tillväxtanalys

En del av ramprojektet
"Multinationella företag i svenskt näringsliv – vilka är policyimplikationerna för näringspolitiken?"

PM 2019:09

International investment agreements

– efficient means to promote Swedish growth?

THIS STUDY DISCUSSES PROS AND CONS of the Swedish international investment agreements from an economic perspective. It concludes that the older Swedish bilateral agreements should be revised to ensure that they do not provide more protection in Sweden to investment from partner countries, than is available to investment from non-partner countries or to Swedish domestic investment.

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Förord

Frågeställningarna inom tillväxtpolitiken är komplexa och kräver en djuplodande och mångsidig belysning för att ge kunskap om vad staten kan och bör göra. Tillväxtanalys arbetar därför med vad vi benämner ramprojekt. Ett ramprojekt består av flera delprojekt som bidrar till att belysa en viss frågeställning. Den här studien utgör ett av flera kunskaps-underlag till ett pågående ramprojekt, *Multinationella avtal i svenskt näringsliv – vilka är policyimplikationerna för näringspolitiken?* Ramprojektet kommer att avrapporteras under första halvåret 2020.

Bland ekonomer är den allmänna uppfattningen att utländska direktinvesteringar – utgående, såväl som ingående – har positiva effekter på ekonomisk tillväxt. Internationella investeringsavtal syftar till att öka dessa investeringar. På senare år har det uppstått en debatt kring hur dessa avtal har konstruerats. I denna rapport diskuteras fördelar och nackdelar med internationella investeringsavtal utifrån ett *ekonomiskt* perspektiv.

För svensk del sker förhandlingar om nya avtal främst på EU-nivå och i utformningen av dessa har stor hänsyn tagits till den kritik som framkommit mot de gamla avtalen. Sverige har emellertid fortfarande kvar gamla avtal och i rapporten diskuteras hur dessa bör hanteras. Bland annat med Kina och Indien finns gamla avtal och även om förhandlingar med dessa länder för närvarande pågår på EU nivå är det viktigt att Sverige trycker på för att se till att nya, moderna avtal kommer till stånd med dessa länder så snart som möjligt.

Rapporten har skrivits av professor Henrik Horn och docent Pehr-Johan Norbäck vid Institutet för Näringslivsforskning, IFN. En referensgrupp har varit knuten till studien som diskuterat och givit synpunkter på tidigare versioner. Dessutom vill författarna tacka Shon Ferguson och Robert L. Howse.

April 2019

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Tillväxtanalys

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Sammanfattning

En central aspekt av Sveriges ekonomiska integration med omvärlden är ut- och ingående direktinvesteringar. Sverige har liksom många andra länder ingått ett stort antal mellanstatliga investeringsavtal som generellt syftar till att främja direktinvesteringar genom att skydda investerare mot förluster orsakade av offentliga åtgärder i värdländerna. Sedan 1965 har Sverige ingått cirka 70 bilaterala investeringsskyddsavtal (eng. Bilateral Investment Treaties, BITs), och Sverige kommer att omfattas av flera nyligen förhandlade, men ännu ej ratificerade, EU-avtal. Dessutom är Sverige medlem i det sektorspecifika investeringsskyddsavtalet Energistadgefördraget (eng. Energy Charter Treaty, ECT).

På den globala scenen tillkom de första investeringsskyddsavtalen i slutet av 1950-talet, men de flesta sådana fördrag har ingåtts efter mitten av 1990-talet. Dessa avtal ingicks ursprungligen mellan ett utvecklingsland och ett utvecklat land med syfte att uppmuntra investeringar från det utvecklade till utvecklingslandet. Detta skedde under en period där expropriationer och andra typer av politiska åtgärder med liknande effekter var vanliga i utvecklingsländerna. Över 2 300 BITs är för närvarande i kraft, och drygt 300 andra slags avtal, och då främst handelsavtal, innehåller investeringsskydd.

Investeringsskyddsavtalen har på senare tid debatterats intensivt internationellt. Debatten i Europa initierades av förhandlingarna om det transatlantiska handels- och investeringsskyddsavtalet TTIP mellan EU och USA och CETA-avtalet mellan Kanada och EU. Investeringsskyddsavtalen hävdas vara förknippade med en rad problem. Exempelvis sägs de materiella åtagandena i avtalen vara för vagt formulerade och därigenom tillåta skiljedomstolar att göra alltför långtgående tolkningar av de åtaganden som avtalen innebär för värdländer. Det hävdas också att tvistlösningsmekanismen i avtalen brister i olika avseenden. En ofta kritiserad aspekt är att avtalen vanligtvis tillåter utländska investerare att stämma värdländer, tvister som oftast avgörs utanför värdländernas inhemska rättssystem (eng. Investor-State Dispute Settlement, ISDS). Kritiken av avtalen har inte bara kommit från individer och organisationer som är generellt negativt inställda till internationell integration. Kritik har också kommit från internationellt erkända akademiska jurister, ekonomer och statsvetare.

Ett antal länder har på senare tid reviderat sina avtal, både vad gäller materiella åtaganden och tvistelösningsförfaranden. EU har spelat en ledande roll i denna förändringsprocess. De svenska avtalen har dock lämnats i stort sett oförändrade. De svenska avtalen återspeglar därför ett synsätt på investeringsskydd som går tillbaka flera decennier.

Syftet med denna studie är att diskutera för- och nackdelar med de svenska avtalen ur ett *ekonomiskt* perspektiv. Detta är inte det enda sättet att närma sig dessa frågor. Exempelvis kan investeringsskyddsavtal ses som en del av utrikespolitiken. En central anledning till att ingå eller behålla dessa avtal är dock att öka svensk ekonomisk välfärd, och det är därför önskvärt att utvärdera avtalen ur detta perspektiv.

Avsnitt 2 i studien beskriver huvuddragen i de svenska i avtalen ur ekonomisk synvinkel och beskriver kortfattat konsekvenser av EU-medlemskap för den svenska investeringsskyddsregimen. Endast 0,2 procent av värdet av de inkommande utländska direktinvesteringarna i Sverige år 2016 kom från länder utanför EU med vilka Sverige har investeringsskyddsavtal. Samma år fanns mindre än 9 procent av värdet av de svenska utgående direktinvesteringarna i länder med vilka Sverige hade ett avtal. Ur detta

perspektiv förefaller det således som att de svenska investeringsskyddsavtalen praktiskt taget inte haft någon effekt på ingående investeringar, och i bästa fall en blygsam effekt på utgående investeringar.

Avsnitt 3 använder den ekonomiska forskningslitteraturen för att belysa ekonomiska mekanismer genom vilka investeringsskyddsavtal kan öka ekonomisk välfärd för både investerar- och värdländer. Avsnittet diskuterar först kopplingen mellan utländska direktinvesteringar och ekonomisk tillväxt. Avsnittet beskriver sedan den fortfarande mycket begränsade teoretiska litteraturen om hur dessa avtal kan stimulera investeringar. Avsnitt 3 ger även en översikt av den empiriska litteraturen om investeringseffekterna av dessa avtal.

En central observation är att ett avtal endast stimulerar investeringar om det ökar investerarnas förväntade vinst. Denna förväntade vinstökning kan antingen uppstå genom att investerarna kan förvänta sig ökad kompensation från värdlandet och/eller genom förändringar av värdlandets politik i en mer investerarvänlig riktning. I båda dessa fall kommer värdlandet att exponeras för förväntade framtida kostnader. Ett optimalt utformat avtal balanserar fördelarna förknippade med ökade investeringar mot dessa förväntade kostnader.

I avsnitt 4 beskrivs kortfattat kritiken av investeringsskyddsavtal. Avsnittet diskuterar särskilt två huvudsakliga två vanliga källor till kritik: risken för att avtalen får värdländer att avstå från att genomföra (i något avseende) önskvärda ekonomisk-politiska åtgärder (eng. "regulatory chill"), och att avtalen tillåter privata investerare att stämma värdländer.

Avsnitt 5 illustrerar utvecklingen i utformningen av investeringsskyddsavtal genom att beskriva några nya egenskaper hos CETA och hur CETA:s materiella täckning i vissa centrala avseenden är mer begränsad än de svenska avtalen. Avsnitt 5 argumenterar också för att de svenska avtalen, i sin nuvarande form, ger ett utökat skydd för såväl svenska investeringar i partnerländerna som för investeringar från partnerländerna i Sverige.

Avsnitt 6 diskuterar mot bakgrund av den tidigare analysen vad som bör göras med de svenska avtalen. Å ena sidan är det skydd som avtalen ger för svenska investeringar i partnerländerna till nytta för Sverige. Men det skydd som avtalen ger för investeringar från partnerländerna i Sverige är, som visas i avsnitt 3, förknippat med förväntade kostnader. Det tycks inte heller finnas något plausibelt skäl för att ge investeringar från partnerländer särskilt skydd i förhållande till investeringar från icke-partnerländer. Historiskt har detta inte varit ett problem i praktiken då partnerländerna haft mycket en mycket begränsad kapacitet att investera i Sverige. Men flera av partnerländerna utvecklas snabbt i detta avseende. Exempelvis bör vi förvänta oss ökade investeringar från Kina och Sydkorea. Detta gör att frågan om huruvida det är önskvärt att ge investeringar från dessa länder ett högre skydd är av särskild vikt.

Avsnitt 6 drar slutsatsen att de svenska investeringsavtalen i sin nuvarande utformning har positiva effekter på utgående investeringar, vilka måste balanseras mot de övervägande negativa effekterna vad gäller ingående investeringar. Helst skulle denna avvägning göras genom att kvantifiera förväntade positiva och negativa effekter. Detta ligger dock utanför ramen för denna studie. Vi menar dock att det är tydligt att de negativa effekterna dominerar och att det därför finns ett behov av att minska skyddsnivån i de svenska avtalen. Vi ser inget skäl till att Sverige bör agera annorlunda i detta avseende än många andra länder. Skyddsnivån i de svenska avtalen bör minskas så att investerare från BIT-länderna har samma skyddsnivå som investerare från andra länder och investerare från

Sverige. Detta skulle i princip innebära att svenska investerare skulle ha samma skyddsnivå i partnerländerna som de skulle ha i Sverige. Detta skulle eventuellt kunna göras genom att de svenska avtalen reviderades så att åtagandena motsvarar de i CETA.

Summary

A central aspect of the Swedish economic integration with the outside world is out- and inward foreign direct investment (FDI). Like many other countries, Sweden has entered into a large number of *state-to-state investment agreements* that aim to promote FDI by protecting foreign investors against host country policy measures. Starting in 1965, Sweden has entered into approximately 70 bilateral investment treaties (BITs), and Sweden will participate as an EU member in several recently negotiated, but still not ratified, EU agreements. Additionally, Sweden is a member of the sector-specific investment agreement The Energy Charter Treaty.

On the global scene, the first international investment agreements (IIAs) appeared in the late 1950s, but most of these treaties were formed after the mid-1990s. These agreements were initially formed between a developing and a developed country, with the purpose of encouraging investment from the developed to the developing country. This was a period in which expropriations, and other types of policy interventions with similar effects, were common in developing countries. The number of investment agreements has grown rapidly over the years, and there are currently some 2 700 IIAs in force globally.

IIAs have recently become intensively debated internationally. The debate was ignited in Europe by the negotiations concerning the EU-US Transatlantic Trade and Investment Partnership (TTIP), and the Canada-EU Comprehensive Economic and Trade Agreement (CETA). IIAs are claimed to be associated with a range of problems. For instance, the substantive undertakings in the agreements are alleged to be too vaguely worded, thereby allowing arbitration panels to impose severe restrictions on host country “policy space”, that is, on their ability to take policy measures without fear of having to compensate foreign investors. It is also argued that the arbitration mechanisms in IIAs are flawed in various ways. One commonly criticised feature is that the agreements typically allow foreign investors to take host countries to arbitration outside these countries’ domestic legal systems − so called investor-state dispute settlement (ISDS). The critique has been fuelled by some contentious investment disputes. The criticism of investment agreements has not only come from “civil society”. Many internationally highly reputable academics have expressed serious concerns.

Perceived problems with investment agreements have recently caused several countries to change their agreements, both with regard to substantive undertakings and dispute settlement procedures. Among developed economies, the EU has taken the lead in these efforts. But the Swedish agreements have been left unchanged since they were negotiated, and as a result reflect thinking regarding investment protection that dates back several decades.

The purpose of this study is to discuss pros and cons of the Swedish agreements from an *economic* perspective. This is not the only possible way to approach these issues. For instance, investment agreements can be seen as part of foreign policy. However, a central reason for entering into, or for maintaining, these agreements is to increase Swedish economic welfare, and it is therefore desirable to evaluate their economic performance.

Section 2 of the study gives a brief overview of the main features of the Swedish IIAs from an economic point of view, and points to implications of EU membership for the Swedish investment regime. It is observed that only 0.2 percent of the stock of inward investment in Sweden 2016 came from non-EU countries with which Sweden has BITs. On the outward

side, the extra-EU BITs cover less than 9 percent of the Swedish total stock of outward FDI. From this perspective it thus appears as if these BITs have virtually no effect on aggregate inward investment, and modest effect at best on aggregate outward investment.

The economic rationale for IIAs is to stimulate FDI to mutual benefit for the contracting parties. Section 3 discusses this issue from the point of view of the economic literature. The section starts with a discussion of possible links between foreign direct investment and economic growth, pointing to sources of gains for host countries, and for source countries, from FDI. It then turns to the link between investment agreements and FDI. The literature is meagre, but an emerging economic theory points to mechanisms through which investment agreements might promote investment and economic welfare for both host and source countries. It is also argued that the role of IIAs is likely to differ depending on whether the agreements are of a traditional form, between developed and developing countries, or between developed countries. Section 3 also briefly surveys the empirical literature that seeks to assess the impact of these agreements on investment.

A central point that emerges from this analysis is that an agreement will only stimulate investment if it increases the expected profits of investors. This expected increase can come about through either expected compensation payments by the host country to investors in case the host country takes measures that significantly reduce investor profits, and/or by changes of government policies in a more investor friendly direction. The host country is in either case exposed to expected costs. For a host country, an optimally designed agreement should balance the benefits of increased investment against these expected costs.

Section 4 briefly lays out the critique against investment agreements, discussing in particular the two main sources of contention − “regulatory chill” and ISDS − drawing on the analytical economic frameworks laid out in Section 3.

Section 5 illustrates recent developments in the design of IIAs by describing some novel features of CETA, and by comparing CETA with a Swedish BIT. It is shown how CETA in several regards constrains the coverage of the agreements in ways that are not found in the Swedish BIT. Section 5 also explains why we believe that the agreement in their current form provide protection to Swedish investors in the partner countries that they would not have access to absent the agreements − that is, the agreements provide additional protection. It is also explained why we believe that the BITs provide additional protection to investors from the partner countries in Sweden.

Section 6 discusses what should be done with the Swedish agreements in light of the earlier analysis, distinguishing between their effect on outward and inward investment. It is argued that the protection the agreements provide for outward FDI is beneficial to Sweden.

With regard to protection of inward investment we note that while in the past most of the partner countries did not have the capacity to invest in Sweden to any significant degree, some partner countries are rapidly developing in this regard, China and Korea being the leading examples. We should thus expect to see much more inward FDI from these countries in the future. This makes the question of whether it is desirable to give investors from these countries special protection. We argue that absent evidence to the contrary, there does not seem to be an economic rationale for protecting investment from the BITs countries.

The analysis thus leads to the conclusion that we must balance beneficial effects of the BITs on the outward side against the predominantly negative effects on the inward side.

This balancing act should preferably be done by quantifying expected positive and negative effects. It would be a very demanding exercise, however, to the extent it could be done at all in a meaningful way, and it is beyond the scope of this study. Our intuition, for what it is worth, strongly suggests that the negative effects dominate, and that there is a need to reduce the level of protection in these agreements. Indeed, we cannot see any reason why Sweden should act differently in this regard than many other countries.

We believe that the level of protection in the Swedish BITs should be reduced such that investors from the BIT countries have the *same* level of protection as investors from other countries, as well as investors from Sweden. This would at least in principle imply that Swedish investors would have the same level of protection in the partner countries as they would have in Sweden.

1 Introduction

A central aspect of the Swedish economic integration with the outside world is out- and inward foreign direct investment (FDI). In 2016 the total stock of Swedish outward FDI was SEK 3 379 billion, corresponding to 77 percent of Swedish GDP, and the inward stock was SEK 2 725 billon, equal to 62 percent of GDP.[1] Foreign-owned firms currently employ more than 600 000 people in Sweden, and Swedish firms employ almost 1.4 million people abroad.[2] This FDI has importantly contributed to Swedish national income.

Like many other countries, Sweden has entered into a large number of state-to-state investment agreements that aim to promote FDI by protecting foreign investors against host country policy measures. Starting in 1965, Sweden has entered into approximately 70 bilateral investment treaties (BITs), and Sweden will participate as an EU member in several recently negotiated, but still not ratified, EU agreements. Additionally, Sweden is a member of the sector-specific investment agreement The Energy Charter Treaty.

On the global scene, the first international investment agreements (IIAs) appeared in the late 1950s, but most of these treaties were formed after the mid-1990s.[3] [4] These agreements were initially formed between a developing and a developed country, with the purpose of encouraging investment from the developed to the developing country. This was a period in which expropriations, and other types of policy interventions with similar effects, were common in developing countries. The fear of such treatment was believed to importantly deter much needed foreign investment in developing countries. The purpose of the IIAs was to stimulate investment by credibly committing the developing countries to compensate foreign investors in case of expropriations, etc.

The number of investment agreements has grown rapidly over the years, and there are currently some 2 700 IIAs in force globally.[5] While the majority of IIAs are still between a developing and a developed country, agreements between developed countries, and agreements between developing countries, have become more common. It has become increasingly common for preferential trade agreements to encompass investment protection. The North American Free Trade Agreement (NAFTA) was one of the first trade agreements to include an investment chapter with additional investment protection, and many of the major preferential trade agreements include investment protection chapters, or are negotiated jointly with such undertakings.

The role of investment agreements between developed countries is less clear than the role of traditional agreements between developing and developed countries, since it seems plausible that developed countries have less credibility problems. But as will be argued, it could at least as a matter of theory be claimed that developed countries absent agreements, unilaterally choose too low levels of protection of foreign investment from a joint welfare point of view, since they disregard positive externalities that such protection creates for foreign investors.

1 The notion “stock” refers the aggregate value of the assets; data taken from http://www.statistikdatabasen.scb.se.
2 Tillväxtanalys (2018a, b).
3 We will use the terms “investment agreement” or “IIA” interchangeably with “investment treaty”.
4 See UNCTAD (2015) for a description of the evolution of the international investment agreement regime.
5 http://investmentpolicyhub.unctad.org/.

Investment agreements between developed countries could enable the partner countries to internalise these externalities by exchanging concessions to protect foreign investment, to mutual benefit.

The IIAs were initially formed without much political opposition but have recently become intensively debated internationally. The debate was ignited in Europe by the negotiations concerning the EU-US Transatlantic Trade and Investment Partnership (TTIP), and the Canada-EU Comprehensive Economic and Trade Agreement (CETA). IIAs are claimed to be associated with a range of problems. For instance, the substantive undertakings in the agreements are alleged to be too vaguely worded, thereby allowing arbitration panels to impose severe restrictions on host country "policy space", that is, on their ability to take policy measures without fear of having to compensate foreign investors. The agreements build on principles in Customary International Law, but go further than this:[6]

> The standards of protection offered by investment treaties and the possibility of their enforcement through investor-State arbitration have improved the legal position of investors considerably. (Scheurer 2010)

It is also argued that the arbitration mechanisms in IIAs are flawed in various ways. One commonly criticised feature is that the agreements typically allow foreign investors to take host countries to arbitration outside these countries' domestic legal systems − so called investor-state dispute settlement (ISDS).

Several investment disputes have been highly contentious, such as the threat by TransCanada Corporation to take the US to arbitration under NAFTA regarding USD 15 billion in damages for the Obama administration's decision (later overturned by the Trump administration) to disallow the construction of the Keystone XL pipe line; Phillip Morris' case against several countries over tobacco plain packaging legislation; cases against Spain and other countries for withdrawals of renewable energy support schemes; and Vattenfall's case against Germany regarding the German decision to accelerate the phase-out of nuclear power in the wake of the Fukushima disaster.

The criticism of investment agreements has not only come from "civil society". Many internationally highly reputable academics have expressed serious concerns; see, e.g., Howse (2017), Johnson, Sachs and Sachs (2015), and Stiglitz (2008) for comprehensive and forceful critical discussions of investment agreements.[7]

Perceived problems with investment agreements have recently caused several countries to change their agreements, both with regard to substantive undertakings and dispute settlement procedures. For instance, experience from NAFTA cases led Canada and the US to develop new Model BITs, with specific language aimed at ensuring that investor protection does not come at the expense of health, safety, the environment and labour rights.[8] The recently released draft of the revised NAFTA agreement has drastically reduced the scope for investor-state disputes. Canada has completely withdrawn from this part, and there are significant limitations introduced to the possibilities for investor-state dispute settlement between Mexico and the US. In side-letters to the Comprehensive and

[6] Scheurer (2010) points to the relevance of international minimum standards for the treatment of aliens in the context of denial of justice, to state responsibility, and to international rules on nationality, as reflections of principles in Customary International Law in investment agreements.

[7] Pohl (2018) reports the outcome of a comprehensive OECD project to establish an inventory of the societal benefits and costs of investment agreements based on available evidence, as advanced by academia, governments, business and civil society. It also provides extensive references to the huge literature.

[8] UNCTAD (2015, p. 124).

Progressive Agreement for Trans-Pacific Partnership, New Zealand has excluded ISDS with partner countries Australia and Peru, and has reduced the scope for such disputes with three other partner countries. In Europe, Italy has withdrawn from the Energy Charter Treaty. The Netherlands recently presented for public comment a revised Model BIT that contains sweeping changes compared to their 2004 Model BIT. Norway presented in 2015 a proposed Model BIT that contained a number of changes compared to its earlier agreements. There are also ongoing efforts in various international organisations, such as the OECD and UNCTAD, to revise the investment regime. The main forum for arbitration of investment disputes − the World Bank's International Centre for Settlement of Investment Disputes (ICSID) − is currently in the process of significantly revising its procedures. Another important forum for investment dispute arbitration − the Arbitration Institute of the Stockholm Chamber of Commerce − have just selected the winners in a contest for the drafting of a model investment treaty that aims to encourage investment in climate change mitigation and adaptation, in recognition of the deficiency of investment agreements in this regard.

The international debate and policy changes have thus far had little impact on Sweden. Criticism of investment agreements has often been portrayed in the Swedish debate as just reflecting general anti-globalisation sentiments, or worse.[9] And almost all the Swedish agreements have been left unchanged since they were negotiated, and as a result reflect thinking regarding investment protection that dates back several decades.

The purpose of this study is to discuss pros and cons of the Swedish agreements from an *economic* perspective. This is not the only possible way to approach these issues. For instance, investment agreements can be seen as part of foreign policy, mandating an examination from an international relations perspective, or they can be approached from an international law perspective. However, a central reason for entering into, or for maintaining, these agreements is to increase Swedish economic welfare, and it is therefore desirable to evaluate their economic performance. This is a moot issue as it comes to the BITs with EU countries, due to the process that is underway to terminate these agreements. But there are approximately 50 Swedish BITs with non-EU countries in force. More specifically, the objective of the study is to shed light on whether these agreements with non-EU countries are likely to have economically significant impact on Swedish economic *growth* that motivates the costs that the agreements give rise to.

The study is structured as follows. Section 2 gives a brief overview of the main features of these agreements from an economic point of view, and points to implications of EU membership for the Swedish investment regime.

Section 3 lays out some basic economic features of relevance to our evaluations of the BITs. Section 3.1 discusses possible links between foreign direct investment and economic growth, pointing to some of the sources of gains for host countries, and for source countries from FDI. Section 3.2 turns to the link between investment agreements and FDI. The literature is meagre, but an emerging economic theory points to mechanisms through which investment agreements might promote investment and economic welfare for both host and source countries. It is also argued that the role of IIAs is likely to differ depending on whether the agreements are of a traditional form, between developed and developing

[9] For instance, an editorial in Dagens Nyheter (29 May 2015) discards the critique of the investment protection in TTIP as "mestadels trams" (roughly translated as "mostly nonsense"), and an editorial in Dagens Industri (7 April 2015) characterises the critique as "ren galenskap" ("pure madness").

countries, or between developed countries. Section 3.3 briefly surveys the somewhat larger empirical literature that seeks to assess the impact of these agreements on investment.

Section 3 also discusses the cost side of investment agreements for host countries. According to economic theory, an investment agreement will only stimulate investment to the extent that it increases the expected profits of investors by insuring the investors against the effects of host country policies. This will come about through expected compensation payments by the host country to investors, and/or by changes of government policies in more investor friendly direction. The host country is in either case exposed to expected costs, similar to how an insurance provider is exposed to potential costs that might, but does not have to, be realised in practice. For a host country, an optimally designed agreement should balance the benefits of increased investment against these expected costs.

Section 4 turns to the critique against investment agreements. Section 4.1 broadly describes some of the frequent critical claims against investment agreements that are of more political or legal nature. Section 4.2 lays out arguments of more direct economic relevance, focusing in particular on two main sources of contention − "regulatory chill" and ISDS − drawing on the analytical economic frameworks laid out in Section 3.2.

Section 5 illustrates recent developments in the design of IIAs by describing some novel features of CETA, and by comparing CETA with a Swedish BIT. It is shown how CETA in several regards constrains the coverage of the agreements in ways that are not found in the Swedish BIT. Section 5 also explains why we believe that the agreement in their current form provide protection to Swedish investors in the partner countries that they would not have access to absent the agreements − that is, the agreements provide additional protection. It is also explained why we believe that the BITs provide additional protection to investors from the partner countries in Sweden.

Section 6 discusses what should be done with the Swedish agreements in light of the earlier analysis. It is argued that the protection the agreements provide for outward FDI is beneficial to Sweden. With regard to protection of inward investment we argue that there does not seem to be a need for protection of investment from the BITs countries − investors from BIT countries would probably not face more policy risks than investors from other countries. At the same time, the agreements expose Sweden to expected costs in terms of compensation payments and/or changes to policies. Furthermore, if investors from the partner countries are not discriminated against by Swedish authorities relative to other investors, which we presume absent evidence to the contrary − then the agreements de facto discriminate *in favour* of these partner country investors. Balancing the beneficial effects of the BITs on the outward side against the predominantly negative effects on the inward side, we conclude that Sweden should follow the international trend and reduce the level of protection that the BITs provide to the level offered other investors.

Section 6 also makes some remarks regarding the ECT, while Section 7 concludes by discussing some issues related to the governance of the Swedish investment protection regime.

2 The Swedish investment agreements

The global investment protection regime is highly fragmented, consisting of thousands of separate IIAs. While the contents of these agreements vary, there are still some broad features that most agreements share. [10] This section will describe in broad terms the main features of the Swedish bilateral investment agreements, and the investment protection regime in the EU.

2.1 Swedish investment treaties

In this Section, we first identify the BITs that are currently in force. We then broadly describe the structure of traditional investment agreements, such as the Swedish agreements. Finally, we give a broad assessment of importance of the Swedish BITs by exploring the extent to which existing stocks of FDI are covered by the agreements.

2.1.1 The BIT partner countries

The first Swedish BITs were signed in the mid-1960s, with Côte d'Ivoire, Madagascar and Senegal. It took more than a decade for the next agreements to see the light of day. When the process picked up speed toward the end of the 1970s, Germany had already over 40 agreements. Like many other countries in the EU, Sweden concluded several BITs with Eastern European countries, in particular in the 1990s with the reorientation of these countries toward market economies.

Over the years, Sweden has formed 73 BITs. Three of these agreements never entered into force (Nicaragua, Philippines, Zimbabwe), two agreements have been terminated at the request of the partner country without renewal (Bolivia, India), and one country (Ecuador) has declared the intention to terminate its agreements. Table 1 lists all Swedish BITS which are currently in force with the year they went in force. As shown in third column, 12 of these BITs have been formed with EU member states (Croatia and Slovenia have signed twice). In later analysis we will disregard these agreements since there is a wide-spread view that these agreements are in practice dead, if not for legal, for political reasons.[11] Indeed, EU Member States issued a declaration on January 15, 2019, stating that Members States will terminate all intra-EU BITs.[12] Considering that the BIT with Bosnia and Herzegovina has been renewed, this leaves us with 52 non-intra-EU BITs that are currently in force.

[10] See, e.g., Dolzer and Schreuer (2012) for an introduction to legal aspects of investment agreements.
[11] These agreements are with Bulgaria (1994), Croatia (2000), Czech Republic (1990), Estonia (1992), Hungary (1987), Latvia (1992), Lithuania (1992), Malta (1999), Poland (1989), Romania (2002), Slovenia (1999), and Slovakia (1990).
[12] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

Table 1 The Swedish BITs that are currently in force

	Partner country	Year into force	Intra-EU BIT	UNCTAD mapping		Partner country	Year into force	Intra-EU BIT	UNCTAD mapping
1	Côte d'Ivoire	1966	No	Yes	33	North Macedonia*	1998	No	Yes
2	Madagascar	1967	No	Yes	34	Turkey	1998	No	Yes
3	Senegal	1968	No	Yes	35	Venezuela	1998	No	Yes
4	Egypt	1979	No	Yes	36	South Africa	1999	No	Yes
5	Malaysia	1979	No	Yes	37	Uruguay	1999	No	Yes
6	Serbia	1979	No	Yes	38	Malta	1999	Yes	.
7	Pakistan	1981	No	Yes	39	Slovenia	1999	Yes	.
8	Sri Lanka	1982	No	Yes	40	Thailand	2000	No	Yes
9	China	1982 /2005	No	Yes	41	United Arab Emirates	2000	No	Yes
10	Yemen	1984	No	Yes	42	Croatia	2000	Yes	.
11	Tunisia	1985	No	Yes	43	Lebanon	2001	No	Yes
12	Hungary	1987	Yes	.	44	Mexico	2001	No	Yes
13	Poland	1989	Yes	.	45	Uzbekistan	2001	No	Yes
14	Czech Rep	1990	Yes	.	46	Kuwait	2002	No	Yes
15	Slovakia	1990	Yes	.	47	Tanzania	2002	No	Yes
16	Argentina	1992	No	Yes	48	Romania	2002	Yes	.
17	Estonia	1992	Yes	.	49	Bosnia-Herzegovina	2002	No	No
18	Latvia	1992	Yes	.	50	Kyrgyzstan	2003	No	Yes
19	Lithuania	1992	Yes	.	51	Mongolia	2004	No	Yes
20	Indonesia	1993	No	Yes	52	Algeria	2005	No	Yes
21	Hong Kong	1994	No	Yes	53	Ethiopia	2005	No	Yes
22	Peru	1994	No	Yes	54	Guatemala	2005	No	Yes
23	Viet Nam	1994	No	Yes	55	Mauritius	2005	No	Yes
24	Bulgaria	1994	Yes	.	56	Kazakhstan	2006	No	Yes
25	Chile	1995	No	Yes	57	Nigeria	2006	No	No
26	Albania	1996	No	Yes	58	Mozambique	2007	No	No
27	Belarus	1996	No	Yes	59	Morocco	2008	No	Yes
28	Oman	1996	No	Yes	60	Panama	2008	No	Yes
29	Russian Federation	1996	No	Yes	61	Armenia	2008	No	No
30	Korea	1997	No	Yes	62	Iran	2008	No	No
31	Laos	1997	No	Yes	63	Georgia	2009	No	No
32	Ukraine	1997	No	Yes	64	Saudi Arabia	2009	No	No

*Renmark: The mapping is taken from http://investmentpolicyhub.unctad.org/IIA. *North Macedonia is the previous Former Yugoslav Republic of Macedonia (FYROM).*

Source: UNCTAD

The Swedish BITs are similar to the BITs concluded up until some ten years ago by other developed countries with developing countries. The purpose of these “North-South” agreements was to encourage investment in one direction only − from the developed to the developing partner. While formally imposing the same obligations on both contracting parties, the agreements restrained in practice only the developing country, due to the lack of investment by the developing country in the developed partner. Judging by the countries Sweden formed BITs with, it appears as if few, if any, of the Swedish agreements were formed with the intention of encouraging inward FDI to Sweden. But as will be emphasized below, some of the agreements are likely to apply more symmetrically in the years to come due to the economic development in these partner countries.

2.1.2 The economic coverage of the BITs

The total stock of Swedish *outward* FDI was SEK 3 260 billion in 2016.[13] Table 2 breaks down the outward stock according to whether investments are made in EU28 or non-EU28 countries, and according to whether Sweden has BITs with the respective country.

Table 2 Distribution of the stocks of Swedish outward FDI 2016 in percent

Region	No BIT	BIT	Total
EU28	54.8	6.1	60.9
Non-EU28	30.3	8.8	39.1
Total	85.1	14.9	100.0

Source: http://www.statistikdatabasen.scb.se

As can be seen, almost 61 percent of the total outward stock is in EU countries, and a small fraction of this share − approximately 11 percent − is in countries with which Sweden has BITs. For the stocks that are in non-EU countries, the share that is covered by BITs is higher, being approximately 23 percent. But the BITs only cover roughly 15 percent of the stock of Swedish outward FDI, and the extra-EU share is of course smaller:[14]

Observation 1: *The extra-EU BITs cover less than 9 percent of the Swedish total stock of outward FDI.*

We next turn to the BITs and inward FDI. The total value of the foreign-owned stocks of FDI in Sweden were 2016 SEK 2 650 billion, which is smaller than the outward stock, but still large.[15] Table 3 shows whether the stock comes from EU or non-EU countries, and whether it originates from countries with which Sweden has BITs.

Table 3 Distribution of the stocks of Swedish inward FDI 2016 in percent

Region	No BIT	BIT	Total
EU28	79.2	-0.8	78.3
Non-EU28	21.5	0.2	21.7
Total	100.6	-0.6	100.0

Remark: The reason for the negative value for the stock of inward investment from EU countries with which there are BITs is that the numbers are for net FDI, and thus include debt.

Source: http://www.statistikdatabasen.scb.se

Hence, almost 80 percent of all inward FDI stems from EU countries with which Sweden does not have BITs, and close to 20 percent comes from non-EU countries without BITs. What clearly stands out from Table 3 is however the vanishingly small stocks that originate in countries with which there are BITs, whether EU or non-EU countries:

Observation 2: *The extra-EU BITs cover less than 0.2 percent of the total stock of Swedish inward FDI.*

Table 4 breaks down the Swedish outward stocks in 2016 on individual countries, each with at least 0.5 percent of the total stocks. As can be seen, there are no BITs with the 10 largest countries, which jointly account for more than 70 percent of the outward stock.

[13] For some countries there are no numbers reported due to confidentiality concerns. We have simply set these stocks to 0. Data taken from http://www.statistikdatabasen.scb.se.

[14] We will synthesise our findings into “Observations” and “Conclusions”. The former is meant to be summaries of facts, the latter are inferences we draw based on facts. The distinction is admittedly not always be clear.

[15] Data taken from http://www.statistikdatabasen.scb.se.

Instead, Table 4 shows that the outward FDI is located primarily in the US, and in Northern and Western Europe.[16]

Table 4 Share of total stocks of Swedish outward FDI in 2016

Country	Share %	BIT
United States	13.5	
Finland	11.9	
Norway	8.6	
Netherlands	7.7	
Denmark	6.3	
Luxembourg	5.6	
United Kingdom	5.5	
Belgium	5.0	
Germany	3.3	
Spain	3.2	
China	3.0	Yes
Switzerland	2.9	
Italy	2.2	
France	2.2	
Poland	1.8	Yes
Russian Federation	1.8	Yes
Brazil	1.2	
Estonia	1.2	Yes
Canada	1.0	
Japan	0.9	
Ireland	0.9	
Lithuania	0.8	Yes
Korea, Republic	0.7	Yes
Latvia	0.6	Yes
Australia	0.6	
India	0.6	
Czech Republic	0.6	Yes
Mexico	0.5	Yes

Remark: Countries with at least 0.5 percent of the total outward FDI stocks

Source: http://www.statistikdatabasen.scb.se

Table 5 gives the distribution of the inward FDI across source countries that each account for more than 0.5 percent of the total inward stock. It can be noted that none of these source countries has a BIT with Sweden. [17]

[16] Looking at the number of employees in the foreign affiliates to Swedish multinational firms, the pattern is similar. But some large BIT partners score higher on outward employment. In particular, Tillväxtanalys (2018b) reports that Swedish affiliates in China employed about 7 percent of the total Swedish employment abroad, while affiliates in Poland employed about 4.5 percent of the total Swedish foreign employment. Compared with Table 4, these employment shares are about twice as high as their share of the outward FDI stock. A likely explanation is that Swedish firms have chosen to locate labour-intensive activities in China and Poland to take advantage of lower wage costs. For another major BIT country, South Korea (Korea Republic), the employment- and outward FDI stock shares are roughly the same, reflecting that wage costs were likely not the primary motive for investing in Korea. Since our main purpose is to investigate the effect of the Swedish BITs on Swedish national income, we will emphasise the FDI stock measure.

[17] If we instead investigate the source country distribution of the number of employees in foreign affiliates in Sweden, the overall picture is roughly the same. But some large BIT partners again score higher on employment. Chinese firms held less than 0.5 percent of the total inward FDI stock in Sweden. Tillväxtanalys (2018a) reports that Chinese affiliates employed about 3 percent of the total Swedish employment. Again, since our main purpose is to investigate the effect of the Swedish BITs on Swedish national income, we will emphasise the FDI stock measure.

Table 5 Share of total stocks of Swedish inward FDI 2016

Country	Share %	BIT
Netherlands	18.9	
Luxembourg	15.4	
United Kingdom	12.6	
Finland	9.9	
Germany	9.6	
United States	8.5	
Norway	8.1	
Denmark	7.5	
Cyprus	2.2	
Switzerland	2.1	
France	1.6	
Japan	1.0	
Canada	1.0	
Austria	1.0	
Belgium	0.6	

Remark: Countries with at least 0.5 percent of the total inward FDI stocks

Source: http://www.statistikdatabasen.scb.se

As will be described in Section 3.3, empirical evidence suggests that market size is an important determinant of FDI flows. The coverage of the Swedish BITs actually looks quite impressive in this respect (see Table 6):

Observation 3: *The non-EU BIT partner countries account for almost one third of global GDP.*

Table 6 Percentage share of global GDP 2016

Region	No BIT	BIT	Total
EU28	19.9	1.5	21.4
Non-EU28	47.1	31.4	78.6
Total	67.0	33.0	100.0

Source: World Development Indicators (World Bank)

To get a rough feeling for the extent to which Swedish BIT partner countries can be expected to grow in absolute terms, we calculate for all non-EU countries how much their respective 2016 GDP would grow in absolute terms during a year, given that they grow with their average growth rates for the period 2012-2016.[18] Table 7 reports the findings for the 20 non-EU countries with largest absolute "growth potential" measured this way, and it also indicates whether the countries are BIT partners. This simple exercise suggests the following:

Observation 4: *The Swedish BITs are quite well positioned with regard to the partner countries' short-term growth potential, Sweden having BITs with 12 out of the top-20 countries.*

It seems plausible that China will become a dominant source country for FDI, but also a dominant host country for FDI, in particular if the conditions for investing in China improves. The sheer size of the Chinese economy implies that China will grow substantially in absolute terms even if the Chinese growth rate declines in coming years.

[18] More precisely, this computation will give the predicted change in the GDP in 2017 for the respective countries. We could also use compounding to predict longer changes in GDP. We do not pursue that exercise here, since we only want to give a simple illustration how the size of GDP and the growth rate interact with each other.

But several other of the BIT countries should also become increasingly attractive for Swedish outward FDI. For instance, countries like Indonesia, Malaysia, Mexico, Thailand and Vietnam, already participate in global value chains.

Table 7 "Growth potential"

Rank	Country	GDP billion USD	Mean growth %	Growth potential billion USD	BIT
1	China	11 199	7.3	818	Yes
2	USA	18 624	2.2	403	No
3	India	2 264	6.9	156	No
4	Japan	4 949	1.2	61	No
5	Indonesia	932	5.3	49	Yes
6	Turkey	864	5.5	48	Yes
7	Korea, Republic	1 411	2.8	40	Yes
8	Australia	1 205	2.8	34	No
9	Canada	1 536	1.9	29	No
10	Mexico	1 047	2.5	26	Yes
11	Saudi Arabia	646	3.5	23	Yes
12	Philippines	305	6.6	20	No
13	Malaysia	297	5.1	15	Yes
14	United Arab Emirates	349	4.2	15	Yes
15	Bangladesh	221	6.5	14	No
16	Thailand	407	3.4	14	Yes
17	Nigeria	405	3.4	14	Yes
18	Pakistan	279	4.6	13	Yes
19	Iraq	171	7.4	13	No
20	Vietnam	205	5.9	12	Yes

Source: World Development Indicators (World Bank)

Finally, as shown in Table 8, a number of partner countries are small in terms of GDP and will remain so even if experiencing rapid growth.

Table 8 Non-EU BIT countries with GDP less than USD 200 billion 2016

Algeria	Morocco
Albania	Mozambique
Armenia	North Macedonia*
Belarus	Oman
Côte d'Ivoire	Panama
Ethiopia	Peru
Georgia	Senegal
Guatemala	Serbia
Kazakhstan	Sri Lanka
Kuwait	Tanzania
Kyrgyzstan	Tunisia
Laos	Ukraine
Lebanon	Uruguay
Madagascar	Uzbekistan
Mauritius	Yemen
Mongolia	

*Remark: *North Macedonia is the previous Former Yugoslav Republic of Macedonia (FYROM).*

Source: World Development Indicators (World Bank)

2.1.3 The broad contents of the BITs

In what follows we will give a broad overview of the standard components of traditional investment agreements that seem to be of more direct relevance from an economic perspective. We will also indicate the extent to which they are found in the Swedish BITs.

For the latter purpose we will partly draw on an UNCTAD-coordinated project in which the contents of almost 2 600 investment agreements have been mapped in significant detail, using a standardized format.[19] The mapping is reasonably complete for our purposes, since it covers 45 of the 52 Swedish non-intra-EU BITs that are currently in force.[20] It should be emphasised that the mapping is probably inaccurate in certain instances, but is hopefully accurate enough to give broad indication of the actual contents of the BITs. The mapping can be found in Annex 2.

The broad contents of the traditional IIAs, as well as the Swedish BITs, are as follows.

Preamble and definitions

IIAs typically start with *preambles* in which their purposes are described in general terms. While normally not containing binding language, the preambles can still guide arbitration panels when looking for, e.g., the purpose of an agreement. But there are also occasionally *limitations to the substantive scope* of the treaties with regards to whether they cover, e.g., taxation, subsidization, and government procurement. Furthermore, it might be specified whether the agreements apply to both pre-existing and post-BIT investments, or only to post-BIT investments. The initial part of the agreements also often includes *definitions* of key concepts that affect the ambit of the agreement. The preambles of the Swedish BITs are typically short and give little guidance for arbitrators. The agreements include a few definitions, including the meaning of terms such as “investment”, “investor”, “return” and “territory”.

Substantive rules

The core of the IIAs are the substantive rules that they impose on the host countries. First, agreements typically contain one or both of two basic *non-discrimination principles*. The *Most-Favoured Nation* (MFN) principle rules out less favourable treatment of investment from a contracting party compared to the treatment afforded to investment from any other country. All Swedish agreements provide for MFN treatment, but only after the establishment of the investment.[21] The *National Treatment* principle requests host countries not to treat investment from a contracting party less favourably than domestic investment. The ambit of this provision is often restricted to apply to situations where the foreign and the domestic investments are in “like circumstances”. Most Swedish BITs include National Treatment obligations, but then post-establishment only. But some potentially important agreements do not include National Treatment, including those with China, Indonesia, Malaysia and Vietnam.

Second, investment agreements typically request *fair and equitable treatment* of foreign investment, and *full protection and security* for investors. These unspecific obligations serve to cover policy measures that are not covered by the agreements’ more specific protective obligations. These provisions have often been used in arbitration and have been the source of considerable controversy in instances where arbitration panels have made far-

[19] See http://investmentpolicyhub.unctad.org/IIA.
[20] The BITs with Armenia, Bosnia-Herzegovina, Georgia, Iran, Mozambique, Nigeria, and Saudi Arabia are not included in the mapping.
[21] Kommerskollegium (2016) shows that there are important differences between the MFN provisions in the Swedish BITs that affect, e.g., the possibility to use these provisions to “import” obligations from agreements that the parties have entered into with third countries.

reaching interpretations regarding the extent of investor protection that the agreements provide. These obligations are also included in a few Swedish BITs.

Third, a central substantive obligation in investment agreements is the requirement to compensate investors in case of *expropriation.* This provision typically applies to both *direct* expropriation, where the host country seizes an investor’s assets, and *indirect (or regulatory)* expropriation, where a host country action has an effect equivalent to direct expropriation but does not involve outright take-over of assets. The amount of compensation is often requested to be "prompt, adequate, and effective". According to the UNCTAD mapping, all Swedish BITs explicitly include indirect expropriation, apart from the treaty with Sri Lanka.

Fourth, investment agreements include a range of other substantive commitments. For instance, they almost invariably include rights for investors to *freely transfer funds*, and this is also included in all the Swedish BITs.

Fifth, investment agreements often contain *umbrella clauses* that bring contractual and other commitments by the host country under the agreement, for instance, allowing investors to use the agreements for arbitration concerning alleged breaches of commercial contracts with the host country. The UNCTAD mapping reports such clauses for approximately a quarter of the Swedish BITs, and for the more recent agreements.

Dispute settlement

A vast majority of IIAs provide for compulsory *dispute settlement*, both ISDS and state-state dispute settlement (SSDS). SSDS is hardly ever used in practice, however − almost all of the 855 known disputes have been brought by private investors.[22]All mapped Swedish BITs allow for SSDS, and all but the three oldest (with Côte d'Ivoire, Madagascar, Senegal) also allow for ISDS.

The notion that private parties can take foreign states to arbitration—the ISDS component—is a rarity in International Law. For instance, it does not exist in pure trade agreements. When investment agreements allow for ISDS, they specify the international forum (or fora) that investors can choose among, the most common being International Centre for Settlement of Investment Disputes (ICSID) under the World Bank, or arbitration under the rules of the United Nation Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), or the Stockholm Chamber of Commerce (SCC). The Swedish BITs with ISDS typically allow investors to take disputes to ICSID arbitration, some allow for arbitration under UNCITRAL rules, and a few agreements also allow for arbitration in other fora.

Duration and termination

Investment agreements specify the *duration* of the agreements, for instance whether they are time limited, or are automatically renewed. Almost all Swedish BITs are of indefinite length with automatic renewal. IIAs also contain *sunset clauses*, specifying the coverage of the agreements, should they be terminated. It is typical that if agreements are terminated, they apply for an extended period, such as ten years or more, to investment that was in place at the time of the termination. The sunset clauses in the Swedish BITs ensure

[22] http://investmentpolicyhub.unctad.org/isds

investors of protection for existing investment for between ten and twenty years after termination.

Enforcement

While not formally part of the investment agreements, a central feature of the agreements is the *enforcement mechanisms* that they draw upon. Broadly, if a dispute is arbitrated under ICSID, all 154 Member States of ICSID (Sweden being one) are requested to automatically recognise the award, without reviewing it before national courts. Investors can therefore request courts in any ICSID Member States, e.g., to seize assets belonging to an ICSID host country that does not respect a determination going against it (although in practice there might be other forms of legal hurdles against such executions). The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") provides similar possibilities, although not quite as strong, for the enforcement of arbitral awards for disputes outside ICSID. The more exact functioning of the enforcement regime is highly complex and cannot be adequately described here. But the important bottom line is that investment agreements build on *highly potent enforcement mechanisms*, in particular when compared to other state-to-state treaties, such as trade agreements where there are no possibilities to rely on third parties for enforcement.

Disputes

The total number of disputes under investment agreements is not known, since many agreements include confidentiality clauses. But among the 855 known disputes, host countries have prevailed in the majority of cases. But there has also been a number of disputes where panels have interpreted investment agreements to impose far-reaching restrictions on host country policy space; we will return to this below.

The UNCTAD data base does not report any case against Sweden. But there are five known cases where Swedish investors have taken a BIT partner country to arbitration, four of which have been against EU member states − Latvia, Bulgaria, and Romania (twice, one still ongoing) − and the fifth and still ongoing case is against Tanzania.

2.1.4 The Energy Charter Treaty

In addition to the BITs to which Sweden is a party, Sweden is also a member of the sector-specific investment agreement *The Energy Charter Treaty* (ECT). The ECT was formed shortly after the fall of the Berlin Wall. Signed in 1994, it entered into force in 1998. The general purpose of the ECT is "…to promote long-term cooperation in the energy field" (Art. 2). An important political driving force behind the creation of the ECT was the desire to ease former socialist countries' transition toward becoming market economies, and to become members of the GATT/WTO. There were also EU interests in getting access to cheap, and geographically close, sources of energy supply.

The ECT is unusual among investment agreements in several regards. First, it covers only a single industrial sector. Second, it was one of the first agreements to include trade and investment undertakings in the same agreement. Third, the ECT is open to accession to any country, and it is thereby the only multilateral investment agreement to date. In practice though, the vast majority of the currently 49 Contracting Parties are European, or former transition, countries.[23] Fourth, all members of EU 28 except for Italy (which has with

[23] The agreement has also been signed, but not ratified, by Australia, Belarus, Norway, and Russian Federation, but Belarus applies the agreement provisionally.

drawn) are signatories of the ECT, and the EU itself is independently a signatory. This is similar to the arrangement in the WTO, where both EU member states and the EU are members. But EU members states are more active as individual members of the ECT than they are in the WTO. The non-EU members of the ECT are listed in Table 9.

Table 9 Non-EU members of the Energy Charter Treaty (ECT)

Country	
Afghanistan	Liechtenstein
Albania	Moldova
Armenia	Mongolia
Azerbaijan	Montenegro
Belarus[24]	North Macedonia
Bosnia and Herzegovina	Switzerland
Georgia	Tajikistan
Iceland	Turkey
Japan	Turkmenistan
Kazakhstan	Ukraine
Kyrgyzstan	Uzbekistan

The ECT is of interest from a growth perspective, since a well-functioning energy sector is often perceived to be conducive to economic growth. The ECT is also explicitly growth oriented; for instance, the preamble states the Contracting Parties wish to

> …catalyze economic growth by means of measures to liberalize investment and trade in energy; …

The ECT builds on the standard IIA components: it requests fair and equitable treatment, there are non-discrimination rules, both in terms of National Treatment, and MFN treatment post investment (although the treaty mostly do not use these terms), and it includes a standard form of expropriation provision.[25] But the ECT imposes in certain respects a more stringent regime than the traditional IIA. For instance, Art. 10(1) contains far-reaching language concerning policy decisions by Contracting Parties:

> Each Contracting Party shall … *encourage and create stable, equitable, favorable and transparent conditions* for Investors of other Contracting Parties to make Investments in its Area. Investments shall also *enjoy the most constant protection and security* … [emphasis added]

On the other hand, Art. 24 specifies general grounds for exceptions from the obligations in the ECT. Of most interest from a regulatory point of view is Art. 24(2), which stipulates that the agreement

> …shall not preclude any Contracting Party from adopting or enforcing any measure (i) *necessary to protect human, animal or plant life or health*…[emphasis added]

This language is borrowed from the General Exceptions clause in Art. XX GATT. Similarly to in the GATT, exceptions under Art. 24 ECT require that the measures do not constitute "disguised protection", or "arbitrary or unjustifiable discrimination". But the scope of the exceptions clause seems to be significantly further restricted in the ECT by the requirement that the measures in question are

[24] Belarus has not ratified the ECT but applies it provisionally.
[25] The obligations regarding pre-investment are less demanding.

> …duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.

There is also a further important restriction to the scope of the exceptions clause in Art. 24 in that it does not apply to the expropriation rules. Hence, the carve-out for regulatory policies seem quite restricted.

Finally, the ECT contains rules concerning compulsory dispute settlement. It allows for ISDS regarding investment promotion and investment protection undertakings. Investors can bring disputes to either host country courts, to international arbitration, or to "…any applicable, previously agreed dispute settlement procedure". There are certain exceptions to this rule, however. For instance, some countries (Sweden included) have reserved the right to refuse to have their disputes resubmitted to international arbitration after adjudication in a local court. As is typically the case with investment agreements, the ECT also provides for state-state dispute settlement.

119 disputes have been brought under the ECT at the time of writing.[26] The ECT is thus by far the investment agreement with the largest number of cases. More than half of these disputes concern renewable energy measures in Spain, Italy, and the Czech Republic, respectively. Italy withdrew from the ECT in 2016, but investment in place at the time of withdrawal will be protected for a further 20 years.

Two major disputes involving Sweden have taken place under the ECT, both involving the publicly owned energy company Vattenfall and Germany. The first case concerned the issuing of permits for a new power plant and was settled out of court. The second case, still pending, concerns German decisions regarding the phase-out of nuclear power.

2.2 Implications of EU membership for Swedish investment agreements

The Swedish EU membership has several important implications for the Swedish investment protection regime. An immediate implication of membership is that Sweden is bound to respect the free movement of capital that is enshrined in the Treaty on the Functioning of the European Union (TFEU). This principle does not only apply between member states, but also explicitly to extra-EU movement of capital:

> 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. (Art. 63 TFEU)

There are also various other EU laws and regulations, and conventions to which Sweden is a signatory, that protect third country investors and investments. These legal arrangements are central to the effects of Swedish investment agreements for foreign investors, and for Swedish policy space, since they jointly determine what rights foreign investors would have *absent* the Swedish investment agreements; we will return to this issue is Section 7.

This Section will briefly describe two other central ways in which the Swedish investment protection regime is affected by EU membership: the implications of EU membership for the possibility for Sweden to conclude investment agreements with the EU members and

[26] https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/.

with third countries; and the agreements that the EU concludes on behalf of Sweden and the other member states.

2.2.1 The competence regarding investment agreements in the EU

The 28 member states of the EU have approximately 1 400 bilateral investment treaties in force, most of which with third countries. The possibility for EU members to have investment agreements has been a contentious issue for many years, however, and there has been a trend towards shifting the responsibility to the EU level. A major step in this direction came with the Lisbon Treaty in 2009. Art. 207 of the TFEU gives the EU the exclusive competence over protection of FDI (but not portfolio investment), making investment protection part of the EU common commercial policy.

An important qualification to the distribution of competence came 2017 with a judgment by the Court of Justice of the European Union (CJEU) regarding an agreement that the EU had negotiated with Singapore. The CJEU stated that while the EU has exclusive competence with regard to FDI, the ISDS mechanism in the Singapore agreement still required ratification also by member states, since it would remove disputes from the jurisdiction of national courts. This determination seems to have led the Commission to form separate investment and trade agreements, although they in practice are parts of the same negotiation package. This prevents the trade parts, for which the EU has exclusive competence, from being upheld in lengthy ratification processes with uncertain outcomes.

A particularly contentious issue has been the BITs between EU member states; there are currently 194 such BITs. The EU Commission has argued for several years that the intra-EU BITs violate EU law by discriminating between investors from different member states, and by not allowing the CJEU to review determinations from ISDS arbitrations under the BITs. Almost all member states have been keen to maintain their agreements, however, Sweden included. But the recent determination by the CJEU in the *Achmea* case, which involved a BIT between the Netherlands and Slovakia, has widely been interpreted to signal the end of the intra-EU BITs.[27] [28] For instance, the Netherlands recently announced that it would terminate all its intra-EU BITs.

The situation is different regarding the EU member states' approximately 1200 extra-EU BITs, however. Regulation no 1219/2012 of the EU Parliament and the Council stipulates that extra-EU BITs that have been notified to the Commission, may be maintained in force, or enter into force, until a BIT between the EU and the same third country enters into force. Since the EU is unlikely to negotiate investment agreements with many of the economically less important partner countries in these BITs, these agreements seem likely to survive for the foreseeable future.

Regulation 1219/2012 also keeps the door open for EU member states to conclude new BITs with third countries, provided some conditions are fulfilled. Before such a negotiation the member state must notify the Commission of its intention to negotiate, and

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[27] In its decision the CJEU holds that it is the supreme instance for EU law. It therefore violates EU law that a BIT arbitration panel can be requested to apply or interpret EU law, while at the same time the BIT does not allow the panel to refer the case to the CJEU for a preliminary determination, and that the parties cannot appeal the decision to the CJEU.

[28] A group of EU member states proposed 2016 in a non-paper the creation of an EU-wide BIT that would replace the existing intra-EU agreements; see https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2016/05/18/non-paper-investeringsbescherming-tussen-eu-lidstaten/intra-eu-investment-treaties-non-paper.pdf.

it must explain the negotiation's objectives and the provisions to be discussed. The Commission can refuse the authorization if:

- the negotiations would conflict with EU law;
- the Commission is in the process of opening negotiations with the country concerned;
- the negotiations would be inconsistent with the European Union's principles and objectives for external action; or
- the negotiations would seriously hinder the EU from negotiating an IIA with the country.

24 out of 28 EU member states have so far used this opportunity to sign a total of 89 new BITs with third countries after the Lisbon Treaty went into force 1 January 2009.[29] The only member states not to have done so are Ireland, Malta, Poland, and Sweden. Many of these new agreements were formed in 2009 and 2010, but some are also recent, such as the BIT between Luxembourg and Iran from 2017.

2.2.2 The new EU agreements

The EU has concluded some 70 investment agreements according to the UNCTAD IIA data set. These agreements take a variety of forms, such as association agreements, cooperation agreements, economic partnership agreements, etc. But most of these agreements lack the stringent form of investment protection that is found in standard BITs that stems from clauses regarding fair and equitable treatment, full safety and security, expropriation, etc. The agreements mostly do not go further than to include general best endeavors-type clauses regarding investment promotion. In what follows we therefore disregard this latter type of agreements.[30]

But there are recently negotiated agreements with more traditional type of investment protection with Canada (CETA), Singapore, and Vietnam, none of which is yet in force. There are also advanced stage negotiations regarding investment protection agreements with Japan and Mexico, and the EU is also negotiating investment rules with China, Egypt, India, Indonesia, Malaysia, Mercosur, and the Philippines, and the US (currently on hold).[31]

A distinguishing feature of the negotiations regarding these investment agreements is that they are coupled with negotiations over trade liberalization undertakings; the negotiations with China have thus far been an exception in this regard. Indeed, until the above-mentioned CJEU determination concerning the EU-Singapore agreement, the Commission's intention was to include investment protection in all new preferential trade. This has also been the approach in negotiations regarding other major trade agreements, such as the Trans-Pacific Partnership (or what became the Comprehensive and Progressive Trans-Pacific Partnership after the withdrawal of the US), and the Regional Comprehensive Economic Partnership. These developments seem to herald a convergence between two hitherto separate international treaty regimes: trade agreements and investment agreements.

The general structure of the recent EU agreements is largely the same as in the traditional type of BIT, as described in Section 2.1. But the new agreements contain important

[29] http://investmentpolicyhub.unctad.org/IIA.
[30] Table A-1 in the Annex lists the agreements thus disregarded.
[31] http://ec.europa.eu/trade/policy/accessing-markets/investment/.

novelties, introduced in response to the criticism of the investment protection during the CETA and TTIP negotiations. We will return to these changes in Section 5.

2.2.3 EU constraints on Sweden's future investment protection regime

The EU investment protection regime is still in its infancy, with the first agreements yet waiting to enter into force. Future agreements will affect the Swedish investment protection regime in at least three ways.

First, to the extent that Sweden does not have BITs with the new EU partner countries, the agreements will add protection to outward investment, and possibly protection commitments for inward FDI. For instance, future partner countries, like Canada and Japan, can clearly be of relevance both as source countries of FDI and as hosts for Swedish outward FDI. The EU is also pursuing negotiations with several countries, and some of these negotiations are at an advanced stage.

Second, Sweden will have to terminate existing BITs with countries that the EU concludes new agreements with. In particular, if the ongoing EU negotiations are successful, Sweden will have to terminate the agreements with China, Egypt, Indonesia, Malaysia, Mexico and Vietnam, all of which with GDP larger than USD 200 billion.

Third, the EU agreements or negotiations concerning agreements, will also affect the possibility for Sweden to form *new* agreements. As discussed in Section 2.3, although the competence regarding investment protection lies with the EU since 2009, it is still possible for EU member states to enter into new BITs under certain conditions. Most EU countries have used this possibility, albeit mostly in a limited way, but not Sweden. But the fact that 60 percent of global GDP is generated in countries with which Sweden does not have BITs might suggest that there is such a scope. A closer look shows that these possibilities are limited, however.

The six largest non-EU economies in terms of GDP with which Sweden does not have any BIT are listed in Table 10.

Table 10 Share of global GDP 2016 for 6 largest non-EU and non-BIT countries

Country	Share in %
United States	25.3
Japan	6.7
India	3.1
Brazil	2.4
Canada	2.1
Australia	1.6
Total	41.3

Source: World Development Indicators (World Bank)

Sweden would most likely not be able to negotiate a BIT with either of these countries: the EU is already in the process of negotiating investment protection with the US for TTIP, although the negotiations are currently on hold; there is already an investment chapter in CETA awaiting ratification; there are advanced ongoing negotiations between the EU and Japan; and India and Brazil have shown little interest to have traditional investment protection agreements. If these countries are excluded, there is little scope for further agreements as measured by GDP, since the countries with which Sweden might possibly negotiate new BITs account for less than 6 percent of global GDP. Hence, the Swedish BIT regime can at a maximum be expanded to cover an additional 6 percent of global GDP.

3 Investment agreements from an economic perspective

The previous Section laid out basic institutional and legal aspects of investment agreements. We will now look at economic aspects of such agreements. Section 3.1 will discuss the complex relationship between FDI and growth; Section 3.2 considers the mechanisms through which investment agreements might promote FDI, and at what costs; Section 3.3 examines the empirical evidence regarding the effects of investment agreements on FDI; and Section 3.4 examines the relationship between FDI and the level of development of a BIT partner country.

3.1 FDI and economic growth

While there is a large literature on the causes and consequences of FDI, and a burgeoning literature exploring country-level growth, the literature on the relationship between FDI and aggregate economic growth is smaller and has reached less consensus.[32]

3.1.1 Why FDI differs from other investments

Formally, FDI occurs when a firm in a *source* country acquires or merges, with an existing local firm in a *host* country, or when the source country firm establishes a new venture in the host country (a green-field entry). In contrast to a portfolio investment, FDI requires that the source country firm acquires sufficient ownership over the foreign subsidiary to be able to partially or completely control the operations.

The theory of FDI/multinational firms goes back to Hymer (1960), who argued that multinational firms must possess firm-specific assets to overcome the additional costs that arise from operating abroad. These assets could be, e.g., propriety technologies, know-how, patents, marketing or managerial skills. The theory suggests that one should expect FDI to not only involve financial transfers, but also transfer of firm-specific assets that are not available, or in short supply, in the host country. But ownership of firm-specific assets does not suffice to explain why a firm invests in a foreign country, since the firm could exploit these assets by exporting to the market, or by licensing local firms to produce. There must thus additionally be some reason why it is profitable to maintain the operations "in-house" and in a foreign location.

There is in theory a distinction between FDI that is primarily motivated by a desire to achieve better access to the local or neighboring markets − referred to as *horizontal* FDI − and FDI that is driven by a desire to get improved access to inputs − *vertical* FDI. Under the latter type, the investor splits the value chain geographically, locating different parts of the production chain in different countries to take advantage of local conditions. In practice however, most FDI have elements of both types of incentives.[33]

The prominent current theoretical approach to understanding the selection of firms that become multinational is the "heterogeneous-firm" approach (see, e.g., the overview in Antras and Yeaple, 2014). In the typical heterogeneous firm model, firms differ in productivity and sort into different firm types according to their ability to take on different fixed costs. Firms in the lower part of the productivity distribution choose to serve the

[32] For instance, a leading textbook on growth such as Acemoglou (2009) contains no index entry on FDI.
[33] Markusen (2004) shows how both types of FDI emerge in general equilibrium in the so-called Knowledge Capital Model.

home market only. Firms in the middle part of the productivity distribution find it profitable to pay the additional fixed costs for exporting. With large sales volumes, firms in the high end of productivity distribution will find it profitable to enter foreign markets despite the associated high entry costs. Thus, only the most productive firms undertake FDI and become multinationals. This theoretical approach has been supported by ample evidence from empirical studies using firm-level data. Many studies show that multinational firms are more productive than other firms, pay higher wages, have larger turnover, and use more skilled labour and conduct more research and development.[34]

Observation 5: *Multinational firms tend to have higher productivity, larger size and pay higher wages, compared to indigenous firms.*

3.1.2 Channels through which FDI can affect growth

We now turn to how FDI can affect the income and growth of a country. In an open economy, growth refers to the yearly rate of change of *Gross National Income* (GNI, previously called Gross National Product). For a closed economy, for which there are no cross-border transactions such as FDI or trade, GNI equals the more well-known *Gross Domestic Product* (GDP), which measures the value of all final goods and services produced in the economy. GDP can increase over time for two broad sets of reasons. First, the productive resources that are used can increase in volume, or in quality; for instance, an increase in the size of the capital stock or a larger labour force would increase GDP. Second, the economy might become better at transforming its resources into outputs by getting access to, e.g., new or improved production methods, or improved management practises. These changes are denoted enhanced *productivity*. Empirically, this is the main source of GDP growth.

In the open economy, the GDP must be adjusted for two factors to obtain the GNI. One is the income that accrues to foreign entities who hold assets in the home economy, which must be subtracted from the GDP. The second factor is the income that domestic investors are receiving abroad, which must then be added to the GDP. The two measures normally do not differ much in practice, however.[35]

3.1.3 Impact of inward FDI on growth

Inward FDI can cause GDP growth in a host country by increasing its capital stock. But since it is often undertaken by firms with access to special technologies and know-how, the inward FDI might also contribute to growth by increasing the overall productivity through various types of spill-overs. For instance, GDP will tend to increase if the inward investment leads to increased employment or to more higher-paid jobs, or if technical and managerial know-how spills over to employees or to local firms. GDP will also tend to increase if local firms can expand their business by serving as subcontractors to the investing foreign firm. But there are also factors mitigating these effects. First, foreign

[34] Using Swedish data, Heyman, Norbäck and Hammarberg (2018) find that that value added per worker is higher in foreign owned firms than in Swedish-owned firms, and that value added per workers increases after an acquisition by a foreign-owned firm. There are in general small differences between Swedish MNEs and foreign MNEs in this regard. Eliasson, Hansson and Lindvert (2017) find that while foreign firms tend to buy high-productive, skill-intense Swedish firms, skill-upgrading occurs post-acquisition in smaller non-MNE firms. Using Swedish linked employer-employee data, Heyman, Sjöholm and Tingvall (2007) find evidence of a foreign wage premium, that is, controlling for worker- and firm characteristics, individuals employed obtain a statistically significant wage premium.

[35] An exception in Europe is Ireland.

firms might force local firms with low productivity to exit as competition intensifies, causing at least short-term unemployment and losses of income.

We are concerned with national income, as noted above, rather than GDP. We therefore must account for the fact that the profits that are generated by the investment will accrue to the foreign investors (unless taxed by the host country). These transfers must be set against the above-mentioned beneficial effects on income and growth, making the net effect on home country income and growth from inward FDI ambiguous, as a matter of theory.

Reviewing the empirical literature, Alfaro (2017) finds no robust positive direct effect of inward FDI on growth. However, FDI is found to raise host country growth if the host country's human capital stock is large, and if its financial markets are developed. More generally, it seems that host countries need to have sufficiently developed institutions to benefit from inward FDI in terms of increased economic growth.

Using Swedish firm-level data, Heyman, Norbäck and Persson (2018) explore the impact of inward FDI on productivity growth. They find that for the period 1996-2013 foreign-owned firms contributed more to productivity growth than did domestic Swedish firms. Both the increase in productivity within firms and the productivity increase from firms entering the market, were almost twice as large for foreign-owned firms compared with Swedish-owned firms.

In a comprehensive study of the impact of inward FDI on the US economy, Moran and Oldenski (2013) find that foreign (as well as US-based) multinational firms have higher value added and export more than other firms in the US economy, and that there are spillovers of technology and management knowledge to local firms.

3.1.4 Impact of outward FDI on growth

Turning to the growth effects of outward FDI, it is useful to distinguish between horizontal and vertical FDI. If horizontal FDI simply replaces production for exports in the home country, the outward FDI will tend to reduce employment and income generated in the home country.[36] But we again must account for the increase in profits from the investment, which in this case will accrue to the source country and tend to increase national income.

It is rare that FDI is purely horizontal, however. For instance, investment in the foreign market might increase the demand for headquarter services or intermediate inputs produced in the source country, which will mitigate the fall in GDP in the home country. We thus conclude, as in the case of inward FDI, that the net effect of outward FDI on the income of the home country is inherently ambiguous, as a matter of theory.

The empirical literature has primarily investigated the link between host country income growth and inward FDI, often with a development perspective and North-South investment flows. Herzer (2010) is one of few studies examining the relationship between outward FDI and economic growth, finding a positive relationship. The literature has mostly focused on the effects of overseas expansion on source country micro-economic variables such as home-country employment-, exports- or R&D, using of firm-data. For instance, Swedenborg (1991) shows that the overseas expansion of Swedish multinational firms appears to have had a positive effect on Swedish exports. Hufbauer et al. (2013) show that

[36] When discussing the effects of outward FDI, we are implicitly presuming that the benchmark situation without FDI is feasible. For instance, if the alternative to shifting production abroad is bankruptcy, it is not meaningful to say that the effect of the outward FDI is to reduce production in the source country, since this production would not materialize in any event.

when US firms expand abroad, they become more productive, create more high-wage jobs and increase their R&D in the US and overseas.

3.1.5 Conclusions regarding FDI and growth

It is difficult to link FDI to national income growth in a precise manner due to the complex ways in which FDI might affect the economy. Research show no direct exogenous effect of FDI on growth. The benefits from inward FDI on growth appear instead to be conditional on complementary conditions such as the quality of local institutions and the level of development of financial markets. This suggests that Sweden should be able to benefit from inward FDI. At present some 700 000 workers in Sweden are employed in foreign-owned firms, about 1 400 000 foreign workers are employed in subsidiaries to Swedish firms around the world, and about 600 000 workers are employed in their parent companies in Sweden.[37] We believe that the extensive inward and outward FDI have contributed significantly to increase Swedish national income.

3.2 How investment agreements might promote FDI

The economic literature on investment agreements is very small, apart from an empirical literature that seeks to estimate the effects of investment agreements on FDI flows, which will be reviewed in Section 3.3. This dearth of economic analysis contrasts sharply with the large literature on the parallel form of international integration schemes − trade agreements. There is an emerging theoretical literature on investment agreements and regulatory expropriations, however.[38]

In what follows we will make some conceptual observations regarding investment agreements when viewed from an economic perspective. The purpose is in particular to identify the mechanisms through which investment agreements can benefit host countries, and the trade-offs that host countries face when entering into such arrangements. We will mainly draw on Horn and Tangerås (2018), who in turn partly build on Aisbett, Karp and McAusland (2010).

Several points should be noted. First, what will follow is a highly simplified description of abstract economic models. Second, as with any economic model, the purpose is to reduce a highly complex reality to something that is simple enough to be possible to grasp. Hence, the purpose of the exercise is to simplify, but of course without losing relevance. Third, the literature on investment agreements is still in its infancy, and there are many aspects of real-world agreements that have not been analysed. Fourth, as in most economic analysis, it is assumed that decision makers, such as governments, behave purposefully to achieve well specified objectives. Fifth, the theory that will be described here does not take a stand on whether the governments' objectives are in some sense "desirable". What is mostly (but not always) assumed however, is that the performance of the agreements, from the point of view of the host countries, can be evaluated using these same objectives.

Finally, key concepts throughout the analysis are "expected profits" and "expected cost". These concepts are used in situations with uncertainty regarding profits and cost, respectively. To illustrate expected profits, suppose that an investor receives the profit 100 with 40 percent probability, and 200 with 60 percent probability. Then the *expected* profit

[37] Tillväxtanalys (2018a,b).

[38] This literature include Aisbett et al. (2010), Horn and Tangerås (2018), Janeba (2016), Kohler and Stähler (2016), Konrad (2016), Schjelderup and Stähler (2016), and Stähler (2016). An early more informal analysis of investment agreements is Markusen (2001).

is 0.4 x 100 + 0.6 x 200 = 160. But the firm never actually makes the profit 160, it either receives 100 or 200. But the value 160 is still relevant for its decisions. Suppose the investor can alternatively invest into a project that gives 120 with full certainty, and that has the same investment cost as the risky project. A rational risk-neutral investor would then invest in the risky project, since 160 is larger than 120. In the same vein, expected costs are costs that can but need not be realised in practice.

3.2.1 The basic mechanism of traditional agreements: to serve as commitments devices

Consider a foreign firm that contemplates whether to make an *irreversible* investment in a host country absent an investment agreement. If undertaken, the investment will give rise to beneficial effects for the host country. The precise nature of these benefits is immaterial for our purposes but could take any of the forms discussed in Section 3.1; they could thus come in the form of, for instance, tax revenues, wage increases, enhanced competition in domestic markets, or spill-overs of technological or managerial knowledge. Absent host country intervention, the investment will also give rise to operating profits that more than cover the firm's investment cost. The investment will thus be in both the firm's and the host country's interest from this perspective.

The complicating factor is however, that once the investment is in place, the host country might decide to expropriate the assets in order to capture the profits that the production yields. When making this decision, the host country *disregards the interests of the investor.* To induce investment, the host country might declare at the outset that it will not regulate. But the investor will realise that once the investment is in place, it will be in the host country's interest to expropriate regardless of this declaration. Realising this danger, the investor refrains from investing. As a result, *both* parties end up in an inferior situation than if there were investment and no expropriation. This is an instance a generic type of problem with irreversible investment denoted the "hold-up problem".

An investment agreement that requests full compensation for foregone operating profits might help the parties out of this problem, provided that the agreement irrevocably *commits* the host country to compensate the investor whenever it expropriates. The firm will now no longer fear expropriation, since it will be fully compensated in case it occurs. If the host country is less apt at managing the production than the firm, it will abstain from expropriating since the required compensation payment will exceed the profits it could obtain from the expropriated assets.

This simple example captures the essence of the traditional view of investment agreements as *means of providing credible commitment possibilities* for potential host countries that lack the ability of making credible unilateral commitments. [39] It seems as a reasonable depiction of a *direct expropriation* rule in traditional a "North-South" BIT between a developed and a developing country, where investment to the developing country is discouraged by the country's history of political instability, corrupt legal institutions, etc., and where the potential investment flow is from the developed to the developing country.

[39]The same basic mechanism, whereby decision makers benefit from committing themselves to avoid or take certain future actions, is pervasive in economic policy; for instance, central bank independence is an application of this notion whereby a government commits to a monetary policy.

3.2.2 How to balance host country and investor interests

The example above illustrates a basic mechanism of investment agreements. If this were the full story regarding investment agreements, they would probably be uncontroversial. It would also be easy to draft an agreement, since it could just request the host country to compensate the investor with an amount that is sufficient to deter expropriation. However, a core problem for actual agreements is the need to *balance the host country's desire to be able to freely choose its policies against protection of investment*. This issue arises as we move from the treatment of direct expropriation to that of *regulatory (or indirect) expropriation* in actual agreements. To capture such aspects, we need to enrich our example.

As before we assume that the firm makes an irreversible investment. But the host country now cannot directly expropriate the assets; for instance, the host country does not know how to operate the production, or cannot market the output, since it is part of the investor's supply chain. Instead, once the investment is in place, the host country might discover that production gives rise to some adverse effects − an environmental problem for the sake of the argument. If such a problem arises, the host country can abstain from intervening and suffer the environmental consequences, but also benefit from the above-mentioned commercial benefits of production. Alternatively, the host country can impose regulation that takes care of the environmental problem, but in the process also wipes out the operating profits for the investor. The host country's choice will depend on the balance between the severity of the environmental problem (i.e. the "shock"), the benefits that accrues from allowing production, and the magnitude of the requested compensation payments. When making this decision, the host country only considers national interests; it thus disregards the implications for the investor's profits.

There can again be a form of hold-up problem present, since the host country will regulate whenever it is in its own interest, regardless of the consequences for the foreign investor. If the host country could commit to regulate less frequently − or commit to compensate the investor in at least certain cases of regulation − the firm would invest more. An investment agreement that forces the host country to compensate the investor in at least certain instances of regulation, could achieve this. Such an agreement could potentially benefit the host country since it would yield more production in situations *absent* environmental problems. But whether an agreement actually benefits the host country will depend on the design of the agreement.

A more elaborate version of this example is studied by Horn and Tangerås (2018). They show how an investment agreement that share certain core features with actual agreements can be designed to benefit both the source and the host country.[40] The typical feature of an (Pareto) efficient agreement is that it requests the host country to fully compensate investors in case it regulates for less severe regulatory problems (environmental problems in the example above), but has a carve-out from the compensation requirement for all shocks that are more severe than a particular benchmark.

The magnitude of the carve-out effectively determines the level of investment protection that the agreement affords. This level is assumed to be negotiated between the source and

[40] The agreement considered in Horn and Tangerås (2018) has the following features: (a) the agreement does not contract directly on investment levels or regulation; (b) compensation is paid only in case of regulation. (c) there are no payments to or from outside parties; (d) compensation is not required for regulation when the severity of the regulatory shock exceeds a negotiated level; and (e) any compensation equals foregone operating profits.

the host country when they form the agreement. The source country naturally prefers the carve-out to be as small as possible, to obtain as much protection as possible for its outward FDI. For the host country matters are more complex. It will prefer some investment protection in order to promote inward investment − otherwise there would not be any scope for an investment agreement. But beyond some level of protection, further increases in the level of protection will reduce host country welfare; an investment agreement might even *reduce* host country welfare by providing too much protection. In such instances, since the host country will have to compensate investors for such a broad range of situations, the induced increase in investment is not worth its cost to the host country.

Our reasoning above has been simplified to avoid introducing technicalities. But Aisbett et al. (2010) and Horn and Tangerås (2018) provide formal economic demonstrations of how agreements with "investment agreement-like" features can benefit both parties to the agreement. These analyses assume that the agreements under study are formed voluntarily by decision makers that rationally maximize some notion of expected national welfare. These are standard assumptions in economics, and in our view provide a natural starting point for an economic analysis. But one should keep in mind their restrictiveness in certain regards.

First, even if an agreement creates a surplus for the parties, the *distribution* of the expected surplus will be central to how much the host country gains, and this will in turn to be determined by the parties' bargaining power. A dominant source country might effectively set the level of investment protection so high that the host country is (almost) indifferent with regard to whether to accept the agreement. And if the source country could pressure the host country to accept even more protection, the host country would lose from the agreement in expected terms.

Second, while the analysis includes certain restrictions on the type of contract that the parties can agree upon, it disregards other important complications for actual agreements. In particular, agreements are highly "contractually incomplete", as we will discuss below.

3.2.3 Another possible role: exchange of investment protection commitments

The essence of the hold-up problem is that the host country is harmed by its inability to constrain its future regulatory decisions. This seems reasonably descriptive of the situation for developing countries, at least in the past. But it seems plausible that developed countries are better able to credibly commit to protection of inward FDI through their domestic constitutions, laws and regulations, if they so wish. It therefore seems more appropriate to view the extent of protection of inward FDI absent an agreement as resulting from a deliberate choice that balances the benefits in terms increased FDI against costs in terms of constraints on various domestic policies. Hence, the hold-up model seems less useful as a description of an agreement such as, e.g., TTIP.

We can still identify a possible role for an investment agreement, as long as there are two-way FDI flows between the countries, although we here do not have any well-developed formal economic theory to lean against.[41] [42] When deciding on their respective degree of

[41] With one-way investment flows, the source country will set the unilaterally optimal level of protection of inward investment. The source country then has nothing to offer the host country for extending its level protection. Two-way flows allow for an exchange of protection commitments.
[42] This draws on informal work by Bown and Horn (2015), and our ongoing work.

investor protection in their constitutions etc., each country is unlikely to (fully) weigh in the benefits that the protection creates for foreign investors − these are hence (non-internalized) positive externalities. Since there are two-way investment flows, both countries could benefit from a common increase in the levels of protection of inward FDI. *An investment agreement can be the device to coordinate such a mutually beneficial reciprocal exchange between countries that can make credible unilateral commitments regarding protection of inward FDI.*

3.2.4 The costs of investment agreements

We have in the above laid out the basic workings of investment agreements, as perceived from the point of view of economic theory. We will now draw on this framework to make some observations that ought to be kept in mind when evaluating the costs and benefits of investment agreements.

3.2.4.1 *Investment agreement impose expected costs on host countries*

The conceptual framework in Section 3.2.2 illustrates a point of fundamental importance to the evaluation of investment agreements: The investor makes long-term investment decisions without knowing the regulatory circumstances that will arise, since it is not known whether the investment will cause no, moderate, or severe regulatory problems. The investor therefore has to form expectations over the likelihood of the different outcomes. For an investment agreement to stimulate investment, it must therefore in an expected sense *increase the investor's profits*. It achieves this by ensuring the investor that it will be compensated in case of regulation, for certain situations where the investor would not be compensated absent the agreement. *The price that a host country pays for obtaining increased inward investment through an investment agreement is hence that it must expect to compensate investors for certain measures, and/or abstain from certain policy measures that it would otherwise take.* If the agreement had no effect − that is, if it neither ensured the investor of compensation payments in certain situations, or a change of policy that increases investor profits − there would be no increase in the expected profits of investors, and there would no economic motive to enter into the agreement.[43]

3.2.4.2 *Investment agreements should be evaluated as risky investments*

As we have noted, for an investment agreement to have any effect on investment it must impose *expected* costs on the host country. But these expected costs need not actually *materialized* during any given period of time. This complicates the evaluation of investment agreements.

To illustrate, return to the example above, where after an investment agreement is formed, an investment is made. Suppose that the production turns out to be environmentally safe, and that there is consequently no need to regulate production. Observing the increase in investment, and the lack of be compensation payments and changes policies, it would be tempting to conclude that the agreement works well for the host country, and that it thus should be retained.

Now assume instead that after the investment is made, it is discovered that production causes a severe environmental problem. The host country decides to regulate, and as a

[43] One possible setting in which an investment agreement could stimulate investment without imposing expected costs is where investors systematically exaggerate the probability for regulation. We do not find such misperceptions as a solid ground on which to explain the role of actual agreements, however.

result is requested by the agreement to compensate the investor. The host country might then find itself in a worse position than if there had been no agreement.[44] Observing such an outcome one might conclude that the very same agreement that in the previous scenario was considered desirable, is harmful, and that the agreement thus should not be retained.

Neither of the two conclusions is warranted since they both fail to view the investment agreement as a *long-term commitment* that will handle indefinite streams of uncertain investments and uncertain regulatory needs − agreements are in this sense akin to *risky investments*. Consequently, observations of compensation payments, or constraints on host country policy actions, need not necessarily be informative of the desirability of the agreement to the host country, nor are the absence of such realisations.

3.2.4.3 *Investment agreements might be costly without generating much FDI*

As pointed out in the Introduction, there is a rather wide-spread fear that investment agreements might generate costs for host countries. At the same time, as will be shown below, the empirical evidence suggests that the effects on FDI for the most part are modest, if measurable at all. How are these two features reconcilable? After all, the costs of investment protection to host countries take the form of compensation payments, and/or changes in policies in investor-friendly directions. It would therefore appear as if one could not simultaneously have sizeable expected costs, and small effects on FDI. We do not believe that these two features are irreconcilable, however.

To see how, consider the extreme case where investments are made from a source country to host country that have an investment agreement, but where all of the investment would have been made even absent the agreement. *This agreement will still apply to all of the investment that is made.* This is the worst of worlds for the host country: the agreement imposes costs but yields no benefits. Put in economic jargon, the host country benefits of the agreement are related to its extra-marginal effects (the additional investment it causes), while the costs are based on the infra-marginal effects (the total FDI the agreement applies to).[45] Consequently, a *BIT can be costly to the host country, but still have little impact on investment.*

3.2.4.4 *The deterring effect of investment agreements on non-protected investment*

The discussion thus far has disregarded implications of investment agreements for investment from countries that are not covered by an agreement. However, the increase in investment that an agreement induces can *crowd out* investment from firms that are not covered by the agreement, such as domestic firms or firms from countries that do not have investment agreements with the host country. Such crowding out will tend to offset the benefits from the increased investment that the agreement generates.

Suppose for instance that firms A and B from two separate potential source countries are engaged in a bidding contest to acquire an asset to enter the host country. Firm A would

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[44] For instance, it would be better with no agreement and therefore no investment, than having to pay compensation to shut down production (and thus forego any benefits of the investment). And to make a bad thing worse, the compensation might become large if the fact that the agreement has stimulated a large investment.

[45] The same type of economic reasoning applied to an employment subsidy: it would be very expensive to pay a subsidy for each employed, if the purpose is to stimulate new hiring.

acquire the asset absent any agreements. But firm B will acquire it if there is a BIT between the host country and the home country of firm B, since the acquisition would then become more profitable for firm B than firm A. Firm A would thus be crowded out. The only effect of the investment agreement would then be to switch the identity of the acquiring firm. If the externalities from the firms were identical, there would be no net benefit for the host country from the effect of the agreement on FDI, but the agreement would cause the above-mentioned expected cost.[46] Even worse, if firm A would have been the acquiring firm absent the agreement since it would have been better able to manage the acquired firm, there is reason to believe that the externalities would have been larger with firm A. In this case the increased investment by the firm from country B would be directly *harmful* to the host country.

Discrimination in favour of foreign inward FDI could still be economically justified as a means of counter-balancing discrimination against inward FDI by domestic governmental authorities and courts; this was essentially the hold-up motive for the traditional North-South investment agreement. Alternatively, it might also be efficiency-enhancing if the inward FDI has significantly stronger positive externalities than domestic investment. But such an argument in favour of investment agreements would require empirical support to be credible.

3.2.5 The contractual incompleteness of investment agreements

To extract the maximum surplus from their collaboration, the parties to an investment agreement should negotiate an agreement that for each sector completely specifies the amount of investment that should be made, the type of policies that the host country should pursue, and when they should be pursued, etc. But this is not practically feasible, of course. For instance, the long-term nature of the agreements implies that an indefinite number of regulatory problems might arise, circumstances will differ sector by sector, etc. Due to these complexities, actual agreements are highly *contractually incomplete*, in economic jargon. This incompleteness takes different forms.

One manifestation of the incompleteness is that that actual agreements leave *discretion* to firms to make unilateral investment decisions, and to host countries to decide unilaterally whether to regulate. This was implicitly assumed in the above example with a potential environmental problem, where the agreement specified the level of protection (that is, the size of the carve-out from the compensation requirement), rather than investment levels and regulatory policies.

Another essential manifestation of the incompleteness of actual investment agreements is that they are *vaguely formulated*, leaving for future dispute settlement to determine their more exact meanings. This is the source of much of the contention with investment agreements, since it leaves significant leeway for arbitrators to interpret agreements in ways that were unintended by the parties. This uncertainty regarding the interpretation of the agreements may have been reduced through arbitration of several hundred disputes.

Contractual vagueness of investment agreements does not challenge the conclusion that investment agreements should be evaluated as risky investments. But it implies that already realised outcomes under an agreement might provide important information

[46] A similar mechanism can arise in case of greenfield investment, for instance, if the investment in a new production facility crowds out investment by non-partner firms, by absorbing scarce resources such a certain types of labour, production sites, etc.

regarding these expected costs and benefits. For instance, the contracting parties might not know how strongly FDI responds to investment protection but might learn about the true sensitivity from actual changes (or lack thereof) in FDI flows. Also, previous arbitrations might be informative of how future arbitrators will interpret the agreement and might suggest a need to reduce the ambiguity of the agreement. The recent trend toward introducing various carve-outs from the substantive obligations for host country policies, to be described below, can be seen as attempts to reduce this form of incompleteness.

3.2.6 A few general remarks on investment agreements from an economic perspective

It is tempting to equate investment agreements with protection-reducing trade agreements. Solid theoretical and empirical evidence show that while protectionism might benefit certain interests, it reduces national income. Consequently, there are few things that economists agree more on than the benefits from an open trade regime. Investment agreements share certain features with trade agreements, in that they can remove policy-induced barriers to capital movements. But they also serve as insurance schemes for foreign investors, thus shifting risk from investors to host countries. There is much less of a presumption that investment agreements strike the right balance with regard to how to distribute risk between foreign investors and host countries, than that the attempt to mitigate protectionism through trade agreements is desirable, at least when done multilaterally. Consequently, to the extent that economists have expressed views on investment agreements at all, they have been much more sceptical regarding their desirability compared to their support for trade agreements, and in particular multilateral, trade liberalization.

There are several ideas concerning the benefits of investment agreements that have not been captured in the formal economic literature, partly due to its meagre size, but partly also since the ideas are hard to reconcile with economic analysis. For instance, it is occasionally held that these agreements help promote "good governance". But it is not clear what is meant by the notion of "good governance" from an economic perspective. Indeed, a central purpose of economic research and analysis is to identify appropriate policies. If any general message comes out of Economics, it is that "it all depends" − there are rarely simple answers to what constitutes good policies.

Another example is the notion that governments should be bound by political promises. But policy making is done under severe uncertainty, just like investment decisions. The appropriate distribution of the risk is a delicate issue, and the answer is likely to partly depend on our political preferences. For instance, suppose a government is hit by a budgetary squeeze that forces the government to reduce spending. Is it desirable that previous promises to investors regarding subsidies are honoured at the expense of reductions in spending on education, health, or national defence?

3.3 The empirical literature on the effects of investment agreements on FDI

Empirical studies on the relationship between BITs and FDI face many challenges. For instance, to isolate the impact of a BIT on FDI, it is necessary to control for other factors that drive FDI in a particular market. For market-seeking horizontal FDI, the size of the host country market is crucial for firms' investment decisions, and for vertical FDI, the cost- and availability of production factors is important. Since investments decisions are in

practice often driven by a combination of vertical- and horizontal motives, it will be important to control for both types of explanations for FDI. Other important drivers for FDI are geographical proximity, and host country economic policies. If not controlling for all these factors and motives, the estimated effect of bilateral BITs on FDI will be biased.[47]

Another common problem when seeking to estimate the effects of a particular policy change is that the change is often part of a larger package of changes.[48] For example, a potential host country might sign an investment agreement after a change of political regime. But the new government might also take measures to reduce corruption, improve the rule of law, etc. To assess the impact of the investment agreement it will be necessary to somehow control for these other policy changes, and this is often difficult.[49]

Most studies use data on FDI flows or FDI stocks aggregated to the country level. For example, for a given year, the data would measure the value or flow of investments made by Swedish firms in Germany, and the value of the investments made by German firms in Sweden − or the sum of both. Some studies also use transaction data or project data such as the number of cross-border mergers and acquisitions, or the number of Greenfield investments. Very few studies use firm-level data which allows for a detailed study along which margins − in terms of the decision to establish an affiliate, or how the affiliate is to be operated in terms number of employees, or the direction of sales flows, R&D operations and so on − an investment agreement will affect FDI. Considering these (and other) methodological difficulties it is not surprising that the findings in the literature regarding the effects of investment agreements are mixed.

Hallward-Driermeier (2003) examines aggregated FDI flows from 20 OECD countries into 31 developing countries. While she finds no general effect of BITs on inward FDI in developing countries, she finds some evidence that BITs can increase FDI in developing countries with better domestic institutions. Similar mixed results are found by Rose-Ackerman and Tobin (2011). In contrast, Neymayer and Spess (2005) establish that the number of BITs that a host country has is positively associated with FDI inflows.

Later work has tried to improve on previous studies in several ways. To better control for confounding factors, Aisbett (2009) compares FDI-flows before and after a bilateral investment agreement has been ratified (using a regression model with country-pair fixed effects). Using an empirical specification based a general equilibrium model encompassing both horizontal and vertical FDI (see Section 3.1), Aisbett (2009) finds a strong correlation between BITs and investment flows, confirming the earlier result in Neymayer and Spess (2005). However, adding more careful analysis (so-called country specific trends), she concludes that the initial positive correlation between the BITS and FDI is not robust. The positive relationship between BITs and FDI appears to arise from BITs being signed during periods when FDI is rising − so the BITs in themselves have no causal impact on FDI flows.

[47] Blonigen and Piger (2014) analyse an extensive list of drivers of FDI, which could be used as control variables when examining the effects of investment agreements. The particular variables to include will depend on the specific theory or the type of data that are at hand.
[48] Building on the theory in Bergstrand and Egger (2007), Bergstrand and Egger (2013) develop an econometric specification that is used to explore the economic determinants of the formation of BITs and preferential trade agreements.
[49] Another potential problem is reverse causality − that FDI causes the formation of the BITs rather than the other way around.

Busse, Königer and Nunnenkamp (2010) extend the sample of countries. They also use what is called an econometric instrumental variable approach to identify a causal effect of BITs. They find a positive effect of BITs on FDI flows, but this effect seems to be driven by the agreements of transitional countries in Eastern Europe.[50] Falvey and Foster-McGregor (2017) base their empirical analysis on a similar general equilibrium model as used by Busse, Königer and Nunnenkamp (2010), but use an alternative econometric method, a difference-in-difference estimation, to identify the causal effect of BITs on FDI flows. This method involves comparing a set of countries that sign BITs with a control group of countries that do not sign BITs, where the "non-treated" control group is constructed to be as similar as possible with the "treated" group of countries that sign BITs. The authors then compare the change in FDI flows after a BIT is signed in the treated group with the change in the control group (averaging FDI flows using a five-year window).

Falvey and Foster-McGregor (2017) find that signing a BIT does not increase FDI flows to a host country if the source and the host country already have an existing FDI relationship. However, if a host country signs a BIT with a source country without previous investment flows to the host country, the BIT will induce an inflow of FDI from the source country.[51] Falvey and Foster-McGregor (2017) suggest that their results are in line with the view that if host country institutions and economic conditions are already sufficiently strong to attract foreign investments, this will render BITs superfluous.

Most of the literature focus on the effects of BITs on the direct investments where the investing country is a developed country and the host country is a developing country. Only a few papers examine the effect of BITs on FDI flows between developed countries. Salacuse and Sullivan (2005) find that signing a BIT between two OECD countries has no impact on FDI inflows.

Using data on cross-border acquisitions, Bhagwat, Brogaard and Julio (2017) distinguish between "North-South" transactions, "North-North" transactions, "South-South" transactions and "South-North" transactions, where North-South involves acquisitions made by firms in developed countries with targets located developing counties, etc. The authors find that most cross-border acquisitions take place between developed countries − which is not surprising given the well-known stylized fact that FDIs predominantly flow between developed countries. They find that almost all the increase in merger activity is concentrated in the North-South direction: the probability of observing an acquisition after a BIT is signed is 1.8 percent when the direction of the transactions is North-North, South-North or South-South, while the probability of observing a North-South-transaction after signing a BIT is 5.2 percent that is, almost three times higher. This asymmetry remains when using other measures of cross-border activity such as the number of cross-border deals or the aggregate deal value. We note that the finding that BITs predominantly promote cross-border transactions in North-South settings, suggests that the investment agreements can substitute for weak institutions in the host country, along the lines discussed in Section 3.2.1.

Bhagwat et al. (2017) also examine how the quality of political institutions affects the impact of signing a BIT on cross border deals. Their estimates suggest that countries with a

[50] Kerner (2009) also uses an instrumental variable approach finding a positive relationship between BITs and FDI flows. Egger and Pfaffermayr (2004) find a positive effect of BITs when excluding transitional countries.
[51] Falvey and Foster-McGregor (2017) also find a positive effect on countries for which FDI flows were decreasing before they signed BITs.

higher policy risk are less likely to receive foreign investments. They also find that signing a BIT has a stronger positive effect on the probability of a foreign acquisition when the policy risk is higher. However, it is in host countries with "medium" policy risk, but not in the countries with highest policy risk, that this effect is most pronounced. This suggests that signing a BIT can mitigate the negative impact of weak institutions on foreign investments, but only if host country institutions are not too weak.[52]

Another line of exploration is to examine how the *design* of investment agreements affect their impact on FDI. Berger, Busse, Nunnenkamp and Roy (2011) explore the impact of provisions, showing that only BITs with ISDS that affect FDI flows positively. But again, when excluding transitional countries in Eastern Europe BITs, the BITs have no effect on FDI − regardless of whether ISDS is included − echoing the result in Busse et al. (2010).[53] Aisbett, Busse and Nunnekamp (2016) allows for differential impacts of compensation claims, showing that BIT's stimulate bilateral FDI flows, but only as long the host country has not brought claims to arbitration. Myburgh and Paniagua (2016) explore theoretically and empirically how commercial arbitration affects FDI. They find that when both countries in a bilateral relation ratify the so-called New York convention there is an increase in bilateral FDI flows. In contrast, BITs appear to have no effect − or even a negative effect − on FDI flows.

Yet another approach is taken by Egger and Merlo (2012) who use micro data on multinational activities rather than aggregate FDI data, which is used in virtually all other papers. The data is obtained from the Micro-database Direct Investment provided by the Deutsche Bundesbank, which contains foreign investments by German individuals and firms, including information on the identity of German firms' investments abroad; how many affiliates each firm has in each host country; the number of employees, the value of assets and the turnover by firm and country. The data cover the period 1996-2005.

Egger and Merlo (2012) show that in host countries with BITs with Germany, there are more German firms present and the investing firms have more affiliates, more assets and are active in more sectors. But the BITs do not seem to affect affiliate turnover, suggesting that the BITs affect investment decisions, but not the operations of affiliates.[54]

While Egger and Merlo (2012) have a rich data set in certain regards, a drawback is that many German agreements were signed and ratified *before* the time-period for which Egger and Merlo have FDI data. It is well-known that German firms invested actively in Eastern Europe after the fall of the Iron Curtain in 1989. If the German BITs were a small part of − or simply coincided with − a general process of liberalization and deregulation in Eastern Europe which aimed at fulfilling the requirements for entry into the European Union, we cannot tell if was the BITs that induced German firms to increase their investments, or if the BITs just happened to be signed during a period in which the Eastern European countries for other reasons became more attractive investment locations.[55] Indeed,

[52] Researchers have also used aggregate FDI flows to explore how political institutions influence the capacity of BITs to FDI promote, but with mixed results. For an overview, see Sachs and Sauvant (2009).
[53] Frenkel and Walter (2017) construct an index that attempts to capture the strength and coverage of dispute settlement provisions, finding that their index is positively correlated with FDI activity.
[54] Using a partial equilibrium model of horizontal FDI with heterogeneous firms, they show how these results can be reconciled with BITs reducing German firms' fixed costs of entry while having no effect on marginal costs.

discussing this identification problem, Aisbett (2009) concludes that the latter explanation seems more plausible.

To conclude: *The empirical evidence on the effects of investment agreements on FDI is mixed. The positive impact of BITs on inward FDI comes primarily from investment flows from richer developed countries to poorer developing countries. Also, a few studies suggest that BITs can substitute for weak host country institutions.*

4 The critique against investment agreements

Section 3 showed how investment agreements might benefit both host and source countries, correctly designed. But the traditional IIA regime has been severely criticized. In Section 4.1 we will broadly describe some of the frequent critical claims against investment agreements that are of more political or legal nature. Section 4.2 lays out arguments of more direct economic relevance, focusing in particular on two main sources of contention − "regulatory chill" and ISDS − drawing on the analytical economic frameworks laid out in Section 3.2.

4.1 "Non-economic" arguments

Evaluating the lessons learned from 60 years of investment agreement rule making, UNCTAD's (2015, 125) first observation is:

> IIAs bite and may have unforeseen risks − take safeguards…. Broad and vague formulation of IIA provisions has allowed investors to challenge core domestic policy decisions, for instance in the area of environmental, energy and health policies. Whereas in the past, it was mostly developing countries that were exposed to investor claims, there are nowadays also more and more developed countries as defendants (chapter III). The language used in IIAs has generated unanticipated (and at times inconsistent) interpretations by arbitral tribunals, and has resulted in a lack of predictability as to what IIAs actually require from States. As a result, there is today a broadly shared view that treaty provisions need to be clear and detailed, and drafted on the basis of a thorough legal analysis of their actual and potential implications.

These problems are sufficiently severe according to UNCTAD (2017) to mandate revisions of traditional treaties:

> The wording of specific treaty provisions is a key factor in case outcomes, underlining the importance of balanced and careful treaty drafting. This not only applies to future treaties, but also calls for modernizing the existing stock of old-generation treaties.

The critique against investment agreements has come from a wide range of sources and has been expressed with varying degrees of precision and foundation in facts. Below we will discuss in more detail the claims regarding regulatory chill, and ISDS mechanisms. But we start by briefly pointing to other common forms of critique.

One contentious feature of investment agreements is that they allow for arbitration *outside domestic legal systems*. For instance, in a letter to President Trump, more than 220 US-based Law and Economics Professors (including faculty at major US law schools) on this ground urge the US Congress to reject the Trans-Pacific Partnership (TPP) and other agreements that include ISDS: [56]

> Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state or federal domestic administrative bodies and courts. Freed from fundamental rules of domestic procedural and substantive law that would have otherwise governed their lawsuits

[56] http://ccsi.columbia.edu/files/2016/10/isds-law-economics-professors-letter-Sept-2016.pdf.

> against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies' claims. …This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law.

The same critique has been directed from both sides of the US political spectrum. In the words of the Trade Representative of the US government, Robert Lighthizer:

> Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze. So a US person goes into a court system, goes through the system and they're stuck with what they get. A foreign national can do that and then at the end of the day say 'I want three guys in London to say we're going to overrule the entire US system.

Or, as expressed the Democrat Senator Elisabeth Warren:[57] [58]

> Imagine that the United States bans a toxic chemical that is often added to gasoline because of its health and environmental consequences. If a foreign company that makes the toxic chemical opposes the law, it would normally have to challenge it in a U.S. court. But with ISDS, the company could skip the U.S. courts and go before an international panel of arbitrators. If the company won, the ruling couldn't be challenged in U.S. courts, and the arbitration panel could require American taxpayers to cough up millions − and even billions − of dollars in damages.

Much critique has also been directed at the dispute settlement systems. A main target in this regard has been the possibility for private parties to bring states to arbitration − the ISDS mechanisms. We will look closer at this in a moment. But many other aspects of the dispute settlement mechanisms have also been criticised. To give just a few examples of the claims made in the debate, as well as the academic literature:

- The *impartiality of panels is compromised* by the fact that of the normally three persons on a panel, two often effectively represent the parties to the dispute; these panellists often have long-run commercial relationships with law firms representing clients and may thus have personal interests in the outcome of the disputes.
- There are *very limited possibilities to set aside* determinations by panels, which increases the probability of erroneous determinations.
- The rules concerning *confidentiality* imply that governments might be involved in legal processes, and might be obliged to make large compensation payments, without the knowledge of the general public.
- The *lack of consistency in case law* creates uncertainty as to what the obligations agreements actually impose.
- Investors can establish shell companies in countries with investor-friendly IIAs solely in order to use these agreements against third countries − so called "*forum shopping*".

[57] http://www.aflcio.org/Blog/Political-Action-Legislation/What-s-ISDS-in-the-TPP-Very-Scary.
[58] The statement is probably inspired by the well-known NAFTA dispute between the Canadian firm Methanex Corporation and the US, concerning a Californian ban on certain additives to gasoline. For a case summary, see https://legislature.vermont.gov/assets/Documents/2014/WorkGroups/International%20Trade/Methanex%20Case/W~David%20Hall~Methanex%20v.%20United%20States~6-4-2013.pdf.

- Investors can use MFN provisions to claim rights that host countries have committed to in separate agreements with third countries − so called *"cherry picking"*.
- *Third party funding*, whereby outside parties take over the process costs for private investors against receiving a share of any resulting compensation payments, cause an excessive number of complaints.

4.2 Economic arguments

Several of the claims in the debate are of a direct economic nature. A common argument holds that investment agreements in practice *do not stimulate investment*; as we saw in Section 3.3, the empirical literature gives some support to this claim. A relatedly argument is that the investment regime is the outcome of a *race-to-the-bottom* in which host countries, in particular developing countries, in their competition to attract FDI, have given away most or all of the surplus that the agreements generate.

Another criticism of direct economic nature is the assertion that investment agreements are financially burdensome, in particular for developing countries, due to *high compensation payments and arbitration costs*. There are no doubt examples of this. For instance, Ecuador has been requested by arbitration panels to pay a total of USD 21.2 billion.[59] Out of this, Ecuador has thus far paid investors USD 1.5 billion, which represents 31 percent the government education budget, or 62 percent of the health budget. But another USD 1.3 billion has already been awarded to investors, and USD 13.4 billion represent still pending claims. Ecuador has also spent USD 156 million on international law firms. As a result, Ecuador declared its intention to terminate all existing treaties, and it has recently presented a new model BIT with significant carve-outs for host country policies, and with major changes to the dispute settlement mechanism.[60]

The agreements can also be costly for developed countries. As mentioned above, there have been over 40 disputes against Spain under the ECT regarding withdrawal of support schemes in the renewable energy sector. In the few disputes that have so far been adjudicated, Spain has been requested to compensate investors with more than EUR 245 million.

Yet another well-known dispute is the complaint by Phillip Morris against Australia concerning plain packaging legislation for tobacco products, a dispute that Australia won. Australia claimed around ASD 23 million in compensation for legal costs, but was only awarded around ASD 11.5 million.[61] The net cost to Australian tax payers was thus around SEK 76 million, despite winning the case. Philip Morris was not requested to pay the full amount of Australia's costs since Australia raised an admission objection that the arbitrators did not accept. According to the award, this objection took up a "substantial proportion" of the time spent at the hearing on jurisdiction and admissibility, and it required the tribunal to expend "considerable effort" in analysing the claim.

As was discussed in Section 3.2.4.4, yet another argument is that investment agreements, due to their discriminatory feature, might *distort investment patterns*, both geographically, and by causing excessive investment more generally. This argument rests on a solid

[59] CAITISA Boletinos, 8 May 2017 (http://www.caitisa.org/index.php/noticias/boletines/informeejecutivo) and Transnational Institute (2017).
[60] Jaramillo (2018).
[61] The arbitration report can be found at http://pcacases.com/web/sendAttach/2190 and the cost specification at http://aftinet.org.au/cms/sites/default/files/190322%20Unredacted%2BExcerpt%2Bof%2BCosts%2BAward.pdf#overlay-context=users/editor.

economic basis in that discrimination is typically economically inefficient. But discrimination in favour of foreign inward FDI could still be economically justified for several reasons. The conceptual frameworks we examined in Section 3.2 did not include any investment by host country firms in the domestic market, so we could not directly discuss discrimination in favour of local firms. But the models could easily be extended in this direction. We would then see that as the domestic regulatory decisions put more weight on the interests of domestic firms than on those of foreign investors, there might be reason to counteract this discrimination. One possibility, but not necessarily the best one, could be to give foreign firms exclusive protection through an investment agreement.

There might also be other reasons why a country might want to stimulate inward FDI specifically even absent discrimination. For instance, there might be underinvestment by foreign firms due to a lack of information regarding profit opportunities in the host country. It is also possible that inward foreign investment is undersupplied relative to domestic investment, since the positive externalities of foreign investment are stronger. As discussed in Section 3.1, it is well documented that multinational firms pay higher wages, are more productive, more technology intensive, etc. If either or both of these circumstances are at hand, it would in principle be desirable to discriminate in favour of inward FDI. Whether these effects are significant enough in practice to provide a solid base for such discrimination is another matter, however.

The two main economic claims in the debate is investment agreements cause “regulatory chill”, and that the ISDS mechanisms harm host countries by causing excessive arbitrations. In what follows, we will draw on the economic framework laid out in Section 3 to illuminate these arguments.

4.2.1 Regulatory chill

One of the most pervasive claims in the debate is that IIAs cause *regulatory chill* − that is, they induce host countries to refrain from taking regulatory actions that somehow are desirable. The regulatory chill claim has most commonly been made with regards to developing countries. But it also figured prominently in the policy debate during the TTIP and CETA negotiations. The argument has even been put forth by the US government, by Trade Representative Robert Lighthizer:

> ...More importantly, we had situations where real regulation which should be in place, which is bipartisan and in everybody's interest, has not been put in place for fears of ISDS....[62]

While the exact mechanisms for this “regulatory chill” are often not clearly spelled out, several core features of traditional IIAs might jointly work to constrain host country policy space. The first is the ambiguity of the drafting of some of the core substantive undertakings, such as the fair and equitable treatment standard, and the notion of indirect expropriation, can allow arbitration panels to interpret the agreements to impose highly stringent restrictions on host countries. For instance, in the infamous dispute *Tecmed vs. US*, the panel interpreted the fair and equitable treatment standard as follows:

> …The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, *so that it may know beforehand any and all rules and regulations that will govern*

[62] Statement made regarding the renegotiation of NAFTA before the House Ways and Means Committee on March 21, 2018. https://www.c-span.org/video/?c4719932/brady-lighthizer-isds-discussion.

> *its investments, as well as the goals of the relevant policies and administrative practices or directives…* Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[63] [emphasis added]

Several later panels adopted this reasoning, but panels have more lately often distanced themselves from this interpretation. The case illustrates however, that the texts of the traditional IIAs have allowed for very different interpretations.

The fear that arbitration panels will make far-reaching interpretations of ambiguously worded investment agreements might at least in theory induce host countries to abstain from taking measures that are somehow desirable, when combined with two other central features of the agreements: the magnitude of the arbitration and compensation costs that host countries might have to carry if losing disputes, and the strong enforcement mechanisms supporting these agreements.

The exact meaning of "regulatory chill", and the exact mechanisms that would bring it about, are rarely made precise. The concept seems broadly speaking to refer to instances where investment agreements dissuade host countries from taking regulatory measures that would somehow be desirable. It can be noted that there is little empirical evidence to support the critique, which of course does not mean that it is incorrect, in particular not when considering the difficulties involved in gathering systematic evidence on such effects.

One possibility would be to define "regulatory chill" as arising when an agreement induces the host country to abstain from some decision that it would have taken absent the agreement; this seems to be how the concept is used in much of the policy debate. It follows immediately from the economic framework that we presented in Section 3.2.2 that *such regulatory chill should be expected to occur from time to time*. Like with any contract (except pure risk-sharing contracts), the purpose of an investment agreement is to constrain the behaviour of one or several of the parties. For an investment agreement to have any effect, the host country must accept that it will occasionally have to refrain from policy actions that reduce investor profits (or compensate). This notion of regulatory chill hence disregards the benefits that the host country might have from the increase in investment that the agreement trigger, in situations where there are no or only modest regulatory problems, and it is therefore not a useful indicator for the desirability of an agreement from the host country's perspective.

Another deficiency is that this definition takes no account of the cost to the investor of the measure that the host country abstains from taking. Such chill can hence arise in a situation where the host country's regulation causes a large loss to the investor but only a small gain to the host country.[64] As long as there is some way of transferring surplus between the

[63] *Tecnicas Medioambientales TECMED S.A. vs. The United States,* Case N. ARB (AF)/002, International Centre for Settlement of Investment Disputes, May 29, 2003.

[64] An alternative would be to consider the aggregate welfare of the parties, and define regulatory chill as a situation where an agreement induces the host country to abstain from regulating, despite the fact the benefit thereof to the host country exceeds the costs to investors. Such "joint regulatory chill" would indicate a more severe problem, since the agreement would then induce the host country to abstain from measures for which it would be willing to fully compensate investors. Horn and Tangerås (2018) note that this could arise if a host country government accepts more investment protection than what is in the public interest, perhaps due to corruption, or if a host country enters into an agreement without understanding the nature of the commitments it takes on, or without correctly foreseeing how agreement will be interpreted by future arbitration panels. In

source and the host country, they should have a joint interest in preventing host country policy measures that in the aggregate reduce welfare.

4.2.2 Economic implications of the ISDS mechanisms

Investment agreements are unusual in that international agreements normally do not allow private parties to bring cases against states − the *ISDS mechanisms*.[65] A common argument in favour of ISDS is that state-to-state arbitration on behalf of investors can cause political and/or diplomatic costs that do not arise when cases are brought by private parties on purely commercial grounds.[66] The virtue of ISDS is hence that it de-politicizes disputes by bringing them from the realm of politics and diplomacy, into law.

But ISDS has also been severely criticised. The arguments often concern the democratic legitimacy of allowing foreign investors to bring disputes against governments. But the economically most relevant assertion is that ISDS leads to *excessive arbitration* relative to some benchmark. Excessive arbitration can be costly in several other ways: it might cause unwarranted direct arbitration costs, it might cause or add to regulatory chill, and it might induce countries to abstain from participating in agreements that if designed or implemented differently would bring benefits.

The notion that ISDS causes more arbitration than SSDS has intuitive appeal. For instance, it seems implausible that the Canadian government would have pursued the Keystone XL pipe line arbitration; that the US would have brought a case on behalf of Phillip Morris regarding tobacco plain packaging legislation; and that EU countries would have complained against Spain for changes in its renewable energy support schemes. But while there would probably have been less arbitration with SSDS in these cases, this does not necessarily mean that the current ISDS arbitrations are "excessive".

Another example is the Vattenfall case against Germany for the more rapid decommission of German nuclear power. Sweden did compensate the German energy firm E.On when Sweden in 1997 closed the Barsebäck nuclear reactor, and it might appear justifiable for Sweden to expect the same treatment now when the roles are reversed. It still seems implausible to us that the owner of Vattenfall − the Swedish government − would have brought a case against Germany if the ECT would have only allowed for SSDS, since the political costs would then have been too large.

In order to shed a little light on the economic issues involved, we will here draw on Horn (2018), which is the only economic analysis of the difference between investor-state and state-state dispute settlement (SSDS) that we are aware of. To this end, consider again the basic model of investment agreements that we introduced in Section 3.2.2. This model implicitly assumed that requested compensation payments were executed without arbitration. To highlight the most commonly suggested rationale for ISDS − political and/or diplomatic costs from state-state arbitration − we now assume that payments require arbitration, and that this arbitration is costlier with SSDS than ISDS.

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the example above, joint regulatory chill would arise if the agreement requests the host country to compensate the investor with more than the foregone operating profits. Conversely, joint chill will not arise if the required compensation equals (or is less than) the foregone operating profits of the investor. Full compensation for foregone operating profits might thus reflect basic economic as well as legal principles.

[65] In the policy debate as well as in some of the legal literature, the notion ISDS is used as synonymous to "investment treaty". We use it in the more restrictive sense of allowing foreign private investors to bring cases against host countries.

[66] See, e.g., Vandewelde (2005).

Due to the arbitration costs with SSDS, the source country will only bring a case when enough is at stake politically to justify these costs. Smaller investors in particular might not have enough political clout to induce their governments to complain on their behalf, partly since the compensation that they might claim will normally be smaller. SSDS might also hurt investors in general since the source and the host country governments might negotiate other forms of compensation than financial payments, and even if there is a financial settlement, there is no guarantee that the compensation will end up with investors. Furthermore, it would not be possible to have the same strong enforcement mechanism with SSDS as currently with ISDS − in practice, this will require that a losing responding country voluntarily implements the arbitral rewards in the SSDS-system.[67]

The direct impact of SSDS will hence be to reduce the frequency of arbitration, as the popular argument suggests. This will clearly benefit the host country, all else given. But all else will not be given. The more limited enforcement of the agreement reduces the incentives for foreign firms to invest, and this will harm the host country. It is also conceivable that the negotiated level of investment protection will be different with SSDS. As shown by Horn (2018), it cannot be ruled out that both the source and the host country prefer ISDS to SSDS. Indeed, why would the parties to an agreement benefit from weaker enforcement mechanisms? After all, a completely non-enforceable is completely meaningless.

Lacking any economic analysis to suggest the opposite, we thus cannot see any compelling economic reason why SSDS should be preferred to ISDS for either the host or the source country. It does seem plausible however, that ISDS might worsen problems *emanating from the design of substantive undertakings*. But in this case the economically most appealing solution would be remedy these substantive undertakings.

[67] The tendency toward less arbitration with SSDS can be seen in the trade law area where firms have to lobby their governments to purse disputes on their behalf. Governments will typically only pursue a subset of the disputes that could have been successfully arbitrated, partly since governments have to take account of the costs of pursuing disputes in terms of diplomatic or political conflicts with the trading partner, and partly due to the risk of facing tit-for-tat arbitration by the trading partner.

5 The newer EU agreements vs. the Swedish BITs

The last decade or so has seen an increasing tendency to revise existing agreements, and to draft new agreements differently compared to the traditional agreements. As noted in the Introduction, a number of countries have renegotiated, or terminated, their BITs. The EU has also emerged as a driving force in this regard, after changing its position during the CETA negotiations.[68]

5.1 New features in the EU agreements

The changes that have been made concern both substantive undertakings and dispute settlement procedures. With regard to the *substantive undertakings,* there has been an increasing concern during the last decade that core substantive undertakings in traditional agreements are too vaguely drafted. This has allowed arbitration panels to make widely different interpretations of the same type of obligations, causing uncertainty regarding the obligations the agreements impose. Of particular concern has been the possibility for panels to interpret agreements to impose more severe restrictions on host countries than the partner countries desire, at least as host countries. Newer agreements, as well as revised agreement, therefore, typically include a large number of specifications to the substantive obligations that are not found in traditional agreements. This is done, e.g., by introducing *definitions* of terms in the agreement. These definitions reduce the *risk* that the agreements are interpreted in undesirable ways. Another trend is to introduce *carve-outs* in preambles, in main texts, and in annexes regarding for instance host country rights to pursue non-discriminatory policies in order to protect human, animal and plant life and health, to promote sustainable developments, and uphold internationally recognised labour standards, etc.[69] These carve-outs reduce the *level* of protection that the agreements provide. For instance, Annex 8-A CETA restricts the reach of the indirect expropriation provision as follows:

> For greater certainty, *except in the rare circumstance* when the impact of a measure or series of measures is so severe in light of its purpose that it appears *manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations. [emphasis added]

The other area for reform is the *dispute settlement* mechanisms, where in particular the EU has taken the lead. The EU has developed a new mechanism for arbitration, denoted the Investment Court System (ICS), which is hoped to eventually develop into a multilateral investment court that would resolve investment disputes under investment agreements more generally. The ICS has been introduced into CETA, and in more recently negotiated agreements, and the EU seems determined to use it in all subsequent agreements (provided that the CJEU finds it compatible with EU law).

[68] The EU position changed significantly during the CETA and TTIP negotiations. An indication of the importance of the shift in the position of the EU is the study by Alschner and Skougarevskiy (2016), which compared the draft text for the CETA investment chapter that was released at the end of 2014, and the version that came out in February 2016. Using textual analysis tools, they find that very significant changes were made, and that the absolute majority of these consisted of material alterations of the treaty text, rather than formalistic "legal scrubbing".

[69] There are also newer IIAs that restrict host countries' ability to reduce these standards in order to attract investment. Furthermore, some agreements take steps toward imposing restrictions on investors by requesting that investors should respect norms regarding corporate social responsibility.

The ICS differs in fundamental ways from the standard arbitration mechanisms in IIAs. For instance, like the dispute settlement mechanism in the WTO Agreement, it comprises a two-tier adjudication system, which allows for appeals in a broader set of circumstances, compared to in standard investment agreements; the ICS consists of a permanent pool of judges, the judges are not to be selected by the parties to disputes, but by random draw; judges will not be allowed to work as investment lawyers, to avoid conflicts of interest; the proceedings are to be significantly more transparent, for instance by making all documents available online, and by web-streaming hearings; etc.. The hope is that the ICS will address much of the critique directed at traditional arbitration mechanism.

Another reflection of this process of revising dispute settlement procedures is the ongoing work at ICSID to revise its rules (but not the Convention).[70]

5.2 A comparison between CETA and the Swedish BIT with Korea

To illustrate the emphasis in the newer agreements on host country policy space, and the lack thereof in the Swedish BITs, we will compare the carve-outs in CETA with those in the Swedish BITs, using in particular the example of the Korea-Sweden agreement from 1995. This agreement − which is reproduced in its entirety in Annex 3 − is broadly the same as the other Swedish BITs.[71] It is also of interest in light of the fact that Korea is an economically important partner country. A comparison with the most recent BIT, the one with Georgia that was signed in 2008, gives essentially the same outcome (see remark below), as does a comparison with the Swedish Model BIT of May 2002.[72] [73]

The difference between the two types of agreements is apparent already in the preambles. The preamble to CETA (to the whole agreement, not just to the Investment Chapter) recognises that its provisions preserve the Parties' right to regulate and

> ...the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity…

There are carve-outs for host country regulatory policies also in some of the preambles of Swedish BITs, but they are quite rare. The Korea agreement is more typical in this regard, with its complete lack of mentioning of any host country interests.

With regard to the standards of treatment, CETA have exclusions regarding taxation, as do the Swedish BITs. Indeed, the *only* carve-out in the Korea BIT is for taxation, but then only with regard to the National Treatment, and Most-Favoured Nation provisions. But CETA also have exclusions for subsidisation, and government procurement. As we saw

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[70] See, e.g., the overview by Kinnear (2018).

[71] This version is downloaded from the UNCTAD website, since it is unavailable − or at least we have not been able to find it or any other agreements − on Swedish governmental websites (see remarks on this in Section 8).

[72] The Model BIT is downloaded from the UNCTAD Investment Hub. We are uncertain as to whether this is the most recent Swedish Model BIT − as discussed further in Section 7, the Swedish government website provides no information on this score.

[73] The preamble to the BIT with Georgia does include vague references to internationally recognised labour rights, and (in our translation − we have only access to the Swedish version) "generally implemented measures regarding health, safety and the environment". The text in Swedish is the following:

> Konungariket Sveriges regering och Georgiens regering, …som erkänner att utvecklingen av ekonomiska förbindelser och affärsförbindelser kan främja respekten för internationellt erkända rättigheter för arbetstagare, som är överens om att dessa mål kan uppnås utan att man ger avkall på allmänt tillämpade åtgärder i fråga om hälsa, säkerhet och miljö.

above, Annex 8-A CETA restricts the ambit of the indirect expropriation clause. CETA also contains qualifications to the contentious fair and equitable treatment provision. Such qualifications are only found in some of the Swedish BITs, in which there are references to International Law or Customary International Law. Art. 8.10(2) CETA even provides a list of measures that would breach the fair and equitable treatment:[74]

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment of investors, such as coercion, duress and harassment;

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

This list restricts the ambit of the fair and equitable treatment provision, which in some earlier cases was very broadly interpreted, as illustrated by the *Tecmed* case mentioned above.[75] Further restrictions on the fair and equitable treatment standard appear in recitals 4-7 of the same Article:

4. When applying the above fair and equitable treatment obligation, a tribunal may take into whether a party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

In contrast to the BITs in general, and also to the Korea agreement, CETA defines indirect expropriation, which is another ambiguously worded provision in the BITs. CETA also has a carve-out from the expropriation clause for general regulatory measures.

There are also a number of other provisions in CETA that contribute to create carve-outs for regulatory policies, and that are rarely if at all found in Swedish BITs according to the

[74] For the sake of completeness: the core of Art. 3, referred to in (f) below, states the "[t]he Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment."

[75] According to the EU Commission, this (closed) list exhausts all possible grounds for a breach of the fair and equitable treatment provision. This would imply that the list very significantly reduces the scope of this provision. But there is some discussion in the literature whether the drafting makes this the only feasible interpretation.

above-mentioned mapping of investment agreements by UNCTAD. For instance, Art. 8.9 includes:

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

It should be emphasised that the existence or non-existence of carve-outs does not tell the whole story with regard to how restrictive the agreements are for host countries, since this will also be determined by the ambit of substantive provisions to which the carve-outs apply. CETA goes in some respects further than the BITs in terms of coverage. For instance, the MFN clause in CETA covers pre- and post-establishment, while the Swedish BITs only cover post-establishment. There is a similar picture with regard to the National Treatment provision, although here some of the Swedish agreements lack specifications. Furthermore, in contrast to the Swedish BITs, the MFN provision in CETA explicitly excludes the possibility of using substantive obligations in other investment and trade agreements as norms for what constitutes MFN treatment under CETA. Hence, CETA tends to constrain the Swedish policy space more in these respects. Also, CETA includes an explicit prohibition against performance requirements, a restriction in host country policies that is only found in one Swedish BIT. To assess the extent to which the Swedish BITs restricts policy space more than CETA, we should ideally evaluate the extent to which the carve-outs apply also to these additional obligations in CETA. We conjecture that we would still find that CETA is less restrictive with regards to Swedish policy than the BITs.

Finally, as indirect evidence of the difference between the carve-outs in CETA and in the Swedish BITs, we can point to the detailed assessments of the implications of CETA for Swedish policy space by Swedish National Board of Trade (2015, 2017). The study finds that CETA will not offer Canadian investors in Sweden much protection beyond what already is provided for through Swedish and EU law, the European Convention of Human Rights, etc..[76] The reasoning in the study rests heavily on a large number of carve-outs in CETA that do not exist in the Swedish BITs.

In sum: *the Swedish BITs lack many of the definitions that are introduced in CETA to reduce the probability that the agreement will be interpreted to impose undesirable constraints on host countries, and the carve-outs that serve to reduce the level of protection the agreement provide.*

[76] The study finds that the fair and equitable treatment and direct expropriation provisions in CETA will not add significantly to the protection third country investors anyway have under current Swedish law. Matters are less clear with regard to regulatory expropriation, where some additional protection might be afforded relative to Swedish law. But Sweden is already constrained here to some extent by the European Convention on Human Rights. On the basis of the limited case law on the matter, Kommerskollegium (2015) concludes that the CETA indirect expropriation clause will probably have only a weak effect on Swedish policy space, pointing to carve-outs in the preamble and elsewhere in the agreement.

5.3 Do the Swedish BITs add protection to what would anyway be available?

A critical issue for the discussion to follow is whether the Swedish BITs add protection to what investors would anyway have access to. We here need to distinguish between the protection that they provide to inward and to outward protection. It seems clear that the BITs do provide added protection to Swedish investors BITs in the BIT partner countries. Most of the these are still developing and have weak legal institutions. Some of these partners are likely to become more developed in the years to come. But we believe that the BITs in their current form will continue to provide additional protection for outward FDI for the foreseeable future, albeit perhaps to a diminishing degree in some countries.

More complex is the question as it concerns Swedish inward FDI. Investors from the partner countries will be protected by Swedish and EU law, and by Sweden's adherence to international conventions, such as Customary International Law. To assess whether the agreements yield protection beyond what investors from the partner countries would otherwise have access to − whether the agreements yield "additional protection" − we should ideally evaluate how likely such interpretations by arbitrators are, investigating conceivable situations under which the different agreements might be used for bringing cases against Sweden. This would be a demanding undertaking however, far beyond the scope of this paper. As noted by UNCTAD (2015, p. 126):

> Anticipating IIAs' effect on regulatory space is not straightforward. Although ISDS cases expose the constraints that IIAs can place on regulatory powers, there is no clear methodology for conducting regulatory impact assessments and for managing attendant risks. The IIA impact will depend on the actual drafting and design of the IIA and the capacity of national and subnational entities to effectively implement the treaty.

The complexity of such a task is also demonstrated by Swedish National Board of Trade's (2016) detailed study of just one of the provisions in the Swedish BITs − the Most-Favoured Nation undertaking.

We will instead proceed by observing that there is a trend to revise existing investment agreements, and to design new agreements, so as to reduce the possibility for arbitration panels to make far-reaching interpretations, to reduce the scope of the substantive obligations, and to institutionalize the arbitration mechanisms. Above we used CETA as to illustrate the type of changes that are being made, but the same type of novelties has been introduced by the EU into its other new agreements, and also by a number of other countries. These changes are introduced despite the evolution of jurisprudence toward more restrictive interpretations of the constraints that the agreements impose on host countries.

The Swedish BITs have not been part of this trend, however. There have been hardly any revisions of the agreements since they were formed. The BITs are therefore still of a traditional type. One simple indication of the difference between the Swedish BITs and these recently revised agreements is the difference in length. For instance, the Dutch 2018 Draft Model BIT contains roughly 8 400 words, and the Norwegian 2015 Draft Model BIT 7 400 words, while the Swedish 2002 Model comprises 2 900 words (all in English).

A further indirect indication of the level of protection that the BITs provide, is the detailed assessment of the implications of CETA for Swedish policy space by Swedish National Board of Trade (2015, 2017). When finding that CETA will not offer Canadian investors

in Sweden much protection beyond what already is provided for through Swedish and EU law, the European Convention of Human Rights, etc., these studies rest heavily on a large number of carve-outs in CETA that do not exist in the Swedish BITs.

To conclude: we believe that it is reasonable to infer from this international trend that a number of developed countries have perceived their traditional agreements to provide protection beyond what investors from their BIT partner countries would have access to absent the agreements, and that significant uncertainty regarding how to understand the obligations that agreements impose still remains. We see no reason to believe that the Swedish BITs are very different in this regard.[77] *It seems reasonable to assume that the Swedish BITs provide more protection in Sweden than is available to foreign investors from non-partner countries.*

[77] For instance, Swedish National Board of Trade (2016) points to one source of uncertainty regarding the obligations that the Swedish BITs impose − the drafting of the Most-Favoured Nation clauses in the Swedish BITs:

> Since arbitrators must make several decisions regarding routes when determining whether [the Most-Favoured Nation clause] allows for importation of articles from other agreements there is room for what can be seen as discretionary determinations. It is therefore unclear what obligations Sweden de facto has made in its investment agreements and the same unclear protection is provided to Swedish investors abroad

6 What to do with the Swedish BITs?

Investment agreements were traditionally formed to encourage mainly FDI flows from developed countries to developing countries (or countries in transition). Most, if not all, Swedish BITs belong to this category. But many developing country partners have grown since the agreements were formed, and in some cases have become developed economies. There has also been an evolution in the views on the appropriate design of investment agreements. This raises the question of whether the Swedish BITs, which for most part remain in their original form, are appropriately designed for a future where Sweden will not only serve as a source country for investment in the partner countries, but also increasingly as a host country for investment from partner countries?

To address this question, we will discuss the role of the BITs for outward FDI and for inward FDI in Sections 6.1 and 6.2, respectively. Section 6.3 then discusses what to do with the agreements. Section 6.4 makes some remarks on the ECT.

6.1 Outward investment

Most Swedish BIT partner countries are less developed. As noted above, it then seems plausible that the BITs currently provide protection for Swedish investment in these countries that goes beyond what Swedish investors would otherwise have access to.

All BITs have been in force at least nine years, and most of them much longer than this (see Table 1), so it seems reasonable to assume that the BITs have had enough time for their effects to show up in the investment stocks. So, what can we say on the impact of the BITs so far? It falls outside the scope of this study to conduct a full-scale econometric analysis of the extent to which the Swedish investment agreements have had a causal impact on FDI.[78] But, as observed in Section 2.1.3, the BITs only covered some nine percent of the stock of outward investment in 2016. Hence, even if the BITs had been decisive for all this investment − which of course is highly unlikely − their impact on outward FDI would still have been modest. This is not to say that the BITs have had no impact − they might have been decisive for some investment to take place − but their aggregate impact does seem to have been limited. It is also possible that Swedish investors have benefitted from more favourable policy treatment due to the BITs, but it is hard to assess the extent to which this has occurred.[79]

Many of the partner economies are likely to grow in aggregate and in per capita terms, and in the process become more developed also in other respects; see the simple attempt to illustrate this in Table 7. These factors are likely to increase Swedish FDI to these countries, since the empirical literature that was reviewed in Section 3.3 indicated that a central determinant of FDI is the level of economic development in host countries. There might also be political changes in partner countries that will make these countries more attractive as host countries, although these are harder to predict. But neither the track record of the Swedish BITs, nor the empirical literature on the effects of investment agreements more generally, give reason to believe that the BITs will have any

[78] Another problem is that identification of causal effects of the Swedish IIAs on in- and outward FDI would be difficult, since many IIAs were formed before the period for which there is available data from Statistics Sweden. Egger and Merlo (2012) face a similar problem in their study of outward FDI and IIAs for Germany, as discussed above.

[79] Swedish investors have been awarded compensation in a few intra-EU disputes, but we as far as we know in no dispute under the extra-EU BITs that we are considering.

quantitatively important effect on outward FDI. The BITs can still give Swedish investors some expected profits however, in the form of compensation payments, and/or affect policies in the partner countries to the advantage of the investors.

6.2 Inward investment

We now turn to the appropriate role of the BITs on the *inward* side. Inward investment can give rise to several forms of benefits to host countries, as explained in Section 3.1. The fact that foreign-owned firms accounted for about 20 percent of Swedish business sector employment in 2016, up from around 10 percent in the early 1990s, speaks its own language regarding the benefits of inward FDI for Sweden.

What economic reasons would there be for Sweden to want to stimulate inward investment from the BIT partner countries through investment agreements? As explained in Section 3.2, the purpose of investment agreements is to promote foreign investment by protecting foreign investors against policy risk. This can be useful for a host country that is unable to implement the level of investment protection that would be in its own long-run interest. We do not find it plausible that such a problem would exist with regard to investment from the BIT partner countries absent these agreements.

First, the level of policy risk that investors face is determined through a large number of domestic laws and regulations, through participation in international agreements, etc. These decisions balance various societal goals, including providing investment incentives. *We find it reasonable to assume, at least for the purpose of this study, that the level of protection that investors from non-BIT countries in practice receive appropriately reflects Swedish policy preferences*.[80] This protection has clearly been significant enough to allow for very large inflows of investment − indeed, almost all inward investment has come from countries with which we do not have BITs (see Table 2).

Second, accepting this general level of protection as adequate, the question becomes: Are there are plausible economic motives for Sweden to offer investors from the BIT partner countries protection through special agreements? We do not think so, since we have *no evidence to suggest that investors from the BIT partner countries would in practice be treated worse than investors from non-BIT partner countries* absent the BITs.[81]

On the inward side, the BITs hence solve problems that do not seem to exist to any important degree. The BITs are hence poorly designed to increase inward investment. This is reflected in the fact that they apparently have had virtually no impact on Swedish inward investment thus far. It is also consistent with the lack of evidence in the empirical literature of investment agreements having strong impact on inward investment in developed countries.

[80] That is, we will not address the question of whether there is some problem with regard to the general level of protection, partly since this would do not find this to be plausible, and partly because it would be require a study on its own to examine this.

[81] A separate economic argument for stimulating investment specifically from the BIT countries could be based on the notion that inward investment from these countries give rise to *more pronounced positive* externalities. We have no evidence that such effects exist, however. Furthermore, even *if* it could be shown that there are such externalities, it does not follow that investment agreements would be the appropriate instrument for stimulating investment. If policy risk is not an important deterrent for investment in Sweden, investment agreements will not have any more important impact on investment. Indeed, the experience with the Swedish BITs so suggests that this is the case. The empirical literature also points in this direction in that it finds little evidence of investment agreements stimulating inward investment in developed economies.

Furthermore, an economically acceptable argument for protecting inward investment through investment agreements would not only require that it could be made plausible that investors from the BIT partner countries would absent the BITs be exposed to more policy risk than would be desirable for Sweden. It would also have to be shown that the increased inflow of investment is worth the *costs*. As explained in Section 3.2, for the BITs to stimulate investment, they must expose Sweden to expected cost in terms of expected compensation payments, and/or changes in policies. These costs can in principle be large even if the effects on FDI flows are limited, since the agreements protect *all* FDI from the partner countries, not only the FDI that is induced by the agreements.

It is difficult to assess how large these expected costs are in practice. Sweden has apparently not been involved in arbitration proceedings or made compensation payments as a result of arbitration. Nor are we aware of instances where compensation payments have been made by Swedish authorities, or where Swedish policies have been changed, to avoid arbitration. But this does not mean that such costs will not materialise in the future. Indeed, increased inward FDI from some of the partner countries that are growing rapidly in absolute terms, will tend to make such costs more likely in the future. It can also be noted, as will be discussed below, that a number of other countries have apparently viewed these costs as large enough to warrant revision of their corresponding agreements.

A second type of cost of the BITs might arise if the BITs generate investment, but there is no discriminatory treatment of investors from the BIT partner countries. As explained in Section 3.2.4.4, the increase in investment due to the BITs might crowd out investment from non-partner countries. Such crowding out might even reduce welfare if there is no discrimination of investors from BIT partner countries. This cost then comes on top of the above-mentioned costs from the agreements.

In sum: *when considering the rationale for the BITs with regard to inward investment, we fail to see any persuasive reason for affording investors from the BIT countries more protection than what they would otherwise have access to in Sweden.*

6.3 Conclusions regarding the BITs

As argued, it seems plausible that the BITs provide protection for Swedish *outward* investment that goes beyond what investors would otherwise have access to. This protection does not cause any direct costs for Sweden, so the more protection that Swedish outward investment gets through the BITs, the better from a Swedish national income perspective.[82]

In contrast, we have been unable to see any valid economic rationale for giving extra protection to inward investment from the BIT partner countries. With increasing inward FDI from the BIT partner countries, the agreements increasingly apply also to Swedish inward investment. It is becoming increasingly important to get the balance the right between Swedish interests on the outward and the inward investment side. We believe that the potential for significant increases in inward investment from larger BIT partner countries like China, Korea, Turkey and Russia, calls for a revision of the BITs (see Table 7).

There are several reasons to believe that the Swedish BITs should be revised. First, the BITs are of a traditional type. These agreements were largely designed to circumvent

[82] The BITs could distort investment away from Sweden if they were to provide Swedish investors that goes far beyond what is offered in Sweden. But we do not think this is a problem in practice.

credibility problems in developing countries that severely needed an inflow of investment in order to develop. The situation in Sweden is very different. We do not have the same credibility problem as these countries had. And at a higher level of development, we do not have the same need for inward investment.

Second, as discussed above, traditional types of investment agreements have been severely criticised by reputable scholars and by governments on a variety of points. A number of countries have chosen to significantly redraft their traditional agreements, or have negotiated new agreements, in order to reduce the potential ambit of the substantive provisions (and to change the dispute settlement provisions), or in some instances just terminated their agreements. For instance, the EU has radically changed its position on the appropriate design of investment protection. We see no reason why Sweden should come to any other conclusion in this regard.

It is more difficult to specify what level of protection that the BITs should provide after revision. On the one hand, it could be argued that the BITs should provide more protection than what Sweden affords to investors from non-BIT partner countries, since the BITs give Sweden increased protection of outward investment. On the other hand, it is a general economic principle that firms should compete on equal terms, unless a strong case can be made to the opposite. Differential treatment can lead to distortions. We discussed one such possibility above, crowding out of investment from non-BIT partner countries. Differential treatment can also induce those who are afforded less favourable treatment to try to get access to the better treatment – "treaty shopping" would be an example of this in the present context. To determine how much protection the agreements should optimally afford one would ideally want to quantify the effects of different levels of protection on the inward and outward side. But this would be a highly difficult exercise, and it is beyond the scope of this study.

We believe however, that a number of reasons suggest that Sweden should seek to revise the BITs so that they offer the same protection as the newer EU agreements. First, considerable intellectual efforts have gone into the formation of the newer EU agreements. The level of protection that the EU finds suitable for its recent agreements is presumably largely adequate also for the Swedish BITs.

Second, according the National Board of Trade (2015, 2017), CETA provides a similar level of protection to what investors in Sweden would *anyway* have access to. Consequently, if the level of protection in the Swedish BITs were to be revised to match that in CETA, investors from say China, Korea, Indonesia and Russia would be afforded the same level of protection as investors from say Germany, the US or Sweden. This would provide a level playing field for investors in Sweden. It would also imply that Swedish investors in the BIT countries would have the same level of protection as they would have in Sweden.

This level of protection would in theory (at least) imply that the BITs are reduced to only provide protection for Swedish outward investment. They would have no impact on inward investment. There would in theory not be any expected costs either (assuming that future arbitration panels make no mistakes, and that the costs for Sweden for any future arbitration can be fully shifted on to the complaining party).

Third, using the EU agreements as "boiler plates" for revised Swedish BITs could also have some practical advantages. For instance, the revisions of the agreements might be more readily acceptable to BIT partner countries than if Sweden were to propose

agreement designs of its own invention. It would also simplify matters for investors if the same rules applied in the Swedish BITs as in the EU agreements (similar to how having the same type of competition rules at a national and an EU level are believed to reduce transactions costs for firms), and future jurisprudence from the EU agreements could be used to interpret the Swedish agreements, thus further reducing the uncertainty regarding their actual implications

Conclusion: *The Swedish BITs should be revised to reduce the level of protection they provide, and to reduce the possibility that the agreements are interpreted in undesirable fashion. The recent EU agreement could usefully serve as models for such revisions.*

Finally, many of the BITs are with small and poor economies. For instance, the BIT partner countries listed in Table 8, with GDP less than USD 200 Billion, accounted for a mere 0.6 percent of the Swedish outward FDI stock in 2016. The 28 countries in this group with positive growth (thus excluding Belarus, Ukraine, and Yemen) will according to the simple exercise in Table 7 in absolute terms jointly grow less than 10 percent of what is added to the Chinese economy. *These smaller partner countries will with all likelihood continue to only play a very modest role for Swedish out- or inward FDI, regardless of the BITs.* [83] With little inward investment from these countries, we should also expect the costs of these agreements to be small. The main potential problem would be that they could be used by investors from third countries for some form of treaty-shopping.

6.4 Remarks on the ECT

As noted in Section 2, in addition to the BITs, Sweden is also a member of the ECT. There is little doubt that the ECT imposes significant protection for investment in the energy sector. There has been a large number of arbitrations under the agreement, and investors have been successful a number of times. It also has wide geographical coverage in that there are almost 50 signatories. It is therefore natural to raise the same questions regarding the desirability of the ECT as we have addressed above regarding the BITs.

We should first note however, that certain developments might limit the future scope of the ECT. First, 26 of the ECT members other than Sweden are EU members. Although the CJEU decision in *Achmea* did not formally apply to the ECT, a majority of EU members states are taking steps to end the applicability of the ECT with regard to intra-EU investment. If these efforts succeed, this will significantly reduce coverage of the agreement.

It can also be noted that there is significant overlap in membership between the Swedish non-EU BITs and the ECT. This raises the question of the extent to which the ECT adds to the protection that is provided by the BITs. To the extent that the BITs already provides the protection that the ECT afford, the ECT would effectively add protection only for investment between Sweden and ECT members that are neither EU members, nor BIT partners, that is, the ECT would add protection for FDI flows in the energy sector to and from Afghanistan, Azerbaijan, Iceland, Japan, Liechtenstein, Moldova, Montenegro, Switzerland, Tajikistan, and Turkmenistan. This would also significantly reduce the prospective benefits of the agreement. But judging by the preference that investors have

[83] This is not to say that the protection that these agreements yield does not have any value. The agreements will probably occasionally be used by Swedish investors to extract compensation payments. For instance, in an ongoing dispute between a couple of Swedish investors and Tanzania, the requested compensation is said to be around SEK 500 million, a non-negligible amount. But we believe that such instances will be very rare, given the small magnitude of the investments involved.

shown to use the ECT rather than BITs for arbitration, and their success when doing this, it does seem probable however, that the ECT gives protection beyond what the BITs typically provide. Furthermore, since there more jurisprudence for the ECT, there is less uncertainty with regard to the interpretation of this agreement.

On the other hand, the ECT could gain in prominence if the existing Swedish BITs were to be modernised, but not the ECT. The ECT might then become effective also for those non-EU ECT countries with which Sweden currently have BITs. Furthermore, since the ECT is open for accession, it is conceivable that its membership will expand in the future.

Finally, it appears as if the ECT is subject to much of the same critique that we have directed at the Swedish BITs. But a major difference between evaluating the BITs and the ECT is that the ECT applies to a rather narrow set of industries, and thus also more narrow set of policy measures. It would therefore be possible to make a more detailed assessment of the pros and cons of the ECT than can be done with the BITs, which apply to any industry. Such an evaluation would go far beyond the purpose of this study, but we recommend that it is done. It can also be noted that there are ongoing discussions regarding a modernisation of the ECT.

7 Concluding remarks

We conclude by making some reflections on the governance of the Swedish investment agreements.

First, a necessary but not sufficient condition for investment agreements to promote investment is obviously that *investors are aware of their existence and understand what protection they offer*. A possible reason why the BITs do not stimulate outward FDI in any significant way might be that Swedish investors simply are *unaware* of the protection the agreements offer. This has been suggested as a reason why investment agreements in general appear to have little effect.

In June 2007, The Economist Intelligence Unit conducted a global survey of senior executives of MNEs in Western Europe, North America and Asia (evenly distributed across these source regions) to investigate how policy risk affected their overseas investments. The survey also included the question *"To what extent does the existence of an international investment agreement (for example a bilateral investment treaty) influence your company's decision on which market to invest in?"* About one-fifth of the recipients stated that an investment treaty influenced their investment decision "to a very great extent". However, roughly the same share of the recipients replied, "not at all", roughly half of the recipients responded that investment agreements influenced investment decisions "to a limited extent", while about one tenth of the executives answered, "Don't know". As also noted by the World Bank (2005, p. 177), firms may even be unaware of the existence of BITs until events unfold under which the agreements prove useful:

> ... there is evidence that many investors are not aware that a BIT is in place at the time of considering an investment, and indeed investors may remain oblivious until some issue arises when its provisions may be relevant.

It is not inconceivable however, that the recent debate regarding investment agreements increases the awareness of the protection afforded by the BITs, and thereby increases also their impact.

We therefore propose *a study to be done regarding Swedish business executives' perceptions regarding the Swedish BITs and the ECT*, to examine the awareness of existing agreements, how often the agreements have affected business decisions, whether new BITs should be negotiated, etc.

Second, and related, we have found it very difficult to locate information about the BITs on Swedish government websites. We have also searched on the Business Sweden website without much success; for instance, the term "investment treaty" gave four hits, none of which was relevant. If the BITs are to have any implications for Swedish investors, they must be visible; otherwise they might as well be terminated. We thus propose that *the agreements that are to be retained are made visible to investors* in order for the agreements to stimulate investment.

Third, the Swedish Ministry of Foreign Affairs is currently responsible for the Swedish investment agreement regime. This might reflect the fact that many of the BITs have been formed for political reasons, rather than to promote Swedish economic interest, or perhaps the choice of these partner countries reflects the allocation of the responsibility regarding investment protection within the Swedish government. Regardless, the limited activity with regard to the agreements during the last decade or longer, including the just

mentioned lack of a web site, suggests a limited interest in these issues. It would seem natural to view the BIT regime as part of economic policy more generally, in particular with regard to the agreements with larger, and more developed partners. We therefore think that it would be natural to have *more involvement by Ministry of Enterprise and Innovation (Näringsdepartementet), and/or the Ministry of Finance in the handling of these agreements*, and other international agreements with clear economic purposes, such as trade agreements.

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In addition to the literature above, interested readers are recommended to consult the UNCTAD website for information in general on FDI and IIAs. For instance the UNCTAD Issue notes are valuable sources of information regarding developments in the IIA sphere; these are available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-note.aspx

Annex 1: EU investment agreements excluded from the study

Short title	Partner(s)	Status	Date of entry into force
EU-Armenia CEPA	Armenia	Signed	
EU-SADC EPA (2016)	Southern African Development Community	In force	10-10-2016
EU-Kazakhstan EPCA (2015)	Kazakhstan	Signed	
EU-Georgia Association Agreement (2014)	Georgia	In force	01-07-2016
EU-Moldova Association Agreement (2014)	Moldova, Republic of	In force	01-07-2016
EU-Ukraine Association Agreement (2014)	Ukraine	In force	01-01-2016
CACM-EU Association Agreement (2012)	Central American Common Market	Signed	
EU-Vietnam Framework PCA (2012)	Vietnam	Signed	
Colombia-Ecuador-EU-Peru Trade Agreement (2012)	Colombia, Ecuador and Peru	In force	01-06-2013
EU-Iraq Cooperation Agreement	Iraq	Signed	
EU-Korea FTA	Korea, Republic of	In force	01-07-2011
EU-Korea Framework Agreement	Korea, Republic of	Signed	
ESA-EU EPA	ESA (Eastern and Southern Africa)	In force	14-05-2012
EU-SADC Interim Agreement (2009)	Southern African Development Community	Signed	
EU-Cameroon EPA	Cameroon	Signed	
Cote d'Ivoire-EC EPA	Côte d'Ivoire	Signed	
CARIFORUM-EC EPA (2008)	Caribbean Community and Dominican Republic	In force	01-01-2009
Bosnia-EC Stabilization Agreement	Bosnia and Herzegovina	Signed	
EC-Serbia Association Agreement	Serbia	In force	01-09-2013

Annex 1: Continued

Short title	Partner(s)	Status	Date of entry into force
EU-Montenegro Association Agreement	Montenegro	In force	01-05-2010
Albania-EC Association Agreement	Albania	In force	01-04-2009
EC-Tajikistan Partnership Agreement	Tajikistan	In force	01-01-2010
ANDEAN-EC Cooperation Agreement	ANCOM (Andean Community)	Signed	
Chile-EC Association Agreement	Chile	In force	01-02-2003
EC-Lebanon Association Agreement (2002)	Lebanon	In force	01-04-2006
Algeria-EC Association Agreement	Algeria	In force	01-09-2005
EC-OCT Association	Overseas Countries and Territories	In force	02-12-2001
EC-Pakistan Cooperation Agreement	Pakistan	In force	01-09-2004
EC-Egypt Association Agreement	Egypt	In force	01-06-2004
EC-Macedonia Association Agreement	North Macedonia	In force	01-04-2004
Mexico-EC Cooperation Agreement	Mexico	In force	01-03-2001
Cotonou Agreement (2000)	African, Caribbean and Pacific Group of States	In force	01-04-2003
Bangladesh-EC Cooperation Agreement	Bangladesh	In force	01-03-2001
EC-Turkmenistan Interim Trade Agreement	Turkmenistan	In force	01-08-2010
EC-South Africa Cooperation Agreement	South Africa	In force	01-05-2004
EU-Turkmenistan PCA (1998)	Turkmenistan	Signed	
EC-Yemen Cooperation Agreement	Yemen	In force	02-07-1998

Annex 1: Continued

Short title	Partner(s)	Status	Date of entry into force
EC-Jordan Association Agreement	Jordan	In force	01-05-2002
Cambodia-EC Cooperation Agreement	Cambodia	In force	01-11-1999
EC-Lao Cooperation Agreement	Laos	In force	01-12-1997
EC-Palestine Association Agreement	Occupied Palestinian territory	In force	01-07-1997
EC-Korea Cooperation Agreement	Korea, Republic of	In force	01-04-2001
EC-Uzbekistan Cooperation Agreement	Uzbekistan	In force	01-07-1999
Armenia-EC Cooperation Agreement	Armenia	In force	01-07-1999
Azerbaijan-EC Cooperation Agreement	Azerbaijan	In force	01-07-1999
EC-Georgia Cooperation Agreement	Georgia	Terminated	01-07-1999
EC-Morocco Association Agreement	Morocco	In force	01-03-2000
Ankara Agreement	Turkey	In force	31-12-1995
EC-Mercosur Cooperation Agreement	Mercado Común Sudamericano	In force	01-07-1999
EC-Israel Association Agreement	Israel	In force	01-06-2000
EC-Nepal Cooperation Agreement	Nepal	In force	01-06-1996
EC-Vietnam Cooperation Agreement	Vietnam	In force	01-06-1998
EC-Tunisia Association Agreement	Tunisia	In force	01-03-1998
Belarus-EC Cooperation Agreement	Belarus	Signed	
EC-Kyrgyzstan Cooperation Agreement	Kyrgyzstan	In force	01-07-1999

Annex 1: Continued

Short title	Partner(s)	Status	Date of entry into force
EC-Kazakhstan Cooperation Agreement	Kazakhstan	In force	01-07-1999
EC-Moldova PCA	Moldova, Republic of	Terminated	01-07-1998
EC-Sri Lanka Cooperation Agreement	Sri Lanka	In force	01-04-1995
EC-Russia PCA	Russian Federation	In force	01-12-1997
EC-Ukraine Cooperation Agreement	Ukraine	Terminated	01-03-1998
EC-India Cooperation Agreement	India	In force	01-08-1994
Brazil-EC Cooperation Agreement	Brazil	In force	01-11-1995
EEC-Mongolia Trade Cooperation Agreement	Mongolia	In force	01-03-1993
EC-Macao Trade Agreement	Macao, China SAR	In force	01-01-1993
EC-EFTA	European Free Trade Association	In force	01-01-1994
EC-Paraguay Cooperation Agreement	Paraguay	In force	01-11-1992
EC-Uruguay Cooperation Agreement	Uruguay	In force	01-01-1994
EC-GCC Cooperation Agreement	Gulf Cooperation Council	In force	01-01-1990
China-EC Trade and Cooperation Agreement	China	In force	22-09-1985
ASEAN-EU Cooperation Agreement	Association of South-East Asian Nations	In force	01-10-1980

Annex 2: The UNCTAD mapping of the contents of Swedish BITs

Partner country	Year into force	NT	MFN	Qualified FET	Indirect expropriation	Transfer of funds	Perform require clause	Umbrella clause	SSDS	ISDS	ICSID	UNCTRAL	Other fora	Sunset years
Albania	1996	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
Algeria	2005	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	20
Argentina	1992	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	15
Belarus	1996	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
Chile	1995	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
China	1982/2005	None	Post	No	Yes	Yes	No	No	Yes	Yes	NA	NA	NA	15
Côte d'Ivoire	1966	Post	Post	No	Yes	Yes	No	No	Yes	No	NA	Yes	NA	10
Egypt	1979	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
Ethiopia	2005	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	20
Guatemala	2005	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	20
Hong Kong	1994	Post	Post	No	Yes	Yes	No	No	Yes	Yes	No	Yes	No	15
Indonesia	1993	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	15
Kazakhstan	2006	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	15
Korea	1997	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	10
Kuwait	2002	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	20
Kyrgyzstan	2003	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	10
Laos	1997	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	20
Lebanon	2001	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	15

Annex 2 Continued

Partner country	Year into force	NT	MFN	Qualified FET	Indirect expropriation	Transfer of funds	Perform require clause	Umbrella clause	SSDS	ISDS	ICSID	UNCTRAL	Other fora	Sunset years
Madagascar	1967	Post	Post	Yes	Yes	Yes	No	No	Yes	No	NA	NA	NA	10
Malaysia	1979	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	15
Mauritius	2005	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	20
Mexico	2001	Post	Post	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	10
Mongolia	2004	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	20
Morocco	2008	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
North Macedonia	1998	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	20
Oman	1996	None	Post	No	Yes	Yes	Yes	No	Yes	Yes	Yes	No	No	20
Pakistan	1981	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
Panama	2008	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	20
Peru	1994	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	15
Russian Federation	1996	Post	Post	No	Yes	Yes	No	No	Yes	Yes	No	Yes	No	20
Senegal	1968	None	Post	Yes	Yes	Yes	No	No	Yes	No	NA	NA	NA	10
Serbia	1979	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	15
South Africa	1999	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	20
Sri Lanka	1982	None	Post	No	No	Yes	No	No	Yes	Yes	Yes	No	No	10
Tanzania	2002	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	15
Thailand	2000	Post	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	20

Annex 2 Continued

Partner country	Year into force	NT	MFN	Qualified FET	Indirect expropriation	Transfer of funds	Perform require clause	Umbrella clause	SSDS	ISDS	ICSID	UNCTRAL	Other fora	Sunset years
Tunisia	1985	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	15
Turkey	1998	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	Yes	15
United Arab Emirates	2000	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	No	No	20
Ukraine	1997	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	10
Uruguay	1999	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	20
Uzbekistan	2001	Post	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	15
Venezuela	1998	Post	Post	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	15
Vietnam	1994	None	Post	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	20
Yemen	1984	None	Post	No	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	15

Remark The agreements with EU 28 members Bulgaria (1994), Croatia (2000), Czech Republic (1990), Estonia (1992), Hungary (1987), Latvia (1992), Lithuania (1992), Malta (1999), Poland (1989), Romania (2002), Slovenia (1999), and Slovakia (1990) are not included, nor are the agreements with Armenia, Bosnia-Herzegovina, Georgia, Iran, Mozambique, Nigeria, and Saudi Arabia.

Annex 3: The Korea-Sweden agreement of 1995

AGREMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF THE KINGDOM OF SWEDEN ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

Signed at Stockholm August 30, 1995

Entered into force June 18, 1997

The Government of the Republic of Korea and the Government of the Kingdom of Sweden (hereinafter referred to as "the Contracting Parties"),

Desiring to develop economic cooperation between the two States,

Intending to encourage and create favourable conditions for investments by investors of one Contracting Party in the Territory of the other Contracting Party on the basis of equality and mutual benefit,

Recognizing that the mutual promotion and protection of investments on the basis of this Agreement stimulates business initiative in this field,

Have agreed as follows:

ARTICLE 1 Definitions

For the purpose of this Agreement:

(1) The term "investment" shall comprise every kind of asset, held or invested, directly or indirectly, by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively:

(a) movable and immovable property and any other property rights such as mortgages, liens or pledges as well as goods under a leasing agreement;

(b) shares, stocks and debentures of companies or interest in the property of such companies;

(c) claims to money or to any performance under contract having an economic value;

(d) intellectual property rights, technical processes, trade names, trade secrets, know-how, goodwill and other similar rights; and

(e) business concessions of economic value necessary for conducting economic activities, conferred by law or under contract, including concessions to search for, cultivate, extract and exploit natural resources. Any alteration of the form in which assets are invested shall not affect their classification as investment.

(2) The term "returns" shall mean the amount yielded by an investment, and in particular, though not exclusively, shall include capital gains, profit, interest, dividends, royalties, fees or other current incomes.

(3) The term "investor" shall mean:

(a) natural persons having the nationality of a Contracting Party in accordance with its laws, and

(b) legal persons incorporated or constituted in accordance with the laws of a Contracting Party.

(4) The term "territory" shall mean the territory of the Republic of Korea and the territory of the Kingdom of Sweden respectively, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea over which the State concerned exercises, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploration and exploitation of the natural resources of such areas.

ARTICLE 2 Promotion and Protection of Investments

(1) Each Contracting Party shall, subject to its general policy in the field of foreign investment, promote and encourage within its territory investments made by investors of the other Contracting Party and create favourable conditions for investors of the other Contracting Party for investment and shall admit such investments in accordance with its legislation.

(2) Investments and returns of investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

ARTICLE 3 National and Most-Favoured-Nation Treatment

(1) Investment made by investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment which is fair and equitable and not less favourable than that accorded to the investments and returns of the investors of the latter Contracting Party or of any third State.

(2) Each Contracting Party shall accord fair and equitable treatment to investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal of their investment as well as the acquisition of goods and services and the sale of their production, through unreasonable or discriminatory measures.

ARTICLE 4 Compensation for Losses

Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or other armed conflict, a state of national emergency, revolt, insurrection or riot shall, as regards restitution, compensation or other forms of settlement, be accorded by the latter Contracting Party treatment which is not less

favourable than that accorded to its own investors or to the investors of any third State. Resulting payments shall be transferable without delay in a freely convertible currency.

ARTICLE 5 Expropriation

(1) Investments made by investors of one Contracting Party shall not be nationalised, expropriated or subjected to measures having, directly or indirectly, effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, unless the following conditions are complied with:

(a) the expropriation is taken in the public interest and under due process of law;

(b) the expropriation is distinct and not discriminatory;

(c) the expropriation is accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency. Such compensation shall amount to the fair market value of the expropriated investment immediately before the expropriation or before the impending expropriation became public knowledge and shall include interest from the date of expropriation.

(2) The provisions of paragraph (1) of this Article shall also apply to the returns from an investment as well as, in the event of liquidation, to the proceeds from the liquidation.

(3) The investor whose investment was expropriated, shall have the right under the law of the expropriation Contracting Party to prompt review by a judicial or other competent authority of that Contracting Party of his case and of the valuation of his investment in accordance with the principles set out in paragraphs (1) and (2) of this Article.

(4) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of this Article shall be applied.

ARTICLE 6 Repatriation of Investments

(1) Each Contracting Party shall allow without delay the transfer in a freely convertible currency of:

(a) the returns;

(b) the proceeds from a total or partial liquidation of any investment by an investor of the other Contracting Party;

(c) funds in repayment of loans related to an investment; and

(d) the earnings of individuals, not being its nationals, who are allowed to work in connection with an investment in its territory and other amounts appropriated for the coverage of expenses connected with the management of the investment.

(2) Any transfer referred to in this Agreement shall be effected at the official exchange rate prevailing on the day the transfer is made.

ARTICLE 7 Exceptions

The provisions of Article 3 of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State 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 which may be extended by the former Contracting Party by virtue of:

(a) any existing or future customs union, free trade area, common market, similar international agreement or other forms of regional economic cooperation to which either of the Contracting Parties is or may become a party;

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8 Subrogation

(1) If a Contracting Party or its designed agency makes a payment to an investor of that Contracting Party under a guarantee given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 10, recognize:

(a) the assignment to the former Contracting Party or its designated agency, whether under law or pursuant to legal transactions, of any right or claim of the investor; and

(b) that the former Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such an investor.

(2) The former Contracting Party or its designated agency shall, accordingly, be entitled to assert, if it so desires, any such right or claim to the same extent as its predecessor in title.

(3) Any payment received by the former Contracting Party or its designated agency in pursuance of the rights and claims acquired shall, after payment of taxes due, be freely transferable.

ARTICLE 9 Settlement of Investment Disputes between a Contracting Party and an investor of the Other Contracting Party

(1) Any dispute between a Contracting Party and an investor of the other Contracting Party, including those concerning expropriation or nationalisation of an investment, shall as far as possible be settled by the disputing parties in an amicable way.

(2) The legal remedies under the laws and regulations of the Contracting Party in the territory of which the investment has been made shall be available for the investor of the other Contracting Party on the basis of treatment no less favourable than that accorded by the former Contracting Party to its own investors or investors of any third State, whichever is more favourable to the investor.

(3) If any dispute cannot be settled within six (6) months from the date either party requested amicable settlement, each Contracting Party hereby consents to its submissions to the International Center for Settlement of Investment Disputes for settlement by

conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965. If the parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall have the right to choose.

(4) For the purpose of this Article, any legal person which is constituted in accordance with the legislation of one Contracting Party and in which before a dispute arises the majority of shares are owned by investors of the other Contracting Party shall be treated, in accordance with Article 25 (2) (b) of the said Washington Convention, as a legal person of the other Contracting Party.

ARTICLE 10 Settlement of Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation and application of this Agreement should, if possible, be settled by negotiations through diplomatic channels.

(2) If a dispute cannot thus be settled within six months, following the date on which such negotiation were requested by either Contracting Party, it shall at the request of either Contracting Party be submitted to an ad hoc Arbitral tribunal.

(3) Such Arbitral Tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Contracting Party shall point one member of the Tribunal. The appointed members shall then select a national of a third State, who on the approval of the two Contracting Parties shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within two months from the date of appointment of the other members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of other agreements, invite the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise is prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the Tribunal and of its representation in the arbitral proceedings; the costs of the Chairman and the remaining costs shall be borne in equal parts by Contracting Parties. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be final and binding on both Contracting Parties. The Tribunal shall determine its own procedure.

ARTICLE 11 Application of the Agreement

(1) This Agreement shall apply to all investment, whether made before or after its entry into force, but shall not apply to any dispute concerning an investment which arose or any claim concerning an investment which was settled before its entry into force.

(2) This Agreement shall in no way restrict the rights and benefits which an investor of one Contracting Party enjoys under national or international law in the territory of the other Contracting Party.

ARTICLE 12 Entry into Force, Duration and Termination

(1) This Agreement shall enter into force on the date when the Contracting Parties notify each other that all legal requirements for its entry into force have been fulfilled.

(2) This Agreement shall remain in force for a period of ten years and continue in force thereafter unless either Contracting Party notifies in writing twelve months in advance of its intention to terminate this Agreement.

(3) In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles to 11 shall remain in force for a further period of ten years.

(4) This Agreement may be revised by mutual consent. Any revision of this Agreement shall be effected without prejudice to any rights or obligations accruing or incurred under this Agreement prior to the effective date of such revision.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicated at STOCKHOLM this 30th day of August, 1995 in the Korean, Swedish and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA

FOR THE GOVERNMENT OF THE KINGDOM OF SWEDEN

Myndigheten för tillväxtpolitiska utvärderingar och analyser, Tillväxtanalys, utvärderar och analyserar svensk tillväxtpolitik. Vi ger regeringen och andra aktörer inom tillväxtpolitiken kvalificerade kunskapsunderlag och rekommendationer för att effektivisera och utveckla statens arbete för hållbar tillväxt och näringslivsutveckling.

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