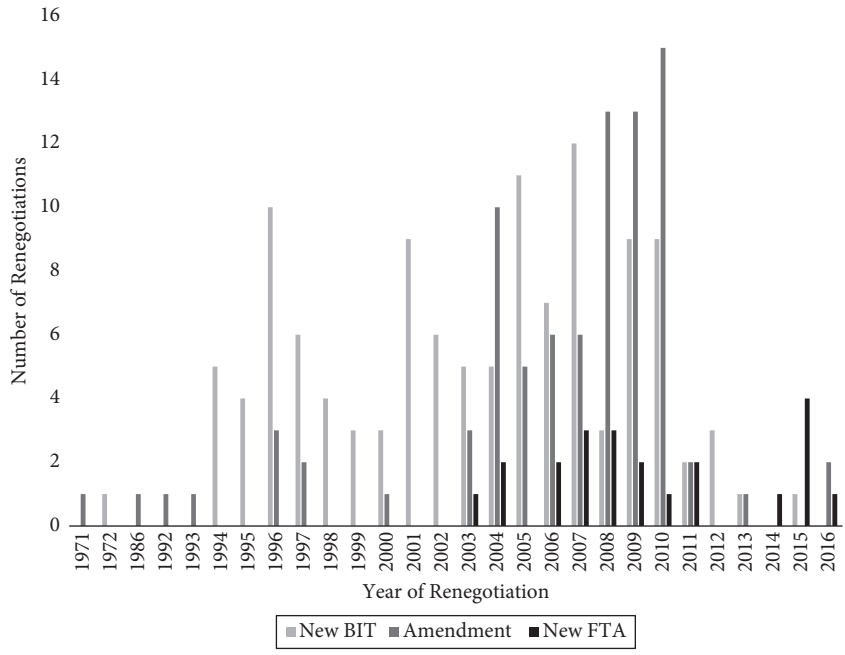

Figure 8.1 Renegotiations by year and type (data: Broude et al.)

[5] UNCTAD, World Investment Report 2016. Investor nationality: policy challenges 111 (2016).

[6] Gordon & Pohl, *supra* note 1, at 36.

[7] Tomer Broude, Yoram Haftel, & Alexander Thompson, *Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?* 5 (2016), https://papers.ssrn.com/abstract=2845297 (last accessed February 17, 2021). The OECD reported similar figures, at 34–35.

[8] Yoram Z. Haftel & Alexander Thompson, *When Do States Renegotiate Investment Agreements? The Impact of Arbitration*, 13 Rev. Int'l Org. 25–48, 33 (2018).

[9] UNCTAD, World Investment Report 2018: Investment and New Industrial Policies 100 (2018).

Table 8.1 Number and type of BIT renegotiations by top five parties

Country	Replaced by BIT	Country	Amended	Country	Replaced by FTA
Germany	17	Romania	26	Peru	4
Romania	15	Czech Republic	21	China	3
China	13	Bulgaria	11	Australia	3
Egypt	13	Slovak Republic	10	Chile	3
Switzerland	10	United States	8	Taiwan	3

In addition, renegotiations have been concentrated among a subset of particularly active states as can be seen in Table 8.1.[10] Of the 226 renegotiations, Romania alone accounts for roughly a fifth or 41 renegotiations. States with large but dated treaty networks, such as Germany, China, Egypt, and Switzerland, have frequently concluded new BITs to replace old ones. Smaller Eastern European states like the Czech Republic, Slovakia, or Bulgaria lead the list of renegotiations through amendments typically prompted by their accession to the European Union. In contrast, South American and East Asian states have predominantly used FTAs to replace BITs, but the numbers remain low in comparison.

Although commentators and international organizations have identified renegotiation as a vital tool to introduce more policy space into older agreements,[11] research shows that renegotiated texts tend to produce agreements that offer *more* rather than *less* protection to investors and have little impact on policy space.[12] Broude et al., for example, find that renegotiated texts typically provide for broader investor-state arbitration clauses.[13] This is unsurprising given that frequent BIT re-negotiators such as Germany or China have primarily replaced old treaty texts that either lacked ISDS (in case of Germany) or limited ISDS to the quantification of compensation in cases of expropriation (in case of China). The 2009 renegotiation of the 1959 Germany–Pakistan BIT is a case in point: the inclusion of ISDS is the major design difference between the new and old BIT, which are otherwise highly similar in contractual completeness.

Moreover, instead of introducing sweeping reforms, many renegotiations only involve technical tweaks. In part, that is because about a third of all

[10] Haftel & Thompson, *supra* note 8, at 34. I am grateful to Yoram Haftel for sharing the underlying data.

[11] *See, e.g.*, UNCTAD, *supra* note 3; Broude, Haftel, & Thompson, *supra* note 7.

[12] *See generally* Andrew Newcombe, *Developments in IIA Treaty-Making*, *in* Improving International Investment Agreements 18–24, 22 (Armand de Mestral & Céline Lévesque eds., 2011).

[13] Broude, Haftel, & Thompson, *supra* note 7.

renegotiations are linked to a country's accession to the European Union, which necessitates targeted adjustments to make IIA obligations compatible with EU law. These typically include reservations to national and most-favored-nation (MFN) treatment for privileges arising out of the country's EU membership or transfer restrictions imposed by EU law. Some scholars point to the introduction of new essential security clauses as evidence for more sweeping changes,[14] but these are also motivated by EU membership to ensure that "essential interests" include obligations deriving from EU membership, for example, in situations where the European Union seeks to comply with resolutions of the UN Security Council.[15]

A 2015 OECD study surveyed thirty-eight renegotiations to study the pairs of before-and-after treaties. It found that replacement treaties are longer than their predecessors.[16] The study also noted that agreements were becoming more homogenous insofar as core provisions such as fair and equitable treatment (FET), which were included less uniformly in the initial agreements, are becoming ubiquitous albeit in varying textual guises and that national security exceptions, rare in the original set, become more common.[17] These findings, encouragingly, reflect the evolution of IIAs traced in Chapter 1 as renegotiated treaties just like newly negotiated ones are moving toward greater contractual completeness. However, as discussed earlier, completing incomplete treaties is often only a by-product of renegotiations motivated by other reasons.

In short, renegotiations are not used to systematically update and improve the contractual completeness of old-generation IIAs and instead are driven primarily by the accession to the European Union and the inclusion of stronger ISDS provisions. Additional changes introduced through renegotiations coincide with larger trends, producing longer, more detailed treaties—the insertion of more regulatory space into renegotiated texts, however, is at best a mere byproduct.[18]

B. Reasons Why Renegotiations Remain Rarely Used

While a range of political, bureaucratic, and diplomatic obstacles may prevent states from using renegotiations more systematically to update incomplete

[14] Haftel & Thompson, *supra* note 8, at 33.

[15] *See, e.g.*, the Letter of Submission to the US Senate explaining the motivations behind the amendments of BITs with new EU members, which clarifies that the changed national security provisions were introduced "at the request of the European Commission" in order to confirm that security interests extend to those derived from EU membership. *See, e.g.*, the Letter relating to the amendment of the US-Czech Republic BIT, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4698/download.

[16] Gordon & Pohl, *supra* note 1, at 37–38.

[17] *Id.*

[18] Alexander Thompson, Tomer Broude, & Yoram Z. Haftel, *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73 Int'l Org. 859–880 (2019).

investment agreements, several practical impediments are frequently voiced in state surveys. First and foremost, states find renegotiations (too) costly. An OECD survey found that states worry about the resources and time that are required to renegotiate IIAs.[19] A subsequent UNCTAD survey identified additional obstacles to widespread renegotiations, such as the opposition from treaty partners, insufficient state capacity, and a lack of political will.[20] Whereas a newly signed IIA makes headlines, renegotiations, even if in the country's best interest, are unlikely to generate the same attention and thus fall below radar of decision makers. A lack of capacity, consensus, and political reward are thus major obstacles to more frequent renegotiations.[21]

Add to this the daunting dimensions of the outdated IIA stock. According to UNCTAD, 95 percent of IIAs in force have been concluded prior to 2010.[22] Closing contractual gaps in incomplete agreements would take more than 2,500 individual treaty renegotiations. Moreover, the sheer size of some national treaty networks makes renegotiations look like a herculean task. Egypt alone, for example, has one hundred BITs in force as of this writing, ninety-seven of which have been signed prior to 2010, mostly in the 1990s, which would need updating.[23] Comprehensive renegotiations can thus easily appear as prohibitively costly and unrealistically ambitious, which likely stifles serious reform attempts even before they begin.

III. A Data-Driven Approach to Renegotiations

Quantitative thinking and technology can revitalize renegotiations as a tool for state-driven change. While they can do little to change the politics and diplomacy around renegotiations, they can reduce the costs and increase the benefits associated with renegotiations. They can help debunk misunderstandings about the inefficiencies of piecemeal renegotiations and overcome practical concerns related to the high costs, low capacity, and opposition from treaty partners in renegotiations.

A. What Treaties to Prioritize for Renegotiation?

It is easy to underestimate the benefits of renegotiations and to overestimate their costs. Most IIAs are incomplete and require modernization. Consequently,

[19] Gordon & Pohl, *supra* note 1, at 32.
[20] UNCTAD, *supra* note 9, at 103.
[21] These findings mirror the responses collected by Taylor St. John and Geoffrey Gertz justifying the rare use of joint interpretations. *See* St. John & Gertz, *supra* note 2.
[22] UNCTAD, *supra* note 3, at 3.
[23] Data retrieved from the UNCTAD Investment Policy Hub, May 21, 2021.

states, like the hosts after a dinner party, are daunted by the cleanup task they face. Where even to begin? Moreover, piecemeal renegotiations seem a poor use of scarce resources. Would it not be wiser to focus time and energy on new agreements or multilateral negotiations that promise higher returns for the same investment? This reasoning is flawed, however, because different renegotiation opportunities produce varying returns. A single targeted renegotiation can have more impact than the renegotiation of dozens of treaties. States can make efficient use of scarce resources by focusing on renegotiations that matter most.

The impact of renegotiations follows a power law distribution: few treaties matter a lot, and most treaties matter little. Consider three metrics: coverage of foreign direct investment (FDI) stock, overlap with other IIAs and ISDS litigation risk. Most IIAs cover a tiny fraction of global FDI stock, but a few IIAs cover large shares. Most IIAs overlap and interact with none or only one other parallel IIA. Yet a few IIA interact and influence many other agreements. Most IIAs have attracted no ISDS claims at all, while a few have been litigated extensively. Policymakers and negotiators can leverage this power law dynamic by focusing renegotiation efforts on those agreements that produce the biggest bang for the buck.

Take a treaty's coverage of FDI stock first. For example, between 2008 and 2017 the FDI stock of the European Union in China more than doubled and increased tenfold in the other direction, amounting to EUR 158 billion and EUR 59 billion in 2017, respectively.[24] The EU–China relationship thereby constitutes one of the most important bilateral country dyads in the world in terms of FDI stock. States can thus pick renegotiation targets by focusing on the economic relationships that matter most.

But states can also pick renegotiations based on their normative impact. Sometimes economic and normative impact align. IIA renegotiations between FDI powerhouses, as in the case of the renegotiation of NAFTA between Canada, Mexico, and the United States, attract global attention and may produce treaty design that is subsequently emulated elsewhere. The remainder of this section, however, focuses on renegotiations that develop significantly normative impact irrespective of their economic significance by homing in on treaty renegotiation candidates that (1) maximize treaty overlap, and (2) minimize ISDS litigations risks.

[24] European Parliament, *EU-China Trade and Investment Relations in Challenging Times*, May 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603492/EXPO_STU(2020)603492_EN.pdf (last accessed October 21, 2021).

Table 8.2 EU treaties replacing overlapping BITs (source: EDIT)

EU Treaty	Number of replaced EU Member BITs
Canada–EU CETA (2016)	7
EU–Singapore Investment Protection Agreement (2018)	11
EU–Viet Nam Investment Protection Agreement (2019)	20
EU–China (under negotiation)	22

1. Maximizing Treaty Overlap

Most renegotiations update a single treaty, but a few renegotiation opportunities can generate broader knock-on effects either by replacing parallel treaties or by affecting their interpretations. It is worth considering each in turn.

The European Union has used its own IIA practice to phase out parallel IIAs concluded by EU member states. Each EU-led negotiation is therefore a de facto renegotiation whereby numerous outdated BITs are replaced by a more complete IIA (Table 8.2). For example, the envisaged EU–China investment protection treaty will not only cover one of the most dynamic and economically important investment relationships, but it will also replace twenty-two existing BITs that EU members have signed with China. These BITs are on average twenty-four years old, with the BIT between China and Sweden going all the way back to 1982. One renegotiation would therefore update a multitude of existing investment treaty relations.

A second way a single renegotiation can impact several parallel IIAs is through interpretation. As argued in detail in Chapter 7, a parallel treaty signed by an overlapping subset of states affects the interpretation of the original treaty as a relevant rule of international law applicable between the parties under VCLT Article 31(3)c). As documented in Table 8.3, the absolute champion in terms of IIA overlaps is the ECT (1994), which coexists alongside 609 signed BITs. Put differently, every fourth BIT currently in force applies in parallel to the Energy Charter. The potential of the ECT to affect the interpretation of these treaties is thus immense.

Renegotiations to modernize the ECT formally commenced in July 2020.[25] These efforts are important not only to align the ECT with the climate change objectives of the twenty-first century, but they matter immensely for the interpretative modernization of the IIA stock. True, the scope of the ECT is confined

[25] Energy Charter Secretariat, *Modernisation of the Energy Charter Treaty*, available at https://www.energychartertreaty.org/modernisation-of-the-treaty/ (last accessed May 21, 2021).

Table 8.3 Regional IIAs overlapping with concluded BITs (signed or in force) (source: EDIT, UNCTAD*)

Treaty	Number of overlapping BITs
Energy Charter Treaty (1994)	609
OIC Investment Agreement (1981)*	345
African Continental Free Trade Agreement (in negotiation)*	158
Unified Agreement for the Investment of Arab Capital in the Arab States (1980)	99
Regional Comprehensive Economic Partnership Agreement (RCEP) (2020)	34

to economic activity in the energy sector.[26] Yet the treaty's investment protection sections cover all core protective obligations, which are indistinguishable from those found in other IIAs in terms of form and substance. As a parallel IIA applicable between the contracting states, tribunals will need to take a renegotiated ECT into account when interpreting an overlapping BIT. As a result, the ECT provides relevant interpretive context for the interpretation of hundreds of investment agreements signed between ECT member states.

According to the modernization mandate adopted by the Energy Charter Conference in 2018, the renegotiations will cover all major aspects of the ECT's investment norms from the definition of investment, to protective obligations such as FET, MFN, and indirect expropriation, to exceptions and the right to regulate as well as matters surrounding dispute settlement.[27] The European Union has submitted detailed text, which mirrors its recent treaty practice.[28] The more than six hundred BITs that are overlapping with the ECT have been concluded on average in 1997, but stretch as far back as 1961. The ECT therefore has immense potential to indirectly inform the reading of a highly incomplete and outdated stock of hundreds of BITs. The ECT thus comes as close as it gets to becoming a quasi-multilateral substantive reform treaty.

The ECT epitomizes the impact a single renegotiation can have when the treaty overlaps with other IIAs. Such interpretive ripple effects are, of course, not

[26] *See* ECT Article 1: Definition.

[27] Decision of the Energy Charter Conference, CCDEC 2018 18, Brussels, November 27, 2018, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201818_-_STR_Modernisation_of_the_Energy_Charter_Treaty.pdf (last accessed May 21, 2021).

[28] EU text proposal for the modernisation of the Energy Charter Treaty, available at https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf (last accessed May 21, 2021).

limited to the ECT, but they apply to any regional IIA. Table 8.3 summarizes the regional IIAs with the highest overlap with signed BITs. While the ECT stands out, other (re)negotiation efforts could also update significant portions of the outdated IIA stock. A renegotiation of the Organization of Islamic Cooperation (OIC) Investment Agreement, for example, could help update the interpretation of 345 parallel BITs. In the same vein, negotiations of the African Continental Investment Code, ongoing at the time of this writing, could help modernize 158 overlapping BITs.

These varying regional treaties have, for the most part, complementary rather than shared sets of members. It follows that only a handful of (re)negotiated IIAs could update more than a third of the BIT stock. If one adds the phase out of intra-EU and some extra-EU BITs, then this almost obfuscates the need for a broader multilateral reform of substantive investment norms as around half of the BIT stock can be updated directly or indirectly through targeted renegotiations.

Add to this the signaling effect of such major renegotiations. As discussed in Chapter 3, states around the globe have routinely looked to leading developed states when revising their own treaty programs. EU-led renegotiations promise to spark similar emulation. In addition, the direct exposure of many states to (re) negotiations, for example, in the context of the ECT modernization, but also as part of the multilateral UNCITRAL reforms discussed in Chapter 9, will likely facilitate finding common ground in subsequent bilateral treaty reforms. Hence, a few renegotiations can generate systemic ripple effects without requiring systemic reforms.

2. Minimizing Risks of ISDS Claims

But focusing solely on the impact of renegotiations on parallel IIAs would miss another important point. Some bilateral relationships are in greater need for renegotiation than others. Incomplete treaties create heightened risks of ISDS claims because they appear more favorable to investors due to their vagueness and lack of exceptions, which helps attract litigation.[29] Moreover, as shown in Part II, incomplete IIAs indirectly also risk rolling back innovation in more complete agreements through MFN, custom, and precedent. A single incomplete IIA can undermine an otherwise entirely modern national IIA network. Renegotiation efforts need to target such weak spots to minimize the exposure to ISDS-related risks for all national IIAs.

Consider the IIA network of Canada as an example. Most of its IIAs are long, detailed, and comprehensive corresponding to today's best practices of concluding more complete IIAs. Yet the country is also still party to several

[29] *See, e.g.*, UNCTAD, *supra* note 3.

old-generation BITs in force that are short, simple, and lack the exceptions and qualifications that characterize later agreements.[30] Such outdated agreements can become a liability. As Patrick Dumberry notes, Article 3 of the Canada–Hungary BIT (1991) contains an open-textured FET clause without textual link to international law or custom, which could be read as offering more favorable treatment than all subsequent Canadian treaties that do contain such a link, in which case that more favorable FET clause could be read into all other Canadian treaties via their respective MFN clauses.[31] One treaty thereby jeopardizes the treaty practice of decades. Such outlier treaties should be prime targets for renegotiations, if only to mitigate their impact on more complete agreements in the same network.

On the other extreme are states with large, outdated treaty networks and few more complete agreements. Germany, for example, may have been a pioneer in the conclusion of BITs, but as a result, German investors are still protected by scores of old BITs that lack ISDS, because they were concluded in the 1960s to 1980s. As the OECD noted in 2012, "Germany, which is reputed to have favourable views on ISDS through international arbitration, is the country with the largest stock of treaties—and the largest proportion of treaties (36%)—that contain no ISDS provisions whatsoever."[32] Targeted renegotiations may thus not be an effective option for the country, and a more ambitious renegotiation agenda is required. Germany may therefore benefit disproportionately from EU-led renegotiations to overhaul its outdated IIA network as compared to other EU states whose treaty practice is of a more recent vintage.

The level of contractual incompleteness, however, is only a rough proxy for the risk of ISDS claims. States may want to go deeper into the design of specific IIAs to assess the vulnerability to investment claims and the probability of adverse rulings to select targets for renegotiation. Australia, for example, renegotiated its 1993 BIT with Hong Kong in 2019 after Philip Morris had launched a claim under the original BIT challenging the country's plain cigarette packaging legislation.[33] The 1993 BIT was the only Australian BIT to contain an unqualified umbrella

[30] Canada–Russian Federation BIT (1989), Canada–Poland BIT (1990), Canada–Hungary BIT (1991), Argentina–Canada BIT (1991).

[31] Patrick Dumberry, *The Importation of "Better" Fair and Equitable Treatment Standard Protection Through MFN Clauses: An Analysis of NAFTA Article 1103*, 14 Transnat'l Disp. Mgmt. 11–12 (2017).

[32] J. Pohl, K. Mashigo, & A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, 2012/02 at 44.

[33] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12. For background and commentary, *see* Jarrod Hepburn & Luke Nottage, *A Procedural Win for Public Health Measures: Philip Morris Asia Ltd v. Commonwealth of Australia, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015 (Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Donald M. McRae)*, 18 J. World Investment & Trade 307–319 (2017).

clause, which Philip Morris had initially used as a basis for one of its claims. The replacement BIT does not contain an umbrella clause.[34] Furthermore, the fact that Australia chose not to renegotiate other older BITs, such as its 1990 BIT with Papua New Guinea, suggests that the country is engaged in a targeted effort to manage liability risks arising from an outlier treaty. This practice is worth emulating.

But how can states identify such outliers? Do countries like Australia have to wait for a claim to be launched before a BIT's litigation risk is exposed? The answer is no. Comparative data analysis on the content of agreements can easily spot outlier agreements. For example, consider the color-coded mapping of selected protection and exception clauses across Australia's BITs extracted from the EDIT database. It reveals the 1993 BIT with Hong Kong as an outlier (Figure 8.2). With an additional arbitrary measures clause (rare in other Australian BITs) and an umbrella clause (lacking in other Australian BITs), the BIT has more protective features than all other Australian BITs. Conversely, it lacks some of the flexibility elements present in at least some of Australia's BITs, such as a balance of payments exception. Together, this makes the Australia–Hong Kong BIT an unusually harsh investment protection agreement compared to other Australian BITs and a reasonable target for renegotiations.

B. How to Renegotiate?

The promise of a data-driven approach to renegotiation, however, goes beyond selecting candidates for renegotiations and has its greatest potential in the preparation and structuring of the renegotiation itself. So-called "legal analytics" applications that represent large amounts of legal information in accessible, often graphical or numerical forms ("dashboards") are beginning to be used throughout legal practice to make evidence-based decisions.[35] From the selection of arbitrators based on a comprehensive assessment of their past practice to the picking of a claim based on a prediction of its probable success in a litigation, legal analytics tools increasingly inform a broad range of legal decision-making, including in investment arbitration.[36] Armed with better data, lawyers and negotiators can make better decisions, including in IIA renegotiations.

[34] Text of the Australia-Hong Kong BIT (2019) available at: https://www.dfat.gov.au/trade/agreements/in-force/a-hkfta/Pages/the-investment-agreement-text.

[35] *See generally* Kevin D. Ashley, Artificial Intelligence and Legal Analytics (2017).

[36] Wolfgang Alschner & Damien Charlotin, *Data Mining, Text Analytics, and Investor-State Arbitration*, *in* International Arbitration and Technology (Pietro Ortolani ed., forthcoming).

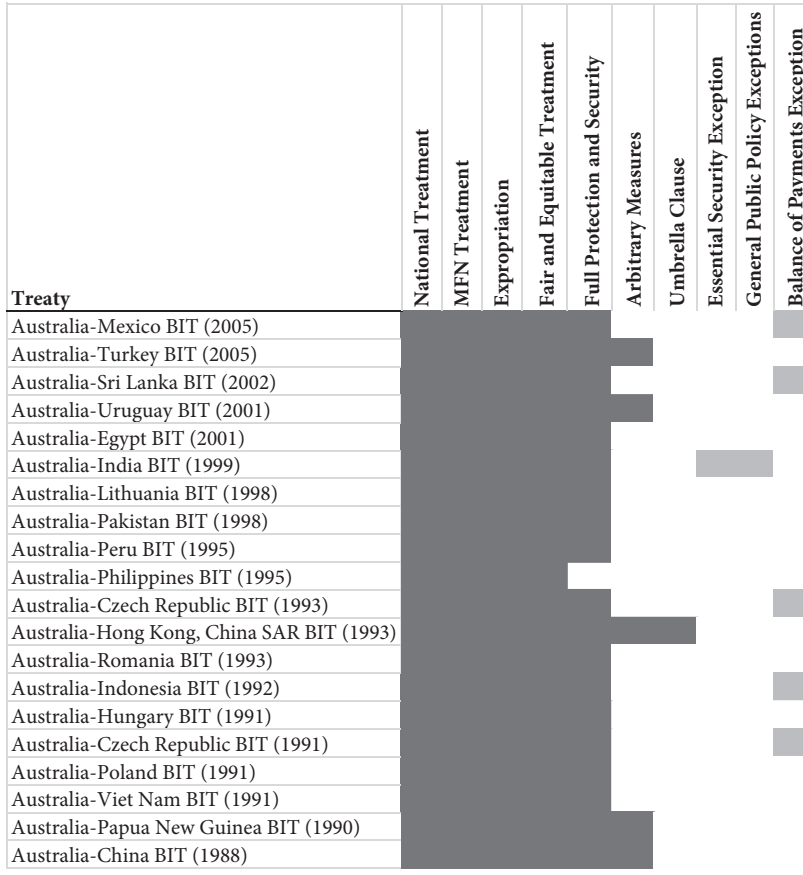

Figure 8.2 Selected content elements in Australian BITs color-coded for their presence (dark grey indicates investment protection obligations and bright grey host state flexibilities; data source: EDIT)

Capacity constraints as well as opposition from negotiation partners are core constraints preventing widespread use of renegotiations. Legal analytics can help address both issues.[37] Legal analytics applications can compensate for a lack of resources by incorporating expert knowledge. They also augment the ability of negotiators to efficiently process large amounts of complex information. For example, legal analytics allow negotiators to quickly access latest trends in treaty-making or compare national IIA practices to identify areas of normative convergence. In the future, legal analytics may go beyond descriptive insights and provide predictive solutions. Early work suggests that technology could

[37] At the same time, technology can also exacerbate power asymmetries; *see* Ashley Deeks, *High-Tech International Law*, 88 GEO. WASH. L. REV. 80 (2020).

autonomously generate consensus language based on an analysis of past practice to help negotiators draft the final treaty.

1. Spotting Trends: Situating Renegotiations in Global Practice

One way to alleviate capacity constraints consists of allowing negotiators to efficiently monitor trends in the IIA universe. What are current best practices? What clauses have fallen into disuse? Where is a country leading and where is it falling behind? If answering these questions requires new research every time, then it is easy to see how states find it challenging to tackle renegotiations. Legal analytics provide an alternative to efficiently monitor global practice.

In preparation for (re)negotiations, negotiators benefit from consulting recent developments in IIA practice. For example, the bar chart of Figure 8.3 compares counts of yearly concluded IIAs with umbrella clauses and public policy exceptions. Negotiators may find it useful to know that umbrella clauses have fallen into disuse while general public policy exceptions have gained traction in recent IIA practice in order to evaluate their own negotiating agenda or to anticipate expectations of their counterparts. Such knowledge can also provide evidence-based arguments for an inclusion of public policy exceptions and an exclusion of umbrella clauses.

The advantage of legal analytics platforms is that information can be adjusted and tailored almost effortlessly to new questions asked by users. Consider a hypothetical renegotiation of the 1992 Turkey–Japan BIT. The BIT ranks low in

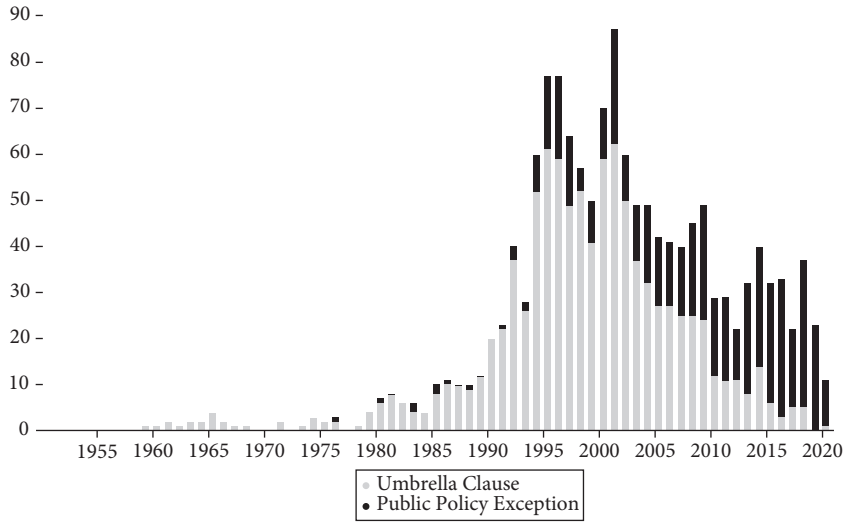

Figure 8.3 Counts of IIAs with umbrella clauses or public policy exception by year of signature (source: EDIT)

contractual completeness. The various strategies discussed in Chapter 2 that render an agreement more complete are largely absent in the treaty. Short, open-textured protective language, an absence of escape clauses (exceptions are limited to privileges arising out of tax treaties and an exclusion of some intellectual property rights), a concise ISDS clause, and a brief preamble characterize the BIT. A renegotiation would thus provide an opportunity to add detail, insert escape clauses, elaborate on the terms of delegation to ISDS, and add new relational elements to render the renegotiated agreement more complete.

Clause-specific trends can then inform the renegotiation around specific treaty elements of the 1992 Turkey–Japan BIT. For example, the 1992 BIT provides an access-to-courts provision on a national treatment and MFN basis. Such a clause is extremely rare in global practice and arguable redundant given that national and MFN treatment ordinarily encompasses treatment by all branches of governments including courts. The provision could thus be eliminated in a renegotiation. Conversely, the BIT lacks an FET provision, which (albeit in different textual guises) has since become quasi-ubiquitous in global treaty practice and could be added to align the agreement with modern practice. Other clauses absent in the original agreement, such as prohibitions on performance requirements or a national security exception, have increased drastically in relative usage and would be candidates for inclusion in a revised agreement.

While this brief comparison of the BIT's content with global practice is by no means exhaustive, it showcases how even simple analytics such as the relative global usage of specific clauses can quickly inform (re)negotiations. Legal analytics thereby does not predetermine outcomes. Negotiators remain free to swim against the tide. But legal analytics does compensate for scarce resources and expertise by quickly distilling information on current trends directing states' attention to issues that may benefit from modernization.

2. Finding Consensus: Mapping Divergence and Convergence between States' IIA Practices

Global trends are, of course, only a starting point. What matters even more is comparing the recent practice of the states involved in the (re)negotiation. Assuming that past practice can tell us about future preferences, such insights allow negotiators to identify low-hanging fruit in a renegotiation on issues where past practices converge and to anticipate and resolve disagreements on matters where practices have historically diverged. Going back to a hypothetical renegotiation of the 1992 Japan–Turkey BIT, in what areas does the recent IIA practice of Japan and Turkey diverge and where does it converge?

One way to conduct such a comparison is to look at the relative inclusion of specific treaty features in a country's recent practice. Figure 8.4 plots the share

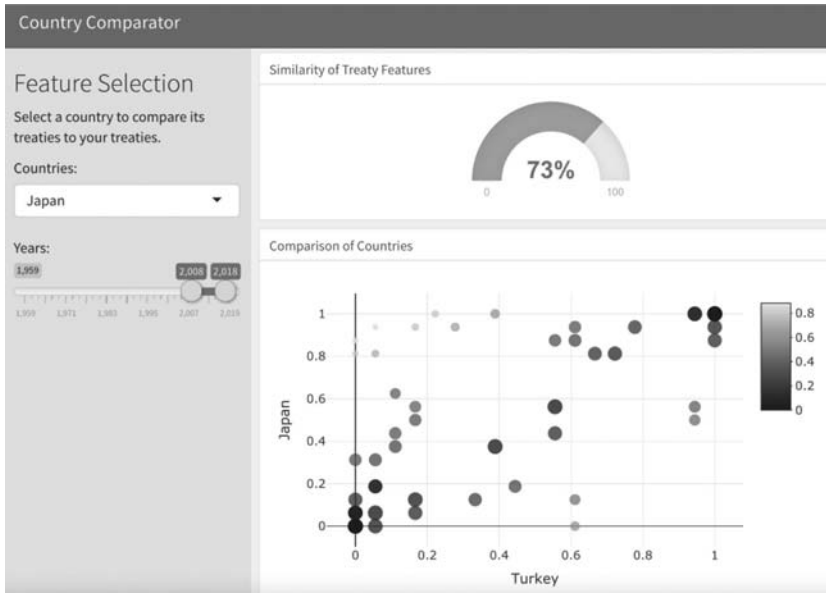

Figure 8.4 Comparison of IIA practices of Turkey and Japan (data source: UNCTAD; analysis and dashboard by author)

of specific content features in Turkish IIAs (x-axis) and Japanese IIAs (y-axis) signed between 2008 and 2018. If all Turkish and all Japanese IIAs possess a treaty feature, as is the case for free transfer of fund clauses, for example, that feature will be in the upper-right corner because 100 percent of Turkish and 100 percent of Japanese IIAs include it. Conversely, a feature that is neither in Turkish nor in Japanese agreements will be located on the lower-left corner because 0 percent of Turkish and 0 percent of Japanese treaties have it. The diagonal line between these points then represents "consensus candidates"—features that Japan and Turkey have included in their agreements in roughly equal shares. For example, 72 percent of Turkish and 81 percent of Japanese IIAs include an essential security clause. In short, the features along the diagonal line are likely to cause little controversy in the negotiations since Japan and Turkey have approached them similarly in their recent practice.

The same visualization also reveals items that will likely prove controversial in negotiations. Treaty features that are closer to the two axes are more closely associated with the practice of one of the two states. At its extreme, a feature located on one of the axes means that only one of the states has included that clause in its prior practice. For example, 88 percent of Japanese treaties include a prohibition of performance requirements, but none of the Turkish IIAs do. Conversely, 61 percent of Turkish agreements exclude portfolio investments from the

definition of investment, but no Japanese IIA does so. These features exclusive to the practice of one of the parties are likely to be the most controversial topics of a renegotiation.

The two sets of information—consensus features and exclusive features—can be aggregated into a score that quantifies the degree to which features are closer to the diagonal line or closer to the axis. For Japan and Turkey that "convergence score" amounts to 73 percent for the period between 2008 and 2018. To put that into perspective, for the same period, a comparison between Turkey and Canada would yield only a 56 percent convergence score, indicating that their practice diverges more significantly than the practice of Turkey and Japan. In contrast, the practice of Turkey and Morocco is more similar, yielding a convergence score of 83 percent. To be sure, such convergence scores should not be viewed as a perfect predictor of the ease of a (re)negotiation. The parties may want to engage in innovation that is not reflected in their prior practice or may seek deviations from prior practice for other reasons. But such legal analytics tools, at the very least, draw on objective data to provide an educated guess on what issues will likely prove easy and what issues will likely prove controversial and thereby, ideally, make (re)negotiations more streamlined, less contentious, and less costly.

3. The Future: Predicting Negotiated Texts

Having a snapshot of parties' prior practice is useful for preparing negotiations, to identify consensus candidates, and to anticipate controversial features. Yet it still leaves much of the actual (re)negotiation to be done as negotiators haggle over the specific language of their future agreement. But even there, the latest generation of predictive legal analytics can assist.

A (re)negotiation today is likely to start with two competing models, or at least with two competing past practices. In domestic contract negotiations, this is known as the "battle of the forms"—prospective contractors bargain over whose template or practice is to form the starting point for the negotiation. Recent advances in artificial intelligence provide an alternative. Neural networks, which have fueled recent successes from better machine translation to more accurate image recognition, have also produced another marvel: automated text generation. Recurrent neural networks (RNNs) can be trained on existing texts to generate new text.[38]

Early research has shown how this technique may be applied to automatically generate consensus drafts as a neutral starting point for IIA negotiations.[39]

[38] Andrej Karpathy, CHAR-RNN: Multi-layer Recurrent Neural Networks (LSTM, GRU, RNN) for Character-Level Language Models in Torch (2016), https://github.com/karpathy/char-rnn.

[39] Wolfgang Alschner & Dmitriy Skougarevskiy, *Can Robots Write Treaties? Using Recurrent Neural Networks to Draft International Investment Agreements*, *in* Legal Knowledge and

Table 8.4 Computer-generated transfer of funds clause

Article 4: Transfer
Each Contracting Party shall, subject to its laws and regulations, guarantee investors of the other Contracting Party the transfer of their investments and returns held in its territory, including: (a) profits, dividends, interests and other legitimate income; (b) amounts from total or partial liquidation of investments; (c) payments made pursuant to a loan agreement in connection with investment; (d) royalties in paragraph 1 (d) of Article 1; (e) payments of technical assistance or technical service fee, management fee; (f) payments in connection with projects on contract; (g) earnings of nationals of the other Contracting Party who work in connection with an investment in the territory of the former Contracting Party. 1. 2. Nothing in paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 6 of this Agreement. 3. The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.

The process consists of three steps. First, an RNN algorithm "learns to speak" the language of IIAs. It is trained on all existing IIA articles, which are inversely weighted by their year of creation so that recent practice matters more than older one. Second, the RNN automatically drafts hundreds of article texts for each article category, such as expropriation or transfer of funds. Third, depending on who the negotiating parties are, the corpus of machine-produced articles is filtered to finds consensus article candidates that are equidistant, in terms of their textual similarity, to the past practice of the negotiating states. In past research, this technique was used to "predict" the language of a possible US–China BIT. Table 8.4 produces an automatically generated transfer of funds clause that is equidistant between China and the United States. Other examples are available on an accompanying website.[40]

Admittedly, the results remain of modest quality. The current generation of artificial intelligence excels at recognizing patterns, but it does not understand the meaning of text. For example, RNN-produced plays sound Shakespearian,

Information Systems: JURIX 2016 119–124 (Floris Bex ed., 2016); Wolfgang Alschner & Dmitriy Skougarevskiy, *Towards an Automated Production of Legal Texts Using Recurrent Neural Networks*, 16th International Conference Artificial Intelligence and Law, Conference Proceedings 229–332 (2017).

[40] Mapping Investment Treaties, RNN experiment, available at http://mappinginvestmenttreaties.com/specials/rnn-experiment/.

but their plots make little sense.[41] While that means that completely autonomous text generation is still years away, it does not mean its current output is without uses. In the context of IIA negotiations, automated text generation can produce first drafts that, while far from perfect, constitute a middle ground between the negotiating parties' past divergent practice. By producing compromise text, it also helps avoid a battle of the forms.

The promise of legal analytics is thus large. In the short term, legal analytics tool can address concerns over cost and capacity constraints. Even simple analytics can help overcome opposition among contracting parties by identifying areas where global practice has moved on or by highlighting areas where the practice of contracting states provides common ground. In the longer term, the shift from descriptive to predictive analytics holds even greater potential. Negotiators ultimately care about text rather than statistics on past practice. RNN technology can significantly alleviate capacity constraints and facilitate negotiations by providing draft consensus texts. A data-driven approach therefore promises to revitalize renegotiations as a tool for investment law reform and for modernizing incomplete treaties in light of more complete ones.

IV. Plurilaterals: Replacing or Exacerbating the Spaghetti Bowl?

Renegotiations are more impactful (few renegotiations can affect many treaties) and less costly and resource-intensive (thanks to technology) than commonly assumed. But even if practical obstacles can be overcome, a policy question lingers: How far should states take the quest for renegotiation and consolidation? Regional and interregional multiparty treaties (called "plurilaterals" for convenience's sake) are quickly replacing bilaterals as the dominant medium for regulating investment protection relations. Should plurilaterals power-charge renegotiations and replace existing bilateral treaties in bulk? Or should plurilaterals add another layer on top of existing BITs?

States have pursued different strategies to manage the coexistence of old BITs and new plurilaterals. On one end of the spectrum, the European Union has used the trend toward plurilaterals to overhaul the often-outdated bilateral treaty networks of EU member states. In intra-EU relations, BITs are being phased out in favor of regional internal EU market rules.[42] In external EU relations, as noted

[41] Andrej Karpathy, *The Unreasonable Effectiveness of Recurrent Neural Networks*, Andrej Karpathy Blog, May 21, 2015, available at http://karpathy.github.io/2015/05/21/rnn-effectiveness/.

[42] The Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union entered into force in August 2020 and terminates at least 124 BITs between

earlier, new EU FTAs with investment chapters and self-standing EU investment protection agreements replace parallel BITs of EU member states. On the other end of the spectrum, plurilaterals create several additional layers on top of BITs. In Southeast Asia, for example, intra-ASEAN BITs coexist with regional ASEAN investment protection rules, and BITs or FTAs by ASEAN members with third states coexist with IIAs signed by ASEAN as a block as well as Regional Comprehensive Economic Partnership (RCEP) rules. In Africa, the future investment code of the Continental Free Trade Agreement will coexist with BITs among African countries as well as regional investment rules of COMESA or Southern African Development Community (SADC) creating three or four layers of investment protection rules.

The majority of plurilaterals are used to complement rather than replace bilaterals. The EDIT database records only thirty-five instances, in which an FTA replaces, incorporates, or suspends a BIT.[43] This compares to more than three thousand instances where FTAs coexist with BITs. Out of fifty-seven plurilaterals in EDIT that overlap with at least five other IIAs, only three plurilaterals (signed by the European Union with Canada, Vietnam, and Singapore) replace all parallel treaties. Some plurilaterals, like the CPTPP, replace some parallel BITs, but only between a small subset of its members.[44] Most other plurilaterals exist in parallel to existing IIAs. In short, as UNCTAD notes, "plurilateral IIAs have missed the opportunity for consolidation and, instead, have led to parallel application of the new and old treaties."[45]

A. The Benefits of Layering

What are the respective costs and benefits of layering? There are at least three potential advantages for using plurilaterals as complements rather than replacements to BITs: (1) treaty ambition, (2) differentiation, and (3) resilience. Ambition is perhaps the most intuitive. When more than two states are involved in negotiations, the need for compromise grows. Ambitious goals may be abandoned as negotiators are forced to settle on the lowest common denominator.

EU members. *See also* Charbel A. Moarbes, *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union*, 60 Int'l Legal Materials 99–137 (2021).

[43] Similarly, Broude et al. count twenty-two instances of PTAs replacing BITs. In the same vein, UNCTAD reports only twenty-two instances of replacement of suspension by a PTA. *See* UNCTAD, *supra* note 3, at 6.

[44] Australia terminated its overlapping BITs in side letters with Vietnam, Mexico and Peru. *See* https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents.

[45] UNCTAD, *supra* note 3, at 13.

The logic of treaties with varying ambition drives layering in the international trade regime where the multilateral rules form a normative baseline, but states remain free to embark on more ambitious liberalization efforts through bilateral or regional free trade agreements.[46] In investment law, however, the case is less clear-cut. Even though bilaterals could, in theory, be used to entrench more ambitious investment commitments, there are only few examples in practice where that is the case.[47] In fact, plurilateral IIAs are often more rather than less ambitious than the older, shallow, and less complete bilaterals that they coexist with.[48]

What about differentiation? In negotiating plurilaterals, states may be forced to agree to a one-size-fits-all approach. That may be problematic, especially when states at very different levels of development are involved. In contrast, bilaterals, in theory, allow for careful tailoring to specific bilateral relations. In practice, however, these stylized expectations are not consistently reflected. Plurilaterals allow for a surprising amount of tailoring. Consider the United States-Mexico-Canada Agreement (USMCA) that provides for ISDS only between the United States and Mexico.[49] RCEP's investment chapter contains country-specific footnotes that carve out or clarify obligations vis-à-vis specific states.[50] The CPTPP is accompanied by side letters that tailor the agreement to the member dyads. Conversely, bilaterals typically follow model templates across negotiations with little to no tailoring to specific country relationships.[51] Hence, differentiation again seems not to be a driving force behind layering.

Resilience is a final factor driving layering. Having a "spare" bilateral in place to protect foreign investor offers a safety net in case the plurilateral is terminated. It enables states to benefit from regional efforts to protect investors, while not being dependent on them. In that sense, it appears risky not to keep overlapping bilaterals in place. Yet, there are alternatives to ensure that investment remains protected. Switzerland, for example, tends to suspend bilaterals when an overlapping plurilateral is signed.[52] If the plurilateral fails for whatever reason, the BIT is immediately reactivated. In short, while layering has potential benefits, they can be achieved without engaging in treaty layering.

[46] Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?*, 17 J. Int'l Econ. L. 271–298, 286 (2014).

[47] For examples and an in-depth discussion, *see id.* at 287–88.

[48] The TPP and its successor, the CPTPP, are cases in point. They were branded as high-ambition agreements and, indeed, are firmly embedded in high-completeness-scoring American treaty practice. Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe*, 17 J. World Investment & Trade (2016).

[49] USMCA, Annex 14-D, Mexico-United States Disputes.

[50] *See, e.g.*, RCEP, ch. 18, footnotes 1 and 2 (limiting the definition of covered investments) or footnote 18 (excluding MFN treatment for some parties).

[51] Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. Int'l Econ. L. (2016).

[52] *E.g.*, the Switzerland–Liechtenstein–Iceland–South Korea investment treaty suspends the Switzerland–South Korea BIT (1971) in Article 27 as long as the former remains in force.

B. The Costs of Layering

Whereas the benefits of layering are questionable, its costs relating to (1) litigation diversion, (2) normative conflict, and (3) unnecessary complexity are readily apparent and undermine the innovation otherwise promised by plurilaterals.

First, layered treaty levels divert claims to old bilaterals and away from new plurilaterals. Treaty shopping is a natural consequence of the availability of a variety of adjudicatory venues.[53] It can become a concern for states when litigation is diverted to unwanted treaties. Claimants are likely to bring their cases where they have the best chances of winning. The vague language and missing exceptions coupled with a poorly defined ISDS procedure tend to turn older, incomplete bilaterals into a more attractive option as compared to more complete plurilaterals.[54] Consider the newly concluded CPTPP, which incorporates the TPP and its Article 29.5, which allows parties to block ISDS claims against tobacco control measures. This new feature can easily be circumvented by launching a claim under a parallel, older BIT that lacks such a safeguard. Layering therefore dulls the practical effect of innovations in plurilaterals by diverting claims to older bilaterals.

Second, the coexistence of plurilaterals and bilaterals raises the specter of normative conflict.[55] A myriad of legal questions relating to jurisdictional treaty overlaps remain unresolved. What happens if an investor pursues the same claim under two parallel treaties, either concurrently or subsequently? Can an investor have a second bite of the apple or do principles like *lis pendens* or *res judicata* bar such claims although the underlying treaties differ slightly?[56] When it comes to the merits, largely unsettled questions on the conflicts of norms decide which of several applicable treaties prevails.[57] Would a tribunal be able to apply overlapping treaties if a claim is launched under just one of them? If so, what happens if one treaty contains a decisive exception and the other does not? In short, the overlap of parallel agreements raises a host of unresolved normative questions and complexities.

Finally, layering adds transaction costs in a system designed to reduce them. When multiple treaties apply to the same investor-state relationship, things get complex.[58] Investors have to decide what treaty is more favorable and anticipate

[53] *See generally* Baumgartner Jorun, Treaty Shopping in International Investment Law (2017).

[54] *See* UNCTAD, *supra* note 3, at 5 (noting that "New, 'reformed' IIAs with reformed treaty clauses thus often co-exist with old, 'unreformed' IIAs containing unreformed treaty clauses.").

[55] *See* Alschner, *supra* note 46, at 288–297.

[56] On managing jurisdictional conflicts, *see* Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals:(Real) Concerns, (Im)Possible Solutions*, 42 Cornell Int'l L.J. (2009).

[57] *See generally* Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (reprint ed. 2004).

[58] UNCTAD, World Investment Report 2014. Investing in the SDGs: An Action Plan 121–122 (2014).

how tribunals may deal with the various normative conflicts that may arise. Host states have to manage compliance with multiple obligations and, similarly, consider possible normative conflicts between them. Since IIAs have developed, at least in part, to reduce political risk and to enhance certainty and predictability, such layering, which increases legal uncertainty and complexity, contradicts investment law's underlying goals.

C. Using Plurilaterals as Renegotiation Tools

In conclusion, states should follow the example of the European Union and use plurilaterals as renegotiation tool whenever possible. While in theory layering could have benefits, in practice these benefits can be reaped through less costly alternative legal means such side letters and footnotes that tailor commitments to specific bilateral concerns and an incorporation or suspension of parallel BITs rather their termination. At the same time, the costs of layering are real and disconcerting.

Plurilaterals are the single most effective way, short of a multilateral treaty, to modernize the stock of outdated IIAs. Of course, states negotiate or renegotiate plurilaterals for a host of political and economic reasons that often have little to do with investment protection. But when the occasion arises, each newly negotiated plurilateral is an opportunity to tidy up existing investment relations, and each renegotiation of a plurilateral is an invitation to modernize multiple parallel BITs through a single replacement agreement. Renegotiations are time- and resource-intensive even when technology is used in support. By leveraging plurilaterals as a renegotiation tool, states can make sure the invested resources are wisely spent.

V. Conclusion

A data-driven approach promises to revitalize renegotiations as a tool for IIA reform and as a vital mechanism to align outdated and incomplete IIAs with current best practices. Smart prioritization and technology can help overcome practical obstacles that thus far have held back the use of renegotiations. They ensure that the scarce resources invested in updating existing IIAs are well spent. A crucial step toward fully leveraging renegotiations consists of ending the dominant practice of layering plurilaterals on top of bilaterals. Instead, wherever possible, plurilaterals should be used to replace outdated and incomplete bilateral rules with modern and more complete intra-regional or inter-regional ones.