

An Unrecognized State as an International Investment Law Actor: The Innovation of Taiwan's New International Investment Treaties

Mao-wei Lo*

Abstract

As an isolated island lacking in natural resources, trade and investment are important instruments for Taiwan's economic policies. However, due to political and diplomatic constraints, Taiwan has been largely excluded from international trade and investment regimes. Taiwan has participated in the Asia-Pacific Economic Cooperation (APEC) since 1991 and successfully joined the World Trade Organization in 2002. However, Taiwan can only participate in these forums as a separate customs territory. Bilaterally, due to China's escalating pressure, Taiwan has been denied the possibility of concluding free trade agreements (FTAs) or bilateral investment agreements with those countries that maintain diplomatic relations with China and do not recognize Taiwan. On the trade front, Taiwan has taken advantage of its status as a "separate customs territory" and concluded two FTAs with Singapore and New Zealand. On the investment front, given the fact that there is no status comparative to "separate customs territory" and considering the strong link between international investment law, public authority and, consequently, sovereignty, Taiwan has been keen to find a way to overcome political obstacles, with a view toward offering legal protection to its investors overseas. Taiwan also seeks to enhance its legal status as an "entity *sui generis*" under international law. Consequently, Taiwan aims to innovatively

* J.S.D. Candidate, Stanford University School of Law. I would like to thank Professors Deborah Hensler (Stanford Law School), Allen Weiner (Stanford Law School), Chien-Huei Wu (Institute of European and American Studies, Academia Sinica, Taiwan), Tom Ginsburg (University of Chicago Law School), Jacques deLisle (University of Pennsylvania Law School) and the participants of "The Future of Public and Private International Law" panel at Salzburg Cutler Fellows Program in International Law and Public Service 2021, for all their valuable and insightful comments and suggestions. The author can be reached at: mwlo@stanford.edu.

advance its foreign policies and investment strategies and break free from China's grasp on Taiwan's international space through the conclusion of international investment agreements (IIAs) with its partners of economic and political importance. The three new updated Taiwan IIAs – vis-à-vis India, Vietnam, and the Philippines under the Tsai Ing-wen administration's Indo-Pacific-focused New Southbound Policy (NSP) – represent valuable case studies in international law and international relations. They are employed to explore how Taiwan utilizes the conclusion of IIAs with its NSP partners to uphold its sovereignty and enhance its international legal status.

This article examines Taiwan's engagement in IIA treaty-making and explores their positive implications for Taiwan's international status from both international law and international relations perspectives. This article first argues that the modern concept of recognition does not necessarily refer to the recognition of statehood. Instead, in the case of Taiwan, where an official declaration of independence is practically impossible due to military coercion from China, the recognition is functionally granted, and the conclusion of economic agreements such as IIAs can alternatively reinforce Taiwan's legal competence in the international sphere. With a specific focus on Taiwan's three new IIAs with India, Vietnam, and the Philippines under the NSP, this article explores the political and economic motivations for Taiwan to update the IIAs with its NSP counterparts and applies an interdisciplinary approach to examine their nature and legal contexts. Further, this article applies the contextual analysis and argues that, compared to their previous versions, these new-generation IIAs concluded by Taiwan not only provide more effective legal guarantees to Taiwanese investors overseas from both substantial and procedural aspects, but also boost the recognition of Taiwan's sovereign rights, including its authority to represent the island and its people, as well as its treaty-making capacity under international law. This article also conducts in-depth, semi-structured interviews with Taiwanese government officials involved in the negotiations for these three IIAs to provide the story behind the scenes. The article maintains that by updating its old IIAs and embracing progressive IIA reform policy recommendations, Taiwan intends to demonstrate that it is a responsible actor in the international community and is a well-prepared partner to negotiate new-generation IIAs with other countries. Most importantly, this article finds that these modernized IIAs between Taiwan and its NSP counterparts can

potentially serve as the basis for Taiwan to extend its IIA network with other like-minded countries or international entities, especially the EU. EU-Taiwan relations are increasingly important, and the EU and Taiwan share economic and geopolitical interests in the Indo-Pacific region. Overall, this article provides both a broader understanding and an interdisciplinary analysis of how an unrecognized state such as Taiwan can employ the successful conclusions of IIAs to fortify its independent identity in international society from both international law and international relations perspectives.

Table of Contents

I. INTRODUCTION 101

II. AN OVERVIEW OF TAIWAN’S EFFORTS IN SIGNING INVESTMENT TREATIES WITH THE NEW INVESTMENT TREATIES WITHIN TAIWAN’S NEW SOUTHBOUND POLICY AS EXAMPLES 104

 A. THE POLITICAL ECONOMY OF INVESTMENT AGREEMENTS AND TAIWAN’S IDENTITY CONSTRUCTION 104

 B. THE HISTORICAL CONTEXT AND PRIORITIES OF THE NEW SOUTHBOUND POLICY 108

 C. CURRENT DEFICIENCIES IN TAIWAN’S IIAS VIS-À-VIS NSP COUNTRIES..... 113

III. A CONTEXTUAL ANALYSIS OF TAIWAN’S RECONSTRUCTION OF CURRENT INVESTMENT TREATIES 116

 A. THE STRUCTURES AND OVERVIEW OF TAIWAN’S NEW INVESTMENT AGREEMENTS WITH INDIA, VIETNAM AND THE PHILIPPINES 116

 1. The preamble, which emphasizes the importance of parties’ regulatory spaces 117

 2. Different scope of “investment” under the three IIAs 118

 3. Clarifying the application of substantive protections. 120

 4. Non-derogation clauses and exceptions are introduced in three new IIAs 124

 5. Imposing obligations upon foreign investors 126

 6. Novel and comprehensive ISDS procedures..... 128

 B. SUMMARY: INNOVATIVE IDEAS ARE INCREASINGLY ADOPTED BY NEW TAIWANESE IIAS..... 132

IV. POLITICAL AND LEGAL IMPLICATIONS OF TAIWAN’S NEW IIAS, VIS-À-VIS NSP COUNTRIES, TO ITS FOREIGN POLICY..... 136

 A. DUAL ROLES OF TAIWAN’S NEW IIAS: PROTECTING TAIWANESE INVESTORS OVERSEAS AND EXPANDING TAIWAN’S INTERNATIONAL SPACE 136

 B. GREATER IMPLICATIONS OF SOVEREIGNTY? WILL THESE TAIWANESE IIAS, VIS-À-VIS THEIR NSP PARTNERS, BE MORE “OFFICIAL” AND “ENFORCEABLE”? 141

 C. A PATH FORWARD: THE PROSPECT OF IIA FOR TAIWAN IN THE FUTURE 146

V. CONCLUSION..... 153

I. INTRODUCTION

As an island country, Taiwan's economic development depends on international trade and investment. Therefore, Taiwan constantly seeks to participate in regional and global economic integration.¹ However, due to its unique status as an "unrecognized state," as perceived by scholars and many other countries, Taiwan has been excluded from the United Nations (UN) and other important international organizations for decades.² This has resulted in even more stringent challenges for Taiwan in negotiating and concluding free trade agreements (FTAs) and international investment agreements (IIAs) vis-à-vis countries that maintain close economic ties with Taiwan. Presently, Taiwan has concluded only 32 IIAs with its partners.³ Taiwan's diplomatic and economic isolation poses serious risks of marginalization from regional economic integration agreements in the Indo-Pacific region, such as the Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁴ The preferential treatment among the members of these two mega-regional trade agreements could weaken the competitiveness of Taiwanese exports and undermine Taiwan's economic development in the long term. Simultaneously, China, which sees Taiwan as a breakaway province and claims the island as an indispensable part of its territory under its "One China Principle," has adopted a series of "favorable measures for Taiwanese," or economic incentives to lure Taiwanese investment and talented working professionals away from Taiwan to China.⁵ As a part of its united front

1. See Joshua Meltzer, *Taiwan's Economic Opportunities and Challenges and The Importance of the Trans-Pacific Partnership 2* (Brookings Inst.: Ctr. for E. Asia Pol'y Stud. 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/taiwan-trans-pacific-partnership-meltzer-012014.pdf>.

2. See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 196–211 (2d ed. 2007) (discussing Taiwan's unique status as an un-recognized state and pursuit of statehood); ALLEN S. WEINER ET. AL., *INTERNATIONAL LAW* 475–77 (7th ed. 2018) (outlining international relations between the U.S. and Taiwan).

3. *Investment Guarantee (Certificate) Agreement*, INVEST TAIWAN, https://investtaiwan.nat.gov.tw/showPagechtG_Agreement01?lang=cht&search=G_Agreement01 (last visited July 19, 2021).

4. Meltzer, *supra* note 1, at 11.

5. Michael M. Tsai & Po-Chang Huang, *China's United Front Strategy and its Impacts on the Security of Taiwan and the Asia-Pacific Region*, 3 FLETCHER SEC. REV. 91, 92 (2017); see generally Chia-Chien Chang & Alan H. Yang,

strategy, China intends to isolate Taiwan internationally and ultimately realize its goal of “reunification” with China.⁶

In response to this dilemma, the Taiwanese government has expanded efforts to deepen its political and economic connections with other regional counterparts in the Indo-Pacific. President Tsai Ing-wen proposed the New Southbound Policy (NSP) to incentivize Taiwanese enterprises and their investments to shift their focus from China to NSP nations, which include India, Australia, and New Zealand, and Association of Southeast Asian Nations (ASEAN) countries.⁷ Nevertheless, both the number and the effectiveness of Taiwan’s IIAs with its NSP partners are of great importance, because IIAs do not merely strengthen the legal protections of Taiwanese investors to their investment properties abroad. More importantly, the existence of new IIAs can also reinforce Taiwan’s assertiveness in consolidating its own sovereignty and statehood. While Taiwan concluded some IIAs with ASEAN countries before the implementation of the NSP, those IIAs were finalized decades ago and fail to provide adequate legal guarantees to Taiwanese investors abroad.⁸ In view of the weakness of the current IIA network, Taiwan has launched its own “reform accelerator,” seeking to renegotiate those IIAs vis-à-vis its NSP counterparts.⁹ This resulted in successfully updating three IIAs – with India, Vietnam, and the Philippines – from 2017 to 2019.¹⁰ Compared to their prior

Weaponized Interdependence: China’s Economic Statecraft and Social Penetration Against Taiwan, 64 ORBIS 312 (2020) (detailing China’s economic pressure on Taiwan).

6. David Sacks, *What Xi Jinping’s Major Speech Means For Taiwan*, COUNCIL ON FOREIGN RELS. (July 6, 2021, 4:39 P.M.), <https://www.cfr.org/blog/what-xi-jinpings-major-speech-means-taiwan>; see generally Michael M. Tsai & Po-Chang Huang, *supra* note 5 (describing China’s United Front policy as applied to Taiwan).

7. *Taiwan’s New Southbound Policy: Deepening Taiwan’s Regional Integration*, CTR. FOR STRATEGIC & INT’L STUD. (July 2019) <https://southbound.csis.org/>.

8. For example, while Taiwan and Vietnam signed bilateral investment agreements in the 1990s, this legal instrument failed to offer solid legal protections to the Taiwanese investors during the Vietnamese Anti-Chinese riot outbreak in 2014. See, e.g., Pasha L. Hsieh, *Rethinking Non-Recognition: Taiwan’s New Pivot to ASEAN and the One-China Policy*, 33 CAMBRIDGE REV. INT’L AFFS. 204, 220–22 (2020).

9. For a discussion of IIA “reform accelerators” in a global context, see generally United Nations Conf. on Trade & Dev. (UNCTAD), *International Investment Agreements: Reform Accelerator* (2020), https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

10. See *Investment Guarantee (Certificate) Agreement*, *supra* note 3.

versions, these new IIAs are much more comprehensive and include specific clauses to attract quality investments and ensure contracting parties' capacity to pursue public policy objectives, such as social and environmental standards, human rights, and public health, which are consistent with current trends in investment treaty reform.¹¹

By concluding IIAs with its NSP counterparts, Taiwan has demonstrated that it possesses the requisite legal competence in international investment law rulemaking and is ready to take yet another step forward to conclude IIAs with other international entities. This is especially the case with the European Union (EU), which stresses its "commitment to reinforcing its role in cooperation with Indo-Pacific partners"¹² and has also expressed its interest in launching IIA negotiations with Taiwan.¹³ Therefore, Taiwan's new investment pacts vis-à-vis India, Vietnam, and the Philippines in the context of its NSP, in my view, should be an important case study that can enrich our understanding of how an unrecognized state, such as Taiwan, seeks to be recognized as a competent actor from the perspectives of international law.

This article explores the ramifications of Taiwan's special international status and its efforts to participate in the process of regional economic integration through its IIA rulemaking, despite China's increasingly aggressive diplomatic suppression of Taiwan. To facilitate an interdisciplinary understanding of Taiwan's new IIAs with its NSP counterparts and their implications for further extending a Taiwanese IIA network in the context of international law and international relations, this article proceeds as follows. Part II first reviews the political and economic considerations of treaty conclusions in empowering Taiwan's legal competence and identity construction in the field of international investment law. With this theoretical background in mind, this section delineates the origin and contents of the NSP, together with current economic relations between Taiwan and NSP countries. Part II also addresses the

11. See, e.g., UNCTAD, *supra* note 9 (describing features of reformed IIAs generally).

12. Eur. Union External Action Serv., *EU Strategy for Cooperation in the Indo-Pacific* (Apr. 19, 2021, 11:11 A.M.), https://eeas.europa.eu/headquarters/headquarters-homepage_en/96741/EU%20Strategy%20for%20Cooperation%20in%20the%20Indo-Pacific.

13. *Resolution on Taiwan-EU Investment Pact Welcomed by MOFA, TAIWAN TODAY* (July 6, 2016), <https://taiwantoday.tw/news.php?unit=2&post=3922>.

weakness of Taiwan's current investment protection legal framework with its NSP counterparts. In Part III, a contextual analysis is undertaken to examine the updated Taiwanese IIAs vis-à-vis India, Vietnam, and the Philippines, illuminating the key features of these new-generation IIAs. Additionally, in-depth, semi-structured interviews with Taiwanese government officials were conducted, with a view toward revealing the stories behind the scenes of the IIA negotiations. Finally, Part IV explores the political and legal implications of Taiwan's new IIAs to determine if these instruments can satisfy Taiwan's interest in strengthening legal guarantees for its overseas investors. Further, this section considers whether these IIAs can serve as a steppingstone for Taiwan to tactically engage with other international entities, such as the EU, to facilitate the negotiations of future EU-Taiwan IIAs, and reinforce Taiwan's legal competence as an actor in the field of international investment law.

II. AN OVERVIEW OF TAIWAN'S EFFORTS IN SIGNING INVESTMENT TREATIES WITH THE NEW INVESTMENT TREATIES WITHIN TAIWAN'S NEW SOUTHBOUND POLICY AS EXAMPLES

A. THE POLITICAL ECONOMY OF INVESTMENT AGREEMENTS AND TAIWAN'S IDENTITY CONSTRUCTION

The motivations behind Taiwan's desire to conclude IIAs are twofold in nature. From an economic point of view, concluding more IIAs can offer a stronger legal guarantee for Taiwanese enterprises to establish their investments abroad. According to the "World Investment Report 2021," published by the United Nations' Conference on Trade and Development (UNCTAD), Taiwan's outflows of foreign direct investment (FDI) were ranked 16th out of more than 200 countries and regions in 2020.¹⁴ However, as mentioned in the previous section, so far Taiwan has only concluded 32 IIAs with other countries. This number is inversely proportional to Taiwan's remarkable economic power in the international community. Hence, there is an urgent need for Taiwan to broaden its investment treaty network to reflect its important role in international investment

14. UNCTAD, WORLD INVESTMENT REPORT 2021, at 7, http://unctad.org/system/files/official-document/wir2021_overview_en.pdf.

activities. That said, the IIAs concluded by Taiwan and the level of protection stipulated within them may also demonstrate Taiwan's resolution to embrace more foreign investment flows and professionals.¹⁵ These IIAs also present Taiwan as a well-prepared partner for participation for regional economic integration agreements, such as the CPTPP and the RCEP.¹⁶

Beyond economic considerations, from a political perspective, the conclusion of IIAs could further reinvigorate the recognition of Taiwan as a competent actor in international investment law regimes. Hsieh argued that the contemporary international community is an "intersubjective process where states struggle for the recognition of their identities" which is "[g]rounded in Hegel's recognition theory."¹⁷ Her arguments draw on Hegel,¹⁸ Ringmar¹⁹ and Kochi's²⁰ ideas of the importance of their identities being recognized. This explains the relationship between recognition and international legal personality under international relations. Unlike conventional international legal theory, which confines recognition to statehood, the form of recognition sought by unrecognized states is increasingly diverse and can be best understood by their desire to be recognized and respected from both a psychological perspective and constructive theory.²¹

In the case of Taiwan, where China's military coercion deters the island from officially asserting its separation from China,²² the second-best option for Taiwan is to seek recognition of its right to engage in the state-centric system with dignity, and without interference from China. Hence, even without the recognition of statehood under international law, the recognition

15. See *infra* Part III(A) and accompanying discussion.

16. *New Southbound Policy Guidelines and Action Plan*, OFF. TRADE NEGOTS., EXEC. YUAN (Oct. 10, 2016), <https://www.ey.gov.tw/otnen/64C34DCA8893B06/a0e8fd0b-a6ac-4e80-bdd4-16b4cf999b49>.

17. Pasha L. Hsieh, *Rethinking Non-Recognition: Taiwan's New Pivot to ASEAN and the One-China Policy*, 33 CAMBRIDGE REV. INT'L AFF. 204, 217 (2020).

18. *Id.* at 209 (citing G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 111 (A.V. Miller trans., 1977)).

19. *Id.* at 217 (citing Erik Ringmar, *The Relevance of International Law: A Hegelian Interpretation of a Peculiar Seventeenth-Century Preoccupation*, 21 REV. INT'L STUD. 87, 94 (1995)).

20. *Id.* (citing Tarik Kochi, *Recognition and Accumulation*, in RECOGNITION AND GLOBAL POLITICS 95, 95 (Patrick Hayden & Kate Schick eds., 2016)).

21. See *id.* at 208.

22. See MALCOLM SHAW, INTERNATIONAL LAW 234 (6th ed. 2003); VAUGHAN LOWE, INTERNATIONAL LAW 165 (2007).

of Taiwan's legal competence to conclude international treaties and the legitimacy of its laws and regulations are still meaningful because they can buttress Taiwan's capacity to exercise sovereign rights and its effective control over its territory and people, which have salient legal and political implications for Taiwan.²³

The choice of signing IIAs to fortify Taiwan's identity construction is not undertaken without contemplation. Originating from the principle of public international law regarding the protection of foreign investors, IIAs and investor-state arbitrations primarily involve the legitimacy of governmental measures and the scope and limits of state regulatory powers.²⁴ These public law disputes include, for example, disagreements concerning the policy of promoting renewable energy, control of substances harmful to public health, and the protection of cultural heritage.²⁵ Thus, the establishment of dispute settlement mechanisms for investor-state disputes and state-to-state disputes implies that the legal equality and capacity of the Taiwanese government are recognized. Overall, successful conclusion of IIAs with other sovereign countries could deliver a strong message from the IIA counterpart that it recognizes the Taiwanese government's authority and its legal competence to be recognized as a subject of international law—at least in the field of international investment law.²⁶

In fact, such “functional” recognition of Taiwan's capacity to conclude treaties has been widely implemented in the international trade law regime.²⁷ Since its accession to the World Trade Organization (WTO) in 2003 with the legal status

23. See Kathleen Claussen, *Sovereignty's Accommodations: Quasi-States as International Lawmakers*, in CHANGING ACTORS IN INTERNATIONAL LAW 21, 46 (Karen N. Scott et al. eds., 2020).

24. See Frank Emmert & Begaiym Esenkulova, *Why Can't We Be Friends? Protecting Investors While Also Protecting Legitimate Public Legitimate Public Interests and the Sustainable Development of Host Countries in Investor-State Arbitration*, 48 TEX. J. BUS. L., Fall 2019, at 1, 5.

25. See, e.g., Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75, 84, 95 (Stephan W. Schill ed., 2011).

26. See generally Kathleen Claussen, *Functional State Recognition and International Economic Law*, in RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER 152, 159–160 (Chiara Giorgetti & Natalie Klein eds., 2019).

27. *Id.*

of “separate customs territory[,]” Taiwan has enjoyed the same rights and benefits of other sovereign state members under this multilateral trading system.²⁸ Moreover, as an “economy” or “separate customs territory[,]” Taiwan has successfully signed FTAs with Singapore and New Zealand, both of which have diplomatic ties to China and do not recognize Taiwan’s statehood.²⁹ While membership in the WTO is not conditioned on statehood and the conclusion of FTAs with sovereign states does not amount to recognition of statehood in international law, these developments have cemented Taiwan’s unique identity as independent from China, as well as its legal competence to sign trade agreements in the international trade law regime. Benefitting from successful experiences relating to its involvement in the WTO and other regional economic coordination agreements, such as the APEC,³⁰ Taiwan seeks to further strengthen its legal status in the field of international investment law by expanding its relatively limited IIA network, which could, over time, maintain Taiwan’s dignity and equality under international law.³¹

As Abbot and Snidal correctly indicate, connecting disciplines of international law and international relations is essential for both explanatory analysis and treaty design, because “[l]aw and legalization involve values and interests; they operate through instrumental and normative channels; they involve power as well as rational design; they are shaped by and shape the behavior of private actors as well as states.”³² In consideration of Taiwan’s unique legal status, the role of IIAs is far beyond that of advancing economic development and

28. Steve Charnovitz, *Taiwan’s WTO Membership and its International Implications*, 1 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 401, 420 (2006); see also Marrakesh Agreement Establishing the World Trade Organization, art. XII, Apr. 15, 1994, 1867 U.N.T.S. 154 (“Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.”).

29. See *Investment Guarantee (Certificate) Agreement*, *supra* note 3.

30. *Member Economies*, ASIA-PAC. ECON. COOPERATION, <https://www.apec.org/about-us/about-apec/member-economies> (last visited May 31, 2022).

31. See STEPHEN D. KRASNER, SOVEREIGNTY 17 (1999); see also Hsieh, *supra* note 17, at 218.

32. Kenneth W. Abbott & Duncan Snidal, *Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 33, 52 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

investment promotion, as traditionally argued by rationalists.³³ Instead, given Taiwan's specific focuses on the construction of identity and legal status in international society, the doctrine of recognition in the international relations theory offers a more precise explanation of the IIAs signed by Taiwan. As a result, it is necessary to refer to theories from both the international relations and international legal disciplines to better understand the origin and contexts of the three new IIAs signed by Taiwan with India, Vietnam, and the Philippines in the context of its New Southbound Policy, and, most importantly, to assess the legal and political implications of these new-generation IIAs for Taiwan's identity construction in the international investment law regime.

B. THE HISTORICAL CONTEXT AND PRIORITIES OF THE NEW SOUTHBOUND POLICY

Taiwan is among the newly industrialized economies that emerged in East Asia after WWII.³⁴ Due to its lack of natural resources and high population density, Taiwan endeavors to brand itself as an open economy. It does this by reviewing and updating its domestic regulations to further liberalize trade and investment regimes, with the view toward boosting trade, increasing investment flows, and connecting itself with the international community.³⁵ Such effort, however, was depressed by a non-economic obstacle, namely, China's suppression. Claiming that Taiwan is its integral and indispensable territory, China insists upon the validity of the so-called "One China Principle" and opposes other countries that seek to establish diplomatic relationships and have official interactions with

33. The rationalists think capital-exporting countries with stronger bargaining powers pursue more enforceable and pro-investment protection IIAs so as to provide credible commitments to protect its nationals investing abroad. Under this perspective, investment-importing countries would also this kind of treaty to attract more foreign investment flows boost its domestic economic developments. See Todd Allee and Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties*, 66 *WORLD POL.* 47, 49 (2014).

34. Shin-Horng Chen & Pei-Chang Wen, *Taiwan, in ASIA IN THE GLOBAL ICT INNOVATION NETWORK: DANCING WITH THE TIGERS* 119, 119–20 (Giuditta De Prato et al. eds., 2013).

35. *Deregulation Launched to Eliminate Investment Obstacles*, NAT'L DEV. COUNCIL (TAIWAN), https://www.ndc.gov.tw/en/Content_List.aspx?n=2F9E4D0A1270D6F6 (last visited Dec. 1, 2021).

Taiwan, such as the conclusion of FTAs and IIAs.³⁶ Taiwan, on the other hand, constantly seeks every opportunity to broaden its international space and keep pace with the train of economic integration amid China's objections.

While it is the consensus in Taiwan that it cannot be isolated from global and regional economic integration, foreign trade and investment policies in Taiwan vary according to its ruling parties: the Kuomintang (KMT) and the Democratic Progressive Party (DPP).³⁷ The primary difference between these two parties is their attitudes toward China, and such varied perspectives have led Taiwan to adopt different strategies and approaches to pursuing participation in economic integration.³⁸ Specifically, when the KMT was the ruling party of Taiwan, the government maintained a policy of being close to the U.S., at "peace with China, and friendly with Japan."³⁹

Under such an ideology, the KMT government placed great emphasis on the importance of maintaining amicable and close relationships with China by recognizing the so-called "1992 Consensus"—a document that refers to "one China[,] but with different interpretations under the KMT's understanding—which served as the political basis for engaging in the dialogue between Taiwan and China.⁴⁰ From 2008 to 2016, with the KMT in power, Taiwan and China signed 23 agreements, including the "Economic Cooperation Framework Agreement (ECFA)," the "Cross-Strait Bilateral Investment Protection and Promotion Agreement," and the "Cross-Strait Agreement on Trade in Service."⁴¹ Meanwhile, Taiwan also sought to extend its bilateral

36. *E.g.*, Fergus Hunter, *Australia Abandoned Plans for Taiwanese Free Trade Agreement After Warning from China*, SYDNEY MORNING HERALD (Oct. 24, 2018, 11:45 P.M.), <https://www.smh.com.au/politics/federal/australia-abandoned-plans-for-taiwanese-free-tradeagreement-after-warning-from-china-20181024-p50bj5.html>.

37. *See generally* Gang Lin & Weixu Wu, *The Transition of Party System in Taiwan: Divergence or Convergence?*, 17 CHINA REV. 141, 158–62 (2017).

38. *Id.* at 160.

39. *See* Wu Yixuan, *Only by "Pro-US, Peace with China, and Friendly with Japan" Can the Crisis Be Turned into Peace* *Ma Ying-Jeou: the Tsai Government has Turned the Two Sides of the Strait from a Deadlock to a Crisis*, UP MEDIA (Aug. 22, 2020, 11:34 A.M.), https://www.upmedia.mg/news_info.php?SerialNo=94409.

40. *See* Austin Wang et al., *What Does the 1992 Consensus Mean to Citizens in Taiwan?: Hint: It's Not What Either Taiwan or China Think It Means*, DIPLOMAT (Nov. 10, 2018), <https://thediplomat.com/2018/11/what-does-the-1992-consensus-mean-to-citizens-in-taiwan/> (explaining the discussions of the 1992 Consensus).

41. *Cross-Strait Agreements*, MAINLAND AFFS. COUNCIL,

trade and investment agreement network with other economies, and participate in regional economic integration based on a mutual understanding between the cross-strait.⁴² It signed two FTAs, with Singapore and New Zealand, in 2013.⁴³

The DPP government, in contrast, holds a more conservative perspective on China's intentions and is highly concerned over the fact that Taiwan's economic development is increasingly dependent on China.⁴⁴ Therefore, in 2016, after DPP candidate Tsai Ing-wen won the presidential election, the DPP government soon announced the NSP, with a view toward reducing its reliance on China by strengthening relationships with the ten ASEAN nations and other economies around the Indo-Pacific region.⁴⁵ The DPP administration further established the "New Southbound Policy Task Force" and the "New Southbound Policy Working Group," which are directly affiliated with the National Security Council and the Office of Trade Negotiations of Executive Yuan, respectively.⁴⁶ They

<https://www.mac.gov.tw/en/cp.aspx?n=FD37619195CF6DA5> (last visited May 19, 2021); *Taiwan and China Sign Landmark Trade Agreement*, BBC (June 29, 2010), <https://www.bbc.co.uk/news/10442557>; Herbert Smith Freehills LLP, *Dispute Resolution Mechanisms Under the China-Taiwan Strait Bilateral Investment Protection Agreement*, LEXOLOGY (Aug. 23, 2012), <https://www.lexology.com/library/detail.aspx?g=69c956cc-0fb4-4679-8721-c59148f69254>; Mo Yan-chih, *Cross-strait Service Trade Pact Signed*, TAIPEI TIMES (June 22, 2013), <http://www.taipeitimes.com/News/front/archives/2013/06/22/2003565371>.

42. Jason Young, *Space for Taiwan in Regional Economic Integration: Cooperation and Partnership with New Zealand and Singapore*, 66 POL. SCI. 7–12 (2014).

43. *Id.* at 12.

44. See Gang Lin & Weixu Wu, *supra* note 37, at 160.

45. The targeted countries of the New Southbound Policy include Thailand, Indonesia, Philippines, Malaysia, Singapore, Brunei, Vietnam, Myanmar, Cambodia, Laos, India, Pakistan, Bangladesh, Nepal, Sri Lanka, Bhutan, Australia and New Zealand. Bonnie S. Glaser et al., *The New Southbound Policy: Deepening Taiwan's Regional Integration*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 19, 2018), <https://www.csis.org/analysis/new-southbound-policy>. Notably, Taiwan sought to enhance bilateral relations with ASEAN countries long before the implementation of the NSP. Since 1990, during the presidency of Lee Teng-hui, the "Go South Policy" was commenced as a constituent of his "pragmatic policy[.]" which aims to strengthen interactions with ASEAN countries that have diplomatic relations with China and encourage Taiwanese enterprises to establish their investments in Southeast Asia instead of focusing on China. Some perceive that the NSP is built upon Lee's "Go South Policy." However, the NSP differs from the "Go South Policy" from the perspectives of their scope and substance. See Hsieh, *supra* note 17, at 211–14. See also Chow Bing Ngeow, *Taiwan's Go South Policy: Déjà Vu All Over Again?*, 39 CONTEMP. SOUTHEAST ASIA: J. INT'L AND STRATEGIC AFF. 96, 113–21 (2017).

46. Chao-Kun Wang, *Coordinating New Southbound Policy: Tsai Directs*

serve as platforms to coordinate relevant government agencies, and to implement policies and tasks assigned by the president.⁴⁷

According to the “Guidelines for the New Southbound Policy,” issued by the Taiwanese government in 2017, the policy goals of the NSP are to “[e]stablish mechanisms for wide-ranging negotiations and dialogues[,]” and “[e]xpand multilateral and bilateral negotiations and dialogue to enhance economic cooperation and resolve disputes and disagreements.”⁴⁸ Aside from the political consideration of diversifying Taiwan’s dependence on mainland China,⁴⁹ the NSP also bears the in-depth mission of cultivating interpersonal connections to integrate Taiwan into the Indo-Pacific community, together with updating and expanding trade, investment, and other economic agreements with NSP-targeted countries.⁵⁰ Executive Yuan of the Office of Trade Negotiations indicated in an interview that India, Vietnam, and the Philippines are the most important Indo-Pacific countries for Taiwan to establish partnerships with because of their political and economic influences within the region.⁵¹ Hence, Taiwan has been exerting great effort to strengthen economic ties with these three NSP countries.⁵²

As revealed in the statistics provided by the Investment Commission of Ministry of Economic Affairs of Taiwan, after the implementation of the NSP, the growth rate of investment between Taiwan and NSP countries steadily increased in recent years.⁵³ Table 1 demonstrates Taiwanese investments in

the National Security Council to Establish the “New Southbound Policy Task Force”, RADIO TAIWAN INT’L (Dec. 26, 2017), <https://www.rti.org.tw/news/view/id/386920>.

47. *Id.*

48. *Guidelines for the New Southbound Policy*, NEW SOUTHBOUND POL., <https://newsouthboundpolicy.trade.gov.tw/English/PageDetail?pageID=50&noDeID=94> (last visited May 14, 2021).

49. Chun Chih Yang, *Taiwan’s New Southbound Policy: Implications for the Relations Between Taiwan and ASEAN*, 54 JAPANESE J.L. & POL. SCI. 199, 201 (2018).

50. See Tan-sun Chen, *The New Southbound Policy and Taiwan’s Role in Facilitating Grassroots Connections in the Indo-Pacific Region*, 19 PROSPECT J. 1, 2–3 (2018) (Taiwan).

51. Zoom Interview with Colleagues of the Office of Trade Negotiations, Exec. Yuan (Taiwan) (May 5, 2020) (on file with author) [Editor’s note: to preserve the confidentiality of the interviewed officials, the Journal has relied on the good faith of the author in citing all interviews.].

52. Hsieh, *supra* note 17, at 212.

53. See *Inbound Investment from NSP Target Countries Grows 61.6 Percent*, TAIWAN TODAY (Mar. 5, 2021), <https://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=195541>.

Vietnam, the Philippines, and India since 2016, whereas Table 2 presents the FDI inflow from these three NSP countries in the same period.⁵⁴ We can see that the investment flows from Taiwan to these three NSP countries double or even triple following the implementation of the NSP. The skyrocketing volume of investment shown in this data presents distinct evidence of the importance of the IIAs for Taiwan and these three NSP partners.

Table 1: Taiwan's FDI in Vietnam, the Philippines and India (thousand USD)

Year	Vietnam		Philippines		India	
	Number of Investments	Amount	Number of Investments	Amount	Number of Investments	Amount
2016	27	451,930	7	61,762	8	14,940
2017	23	683,092	6	225,726	8	30,559
2018	65	901,411	15	149,703	21	361,224
2019	97	914,870	12	106,725	11	70,375
2020	64	767,435	11	92,111	8	152,624
2021	42	1,061,463	3	22,478	14	172,757

Table 2: Taiwan's FDI inflow from Vietnam, the Philippines and India (thousand USD)

Year	Vietnam		Philippines		India	
	Number of Investments	Amount	Number of Investments	Amount	Number of Investments	Amount
2016	27	1,276	21	1,190	34	1,634
2017	30	918	25	1,128	42	2,570
2018	37	1,836	23	5,566	67	4,393
2019	45	4,561	25	5,401	37	2,242
2020	24	700	12	769	23	1,940
2021	31	538	21	2,893	39	1,886

54. Statistics for the Tables were retrieved from INV. COMM'N, MINISTRY OF ECON. AFFS. (MOEAIC), https://www.moeaic.gov.tw/english/news_bsAn.jsp.

C. CURRENT DEFICIENCIES IN TAIWAN'S IIAS VIS-À-VIS NSP COUNTRIES

While Taiwan is increasingly proactive in its engagement with NSP countries in terms of economic, political and cultural interests, scholars have warned that the effectiveness of IIAs between Taiwan and its Indo-Pacific partners has inherent limitations due to the contexts of the IIAs. Liu observes that Taiwan's prior IIAs vis-à-vis ASEAN countries resemble the ASEAN Investment Guarantee Agreement (ASEAN IGA)⁵⁵ and the ASEAN Framework Agreement on ASEAN Investment Area (AIA).⁵⁶ He critically demonstrates the differences between the Taiwanese IIAs and the ASEAN IGA, and how the differences are more significant when compared with the ASEAN AIA.⁵⁷ For example, while those earlier generation Taiwanese IIAs with ASEAN countries and the ASEAN IGA and AIA all include a preamble emphasizing the benefits brought about by promotion and protection of investment; the ASEAN AIA denotes the more progressive function of foreign investments to achieving higher policy objectives, such as promoting the development of technology and know-how among the treaty parties.⁵⁸

Turning to how the agreements treat standards, while include the fair and equitable treatment (FET) standard,⁵⁹ the

55. Han-Wei Liu, *A Missing Part in International Investment Law: The Effectiveness of Investment Protection of Taiwan's BIT's Vis-à-vis ASEAN States*, 16 U.C. DAVIS J. INT'L L. & POL'Y 130, 150 (2010); Agreement Among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of The Philippines, The Republic of Singapore, and The Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5554/download>, replaced by ASEAN Comprehensive Investment Agreement, Feb. 2, 2009, <http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf>.

56. See Liu, *supra* note 55, at 150; Framework Agreement on ASEAN Investment Area, Oct. 7, 1998, <https://www.asean.org/wp-content/uploads/images/archive/7994.pdf>.

57. Liu, *supra* note 55, at 148–150.

58. *Id.* at 150–51.

59. The concept of “fair and equitable treatment” originated from the customary international law minimum standard for the treatment and protection of alien's rights and properties. FET clauses are now included in almost all IIAs and their contents are broadly enriched by investment arbitral jurisprudence to cover the elements of non-discrimination, due process, and the principle of good faith, to name just a few. See generally Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAWYER 87 (2005) (discussing the legal principles and historical background of FET clauses).

standards of full protection and security,⁶⁰ most-favored-nation treatment (MFN) and national treatment (NT) principles;⁶¹ Liu explains that even if all Taiwanese IIAs with its ASEAN partners and both the ASEAN IGA and AIA embodied the FET and MFN standards, the national treatment and full protection and security standards are missing in most of Taiwan's IIAs vis-à-vis ASEAN countries.⁶² Such omissions weaken the protection level for Taiwanese investors in host countries. Moreover, Taiwan's earlier generation IIAs fail to specify functional dispute settlement mechanisms to resolve either investor-state disputes or state-to-state disputes.⁶³ Unlike the ASEAN IGA and AIA, which provide multiple forums for disputing parties to settle their disputes,⁶⁴ almost none of Taiwan's IIAs vis-à-vis ASEAN countries specify a forum or arbitration rules to govern arbitral proceedings.⁶⁵ In other words, the process of dispute resolution depends upon the terms and conditions agreed upon by the disputing parties, which might incentivize the host state to delay or even halt entirely the composition of arbitral tribunals. In short, the "toothless" IIAs between Taiwan and its ASEAN counterparts are too weak to provide enough protection to Taiwanese investors who would like to expand their

60. The full protection and security clause, like the FET standard, is widely included in IIAs. This doctrine requires that host states shall not physically intrude foreign investors' properties and personal security without reasonable grounds. Arbitral jurisprudence also extends this legal guarantee to protect foreign investors and its investment interests against any forms of harm or harassment caused by private actors. *See generally* Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISP. SETTLEMENT 353 (2010) (discussing the doctrine behind full protection and security clauses in arbitration agreements).

61. Most favored nation treatment is a promise between the two IIA parties which guarantees that neither party will extend to third-party investors greater advantages than those extended to investors from the other IIA party. National treatment standard, on the other hand, requires the host state to treat foreign investors at least as favorably as the treatment accorded to its nationals. *See* Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 539 (2012); *see also* U.N. Conference on Trade and Development, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).

62. *See* Liu, *supra* note 55, at 156–62.

63. *Id.* at 142.

64. Prominent examples of these forums include the International Centre for Settlement of Investment Disputes, INT'L CTR. FOR SETTLEMENT INV. DISPS., <https://icsid.worldbank.org/about> (last visited Dec. 1, 2021), and the Permanent Court of Arbitration, PERMANENT CT. ARB., <https://pca-cpa.org/en/services/> (last visited Dec. 1, 2021).

65. *See* Liu, *supra* note 55, at 134, 142.

businesses in the Southeast Asian region.⁶⁶

Another concern of Taiwan's current IIA network within ASEAN is whether these IIAs are treaties under international law and can therefore impose legal commitments on Taiwan and its ASEAN partners. As an area under the Chinese hegemony, all member states of ASEAN recognize "the People's Republic of China" as the solely legitimate government of China and do not maintain diplomatic relations with Taiwan.⁶⁷ Hence, most of the investment pacts between Taiwan and ASEAN countries are all concluded in the name of informal, unofficial institutions, such as the "Taipei Economic and Cultural Office" and comparable agencies in ASEAN countries.⁶⁸ In light of this dilemma faced by Taiwan, and considering these IIAs as Taiwan's informal diplomatic assertiveness; it remains an open question whether and to what extent Taiwan and its investors can enforce these agreements.

Such worries unfortunately came to fruition in the case of Vietnam's anti-China riots several years ago. . In 2014, there was a series of massive anti-China protests across Vietnam in response to the Chinese government's aggressive actions in a disputed area of the South China Sea.⁶⁹ Many of the factories owned by Taiwanese enterprises were accidentally attacked because the protestors could not distinguish whether a company with a Chinese name was based in China or Taiwan.⁷⁰ This incident revealed the failure of, and the deficiencies in, the investment protection mechanism between Taiwan and Vietnam, as well as other ASEAN partners, which is also believed to be the critical factor that triggered Taiwan to formulate its NSP and place IIA reform on the negotiation table.⁷¹ To conclude, as also recognized by the Taiwanese

66. *Id.* at 164–67.

67. Horia Ciurtin, *A New Era in Cross-strait Relations? A Post-sovereign Enquiry in Taiwan's Investment Treaty System*, in *CHINA'S INTERNATIONAL INVESTMENT STRATEGY* 290, 301 (Julien Chaisse ed., 2019).

68. Liu, *supra* note 55, at 140–41; *see also* Hsieh, *supra* note 17, at 213–16.

69. *See* Phuong Hoang, *Domestic Protests and Foreign Policy: An Examination of Anti-China Protests in Vietnam and Vietnamese Policy Towards China Regarding the South China Sea*, 6 *J. ASIAN SEC. & INT'L AFFS.* 1, 14–17 (2019).

70. *Id.* at 15; *see also* Jonathan Kaiman, *Vietnamese Workers Torch Foreign Factories over Chinese Sea Claims*, *GUARDIAN* (May 14, 2014, 2:19 A.M.), <https://www.theguardian.com/world/2014/may/14/vietnamese-workers-torch-foreign-factories-over-chinese-sea-claims>.

71. Hsieh, *supra* note 17, at 220.

government officials interviewed for this article,⁷² there is an urgent need to update Taiwan's IIA framework within the Indo-Pacific region to better serve the NSP and further enhance economic ties with Taiwan's NSP partners.⁷³ The three new IIAs between Taiwan and India, Vietnam, and the Philippines, as recognized by Taiwanese government officials, are a remarkable milestone in the implementation of the NSP.⁷⁴

III. A CONTEXTUAL ANALYSIS OF TAIWAN'S RECONSTRUCTION OF CURRENT INVESTMENT TREATIES

A contextual understanding of Taiwan's new IIAs with NSP countries is essential to analyze the importance and the ramifications of entering into IIAs with NSP countries. Together with the interview results collected from Taiwanese government officials, this Section conducts a comparative analysis of these three new IIAs to highlight the innovative provisions in these legal instruments. In conjunction with the contextual analysis and the theoretical framework in the previous section, we can better understand the strategies that Taiwan has pursued to demonstrate its capacity to conclude international treaties and strengthen its independent status under international law.

A. THE STRUCTURES AND OVERVIEW OF TAIWAN'S NEW INVESTMENT AGREEMENTS WITH INDIA, VIETNAM AND THE PHILIPPINES

Built upon the general format of the IIAs, the main structures of these three IIAs are constituted by five components, namely: (1) preamble, (2) definition of the terms used in IIAs and scope of application, (3) parties' obligations, (4) settlement of disputes, and (5) final provisions.⁷⁵ According to Executive Yuan of the Office of Trade Negotiations, this structure is principally built upon the informal template which substantially refers to the investment chapter under the CPTPP

72. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51.

73. See Glaser et al., *supra* note 45, at 20.

74. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51.

75. See Liu, *supra* note 55, at 141–42.

and more recent Taiwanese IIAs (e.g., Taiwan-Japan IIA).⁷⁶ However, due to different conditions and backgrounds surrounding negotiations, there are still some variations among these three IIAs, even though they were negotiated and signed during almost the same period. This article will address certain prominent provisions embodied in the three newly signed IIAs between Taiwan and India, Vietnam, and the Philippines in the following sections.

1. The preamble, which emphasizes the importance of parties' regulatory spaces

The preamble of an international treaty plays a fundamental role in the interpretation of that treaty.⁷⁷ According to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the treaty terms shall be, *inter alia*, interpreted in light of a treaty's context, object, and purpose.⁷⁸ The preamble of IIAs highlights the treaties' purpose and is thus of key importance in guiding the interpretation of treaties,⁷⁹ particularly when IIAs' treaty purposes include a more "balanced" approach to emphasize public interests. For instance, in addition to reiterating the importance of economic development, some IIA preambles emphasize the importance of environmental protections, human rights protections, and sustainable development.⁸⁰ Such "balanced" preambles can encourage arbitral tribunals to take host states' public interests into account and, to a certain extent, respect host states' right to regulate when adjudicating investment disputes.⁸¹

76. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51.

77. See Makane Moïse Mbengue, *Preamble*, para. 3 in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2006).

78. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

79. See Mbengue, *supra* note 77, para. 4.

80. UNCTAD, *Taking Stock of IIA Reform: Recent Developments*, IIA ISSUES NOTE, June 2019, at 3, https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf; see, e.g., Agreement Between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment, Japan-Jordan, Nov. 27, 2018, pmb., <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5808/download> (maintaining the importance of not weakening "health, safety and environmental measures of general application" as a goal in the preamble).

81. See Alison Giest, Comment, *Interpreting Public Interest Provisions in*

While the three IIAs were concluded in comparatively close sequence, only the preamble of the Taiwan-India IIA explicitly expresses both parties' willingness to reaffirm "the right of the authorities to regulate investments in their territory in accordance with their law and policy objectives."⁸² The Taiwan-Philippines IIA and the Taiwan-Vietnam IIA instead only address the economic benefits that will be brought about by these IIAs, such as creating "favorable conditions for investment" and "stimulating business initiative(s)."⁸³ A Taiwanese government official who engaged in the negotiation process for these three new IIAs explained that the reason why the preamble of the Taiwan-India IIA specifically identifies a host state's right to regulate is because India insisted that the IIA reflect the elements listed in the Model Text for the Indian Bilateral Investment Treaty to emphasize the desire to balance the interests between investors and host states.⁸⁴ Hence, compared with the Taiwan-Vietnam and Taiwan-Philippines IIAs, the Taiwan-India IIA leaves more regulatory spaces for both treaty parties to balance economic interests and public values.

2. Different scope of "investment" under the three IIAs

The definition of "investment" is the foremost issue that is addressed during an investment dispute. Only those assets owned or controlled by investors which qualify or fall within the scope of "investment," as defined in the IIAs, are entitled to enjoy the substantive protections and bring the investment claim.⁸⁵

International Investment Treaties, 18 CHI. J. INT'L L. 321, 338 (2017).

82. Bilateral Investment Agreement Between the Taipei Economic and Cultural Center in India and the India Taipei Association in Taipei, India-Taiwan, Dec. 18, 2018, pmbl. [hereinafter Taiwan-India IIA], <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=Y0050069>.

83. Agreement Between the Taipei Economic and Cultural Office and the Manila Economic and Cultural Office in Taiwan for the Protection and Promotion of Investment, Phil.-Taiwan, Dec. 7, 2017, pmbl. [hereinafter Taiwan-Philippines IIA], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=Y0050063>; Agreement Between the Taipei Economic and Cultural Office in Viet Nam and the Viet Nam Economic and Cultural Office in Taipei on the Promotion and Protection of Investments, Taiwan-Viet., Dec. 18, 2019, pmbl. [hereinafter Taiwan-Vietnam IIA].

84. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51.

85. See Barton Legum, *Defining Investment and Investor: Who is Entitled to Claim?*, 22 ARB. INT'L 521, 521 (2006).

While there is no single uniform definition for the term “investment,” the developments in IIA practices can be summarized as three different regulatory approaches: (1) asset-based definitions, (2) restrictive-list definitions, and (3) mixed approach or with additional requirements.⁸⁶

Investment arbitration practices, on the other hand, have tried to provide specific requirements for finding an investment. For instance, the well-known “Salini test,” which was proposed by the tribunal of *Salini v. Morocco*, elucidates that the basic features of an “investment” involve (1) a certain duration, (2) an assumption of risk, (3) a substantial financial contribution, and (4) a significance for the host state’s development.⁸⁷ The tribunal in *Joy Mining v. Egypt* further introduced “the regularity profit and return” as another independent criterion.⁸⁸ Recently, some tribunals have even indicated that an investment must be made in good faith and in accordance with the domestic laws of the host state.⁸⁹ The elements endorsed above to some extent enhance legal certainty by providing more objective criteria by which to assess whether a given asset or economic interest constitutes an “investment” protected by IIA—despite the parties’ subjective considerations.

The three recently signed Taiwanese IIAs had the benefit of consideration foregoing struggle to define the term “investment.” They adopted the mixed regulatory model to positively define the meaning of “investment” and create a list to exemplify those assets that are counted as protected investments under the IIAs.⁹⁰ Although there are significant similarities, there are two variations between the Taiwan-India IIA and the IIAs with Vietnam and the Philippines regarding the definition “investment.” First, the requirement of “significant contribution to the host state’s development” is contained only in Article 1.3

86. See Jan Asmus Bischoff & Richard Happ, *The Notion of Investment*, in *INTERNATIONAL INVESTMENT LAW* 495, 500–03 (Marc Bungenberg et al. eds., 2015).

87. *Salini Construttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 ILM 609 (2003).

88. *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug 6, 2004), 19 ICSID Rev. 486 (2004).

89. *Gustav F W Hamester GmbH v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf>.

90. Taiwan-India IIA, *supra* note 82, art. 1.3; Taiwan-Vietnam IIA, *supra* note 83, art. 1.2; Taiwan-Philippines IIA, *supra* note 83, arts. 2.1, 2.3.

of the Taiwan-India IIA⁹¹ and not in the IIAs with Vietnam and the Philippines. Second, both the Taiwan-India IIA and the Taiwan-Vietnam IIA incorporate so-called “legality clauses,”⁹² which explicitly condition IIA protections on investments complying with the laws and regulations of treaty parties. These additional requirements will further clarify the scope of “investment” under the IIAs between Taiwan and India, as well as Vietnam.

3. Clarifying the application of substantive protections

Numerous reforms relating to the substantive investment protections of IIAs have been considered or adopted in response to concerns regarding overly broad interpretation and application of these provisions.⁹³ Following such trends, the three newly signed IIAs between Taiwan and India, Vietnam, and the Philippines incorporate certain elements, which can contribute to striking a better balance between investment protection and states’ regulatory space.

For instance, while incorporating the traditional model of the fair and equitable treatment standard,⁹⁴ Article 4.2 of the Taiwan-Philippine IIA exhaustively lists those circumstances that would be considered violations of the FET standard. Examples include: denying justice, egregious violations of due process, exercising manifestly abusive treatment, and engaging in manifestly unjustified discrimination.⁹⁵ The same Article further clarifies that the FET standard in this IIA would neither create additional substantive rights other than customary international law nor automatically establish a FET standard violation based on a breach of another provision of this agreement or other international agreements.⁹⁶ Similar clarifications regarding the scope of the FET standard are also adopted in the Taiwan-Vietnam IIA.⁹⁷ Notably, the Taiwan-

91. Taiwan-India IIA, *supra* note 82, art. 1.3.

92. Regarding the concept of legality clause in international investment agreements, see Tsai-yu Lin et al., *The Tension Between Investors’ Criminal Misconduct Under Host State Law and Investment Treaty Protection: An Unsettled Challenge for Investment Arbitral Tribunals*, 14 CONTEMP. ASIA ARB. J. 83, 87–88 (2021).

93. UNCTAD, *supra* note 9, at 15–29.

94. Taiwan-Philippines IIA, *supra* note 83, art. 4.1.

95. *Id.* art. 4.2.

96. *Id.*

97. Taiwan-Vietnam IIA, *supra* note 83, art. 6.

India IIA removes the FET standard entirely. It alternatively returns to the minimum standard of treatment toward foreign investors accorded by customary international law, including prohibitions against the denial of justice, breach of due process, discrimination, and manifestly abusive treatment.⁹⁸ Article 3.4 of the Taiwan-India IIA further creates a procedural hurdle by requiring the arbitral tribunal to take into account whether a foreign investor has pursued action for remedies through the host state's domestic judicial system prior to initiating an investment claim. These additional conditions significantly reduce the protection level of the FET standard to foreign investors.

An expropriation clause is another investment protection provision which has been frequently invoked by claimants in investment arbitration to challenge host states' regulatory measures, because the boundary between indirect expropriation and legitimate government action is often blurred.⁹⁹ Therefore, IIA parties must endeavor to clarify the scope and meaning of indirect expropriation and distinguish it from host states' legitimate regulatory measures so as to harmonize the needs between investment protection and host states' public interests.¹⁰⁰

Such efforts are reflected in Taiwan's new IIAs with India, Vietnam and the Philippines. First, they regulate both direct expropriation and indirect expropriation. They also provide several factors to determine whether a governmental action is equivalent to expropriation.¹⁰¹ Second, both the Taiwan-India IIA and the Taiwan-Philippine IIA carve out non-discriminatory regulatory measures by the host party, with the purpose of achieving legitimate public welfare objectives (e.g., public health, safety and environment) from the scope of

98. Taiwan-India IIA, *supra* note 82, art. 3.1.

99. See Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 GLOBAL BUS. L. REV. 189, 196–97 (2013); see also Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 481–84 (2008).

100. See Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 388 (2017).

101. The factors include the economic impact of the action, the duration of the measure, the object, context and intent of the measure, whether the actions breach the parties' prior binding written commitment to the investor, and also the principle of proportionality. Taiwan-Philippines IIA, *supra* note 83, annex I, cl. 3; Taiwan-India IIA, *supra* note 82, art. 5.3.

“expropriation.”¹⁰² Third, the provisions of expropriation shall not apply to the issuance of compulsory licenses, or the revocation, limitation or creation of intellectual property rights that are consistent with the WTO TRIPS Agreement.¹⁰³ These regulatory schemes are in line with the regulatory models of other new-generation IIAs.¹⁰⁴

The non-discriminatory treatments, which are comprised of national treatment (NT) and most favored nation treatment (MFN), represent another core pillar of the substantive protections in the IIAs. In contemporary IIA practices, there are also increasing efforts to clarify the application of these two non-discriminatory treatment clauses, such as (1) emphasizing that the NT and MFN shall be accorded to foreign investors and their investments only if they and their respective domestic or third country competitors are in “like circumstances,”¹⁰⁵ and (2) limiting the scope of the MFN treatment by excluding its application to dispute resolution procedures or mechanisms.¹⁰⁶ In terms of NT, reform option policies (1) and (2), which were not included in previous versions, are all adopted by the new Taiwan IIAs with India, Vietnam and the Philippines.¹⁰⁷ Regarding MFN, reform option policies (1) and (2) are also reflected in new Taiwan IIAs with Vietnam and the Philippines. However, the MFN clause is totally excluded in the Taiwan-India IIA.¹⁰⁸ According to Taiwanese government officials, India had insisted that MFN not be included in the IIA because it has suffered in

102. Taiwan-Philippine IIA, *supra* note 83, art. 7.4; Taiwan-India IIA, *supra* note 82, art. 5.5.

103. Taiwan-Philippine IIA, *supra* note 83, art. 7.5; Taiwan-India IIA, *supra* note 82, art. 2.4(c).

104. See, e.g., Trans-Pacific Partnership, art. 9.8, annex 9-B, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (providing an example of regulatory modes of expropriation clauses in the new generation IIAs); see also The Comprehensive and Economic Trade Agreement between the European Union and Canada, art. 8.12, annex 8-A, 2017 O.J. (L 11) 23.

105. See Guiguo Wang, *Likeness and Less Favourable Treatment in Investment Arbitration*, 3 J. INT'L & COMP. L. 73, 74–75 (2016).

106. See Suzy H. Nikiéma, Int'l Inst. for Sustainable Dev. [IISD], *The Most-Favoured-Nation Clause in Investment Treaties*, (2017), <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>.

107. Taiwan-India IIA, *supra* note 82, art. 4.1.; Taiwan-Philippine IIA, *supra* note 83, art. 3.2; Taiwan-Vietnam IIA, *supra* note 83, art. 3.

108. Compare Taiwan-India IIA, *supra* note 82, art. 4 (containing no exclusion on the MFN clause), with Taiwan-Philippine IIA, *supra* note 83, at art. 3.2(c) (excluding dispute resolution procedures from MFN clause), and Taiwan-Vietnam IIA, *supra* note 83, art. 4(3) (same).

recent investment disputes caused by investors' MFN claims brought.¹⁰⁹ Having learned from such experiences, India has decided not to make commitments regarding MFN in its future IIAs.¹¹⁰

Last but not least, there are some unique provisions in these three IIAs aimed at cementing the scope of foregoing substantive provisions. For instance, Article 1.4 of the Taiwan-Philippine IIA precludes the possibility that the breach of non-specific commitments, or the refusal to issue, renew or maintain a subsidy or grant based on the terms or conditions attached to such subsidy or grant, will be considered a breach of FET standards, or expropriation.¹¹¹ Such exclusion reflects the majority's perspective among arbitral tribunals regarding the boundary between the foreign investor's "legitimate expectation" and the host state's right to alter its domestic legal system.¹¹² In other words, except when the host state has made a specific commitment to foreign investors, the general modification of the host state's laws or regulations will not breach its obligations under the IIA. Further, all three IIAs provide transparency requirements which call for each government to disclose all regulations and measures that pertain to the investment regime in a timely manner.¹¹³ The transparency provisions in these new IIAs could benefit investors in both the pre-establishment and the post-establishment stages. Notably, Article 7 of the Taiwan-Vietnam IIA specifies that the treaty parties shall accord investors from other parties' non-discriminatory treatment in

109. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51. The trigger case is the investment dispute *White Industries v. India*. In that case, the arbitral tribunal applied the MFN clause import an obligation to "provide effective means of asserting claims and enforcing rights" from India-Kuwait IIA to the India-Australia IIA, does not stipulate this obligation at all. *White Industries Australia Limited v. Republic of India*, Final Award, 105–18 (UNCITRAL 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

110. Amrit Singh, *Avoiding the MFN Clause: One Step Forward, Two Steps Back?*, KLUWER ARB. BLOG (Dec. 1, 2018), http://arbitrationblog.kluwerarbitration.com/2018/12/01/avoiding-mfn-clause-one-step-forward-two-steps-back/?doing_wp_cron=1592812159.9216771125793457031250. Video Interview with Colleagues of the Office of Trade Negotiations and Executive Yuan (Taiwan) (May 20, 2020).

111. Taiwan-Philippines IIA, *supra* note 83, art. 1.4.

112. *See, e.g.*, *Saluka Inv. BV (Neth.) v. Czech*, Partial Award, paras. 304–08 (UNCITRAL 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>.

113. Taiwan-India IIA, *supra* note 82, art. 10; Taiwan-Philippines IIA, *supra* note 83, art. 18; Taiwan-Vietnam IIA, *supra* note 83, art. 19.

the case of an outbreak of civil strife.¹¹⁴ This provision was sought by Taiwan during the negotiations to provide greater protections to Taiwanese investors and ease their concerns regarding any possible protests and riots in the future.

4. Non-derogation clauses and exceptions are introduced in three new IIAs

There is an increasing trend in IIAs to include so-called “non-derogation” provisions¹¹⁵ acknowledging that it is inappropriate for host states to attract foreign investment by “lowering domestic environmental or labour standards and requiring parties not to waive or otherwise derogate from their domestic labor laws for this approach.”¹¹⁶ Inserting these provisions in IIAs—which reserve the right to protect host states’ public interests (e.g., protecting the environment, public health, and labor rights or even enhancing the sustainable development of host states)—is an affirmative approach to equate the importance of host states’ right to regulate with investor protections.¹¹⁷

Another IIA provision designed to preserve regulatory space for IIA parties is the exception clause. Similar to the non-derogation clauses, the purpose of incorporating exception clauses in IIAs is to provide a “safety valve” for IIA parties to exempt obligations from their treaty if compliance derogates from the public policy goals listed in the exception clauses.¹¹⁸ The exception clauses are either generally applied to all obligations in the IIAs, or they provide exemption from certain specific obligations. In practice, many IIAs allow parties to take measures in order to protect human or animal health, conserve

114. Taiwan-Vietnam IIA, *supra* note 83, art. 7.

115. See, e.g., 2012 U.S. Model Bilateral Investment Treaty, OFF. U.S. TRADE REPRESENTATIVE, arts. 12–13 (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited June 10, 2022).

116. See J. Anthony VanDuzer, *Sustainable Development Provisions in International Trade Treaties: What Lessons from International Investment Agreements?*, in *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW* 142, 162 (Steffen Hindelang & Markus Krajewski eds., 2016).

117. See Lise Johnson, Lisa Sachs & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. TRANSNAT'L L. 58, 94–106 (2019).

118. See J. ANTHONY VANDUZER ET AL., *INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS* 156 (Commonwealth Secretariat ed. 2013), https://www.iisd.org/system/files/meterial/6th_annual_forum_commonwealth_guide.pdf.

exhaustible natural resources, and serve other public interests. The precise treaty language is sometimes varied to fulfill the interests of the IIA parties.¹¹⁹

In this regard, the regulatory models are slightly different in the three new Taiwanese IIAs. Concerning the non-derogation provisions, only the Taiwan-Vietnam IIA incorporates this clause, which states that the IIA shall not be construed to prevent treaty parties from adopting, maintaining or enforcing any measures they consider appropriate, to ensure that investment activities are undertaken in a manner consistent with environmental, health, or other regulatory objectives.¹²⁰ In contrast, all three new IIAs embody detailed exception clauses, which range from general exceptions,¹²¹ to security exceptions¹²² to prudential measures for financial services.¹²³ The general exception clauses in these three new IIAs are more homogeneous with regard to their content, which basically makes reference to the general exception clause in Article XX of the WTO General Agreement on Tariffs and Trade 1994 (GATT 1994), sharing three elements: (1) an exhaustive list of permissible policy objectives, (2) a nexus requirement, denoting the required link between a state measure and a permissible objective (frequently used nexus requirements include the terms “necessary for,” “relating to,” and “designed and applied for”), and (3) prohibitions of both discriminatory and arbitrary application and disguised restrictions on investment.¹²⁴ However, there are

119. See, e.g., Investment Promotion and Protection Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, Nigeria-Sing., Nov. 4, 2016, art. 28, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5410/download>; Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates, Colom.-U.A.E., Nov. 12, 2017, art. 11, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download>.

120. Taiwan-Vietnam IIA, *supra* note 83, art. 17.

121. Taiwan-Philippines IIA, *supra* note 83, art. 16; Taiwan-India IIA, *supra* note 82, art. 31.1; Taiwan-Vietnam IIA, *supra* note 83, art. 13.

122. Taiwan-Philippines IIA, *supra* note 83, art. 17; Taiwan-India IIA, *supra* note 82, art. 32; Taiwan-Vietnam IIA, *supra* note 83, art. 14.

123. Taiwan-Philippines IIA, *supra* note 83, art. 12; Taiwan-India IIA, *supra* note 82, art. 30; Taiwan-Vietnam IIA, *supra* note 83, art. 15.

124. See Barton Legum & Ioana Petculescu, *GATT Article XX and International Investment Law*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 340, 351–62 (Roberto Echandi & Pierre Sauvé eds., 2013) (providing discussions of GATT Article XX-like general exception clauses in international investment agreements).

some variations with regard to the content of security exceptions. In the Taiwan-Vietnam IIA, the security exception clause is plainly formulated, simply recognizing the rights of IIA parties to apply measures they consider necessary for the fulfillment of obligations regarding the maintenance of international peace or the protection of their own security interests.¹²⁵ The IIAs with India and the Philippines, however, specify more detailed grounds that may constitute those actions adopted by the IIA parties aimed at ensuring their essential security interests, which include but are not limited to action relating to traffic in arms, action taken so as to protect critical public infrastructure, or action relating to fissionable and fusionable materials.¹²⁶ Notably, Taiwan and India further lay out their understanding of security exceptions in the Annex as an integral part of the Taiwan-India IIA.¹²⁷ This additional clarification put forward by Taiwan and India is relatively new to the investment treaty practice; it offers useful guidance for the interpretation and implementation of the security exception in the Taiwan-India IIA and prevents the security exception from being abusively employed.

5. Imposing obligations upon foreign investors

Foreign investments bring both positive and negative impacts for host states. Foreign capital flows assist host states in funding infrastructure programs and enhancing public welfare. However, individuals might suffer from multinational enterprises due to the external cost and negative social or environmental impacts from their business activities.¹²⁸ As a result, while operating their businesses, the role of private entities in promoting social interests has been gradually highlighted. The emerging concept of corporate social responsibility (CSR) is premised on the idea that corporations have a degree of responsibility for the social and environmental

125. Taiwan-Vietnam IIA, *supra* note 83, art. 14.

126. Taiwan-Philippines IIA, *supra* note 83, art. 17; Taiwan-India IIA, *supra* note 82, art. 32.

127. Taiwan-India IIA, *supra* note 82, annex.

128. See, e.g., Pratikshya Sapkota & Umesh Bastola, *Foreign Direct Investment, Income, and Environmental Pollution in Developing Countries: Panel Data Analysis of Latin America*, 64 ENERGY ECON. 206, 208, 211 (2017) (providing an example of the academic discussion on this issue).

implications of their businesses.¹²⁹ International organizations, such as the UN Working Group on Business and Human Rights and OECD, have passed several soft law documents, including the UN Guiding Principles on Business and Human Rights, to impose certain obligations on transnational corporations.¹³⁰ This suggests a growing international consensus that foreign investors should bear the duties of respecting host states' regulatory spaces and refraining from maintaining investments that would bring harm to inhabitants.¹³¹ Although those documents are soft law and of a non-binding nature, if IIAs incorporate the core elements of CSR into their contexts, they can, to a certain extent, mitigate the asymmetrical nature of IIAs by imposing legal obligations on foreign investors.

Among the three new Taiwanese IIAs, the concepts of investors' obligations, together with CSR, are exclusively introduced by the Taiwan-India IIA in an independent chapter. Article 11 of the Taiwan-India IIA requires investors and their investments to comply with the domestic laws of the parties, comprised of laws and regulations governing anti-corruption and tax and corporate governance.¹³² Article 12 further encourages foreign enterprises to incorporate internationally recognized CSR principles into their internal management policies, such as respecting the environment, human rights and community relations.¹³³ While the terms "shall endeavor to" or "voluntarily" express no legal requirements, and while the IIA does not stipulate a corresponding result if an investor violates the foregoing provisions—as indicated in the footnote of Article 25.3—mitigating factors can include any harm or damage caused by the investor to the environment and other public interests of the local community.¹³⁴ Hence, they could be considered mitigating factors for the arbitral tribunal in determining the amount of monetary damages during the arbitral proceeding.

129. See generally Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 *BUS. ETHICS Q.* 739, 740 (2011).

130. U.N. Off. of the High Comm'r for Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04, at 2 (June 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guiding_principlesbusinesshr_en.pdf.

131. See, e.g., *id.*; OECD, *OECD Guidelines for Multinational Enterprises*, 13–15 (2011), <https://www.oecd.org/corporate/mne/48004323.pdf>.

132. Taiwan-India IIA, *supra* note 82, art. 11.

133. *Id.* art. 12.

134. *Id.* art. 25.3 n.1.

6. Novel and comprehensive ISDS procedures

Over the past decades, a “legitimacy crisis” has beleaguered the international investment legal regime, and the investor-state dispute settlement (“ISDS”) system has been accused of bearing responsibility for such criticism.¹³⁵ There are concerns that the current mechanism exposes host states to additional legal and financial risks. For instance, it creates the risk of a “regulatory chill” on legitimate government policymaking, it results in inconsistent arbitral awards, and it is insufficient in terms of ensuring transparency, selecting independent arbitrators, and guaranteeing due process.¹³⁶ With a view toward addressing the inefficiency and impartiality of dispute settlement mechanisms in Taiwan’s old versions of investment agreements, all three IIAs between Taiwan, India, Vietnam, and the Philippines have redesigned dedicated ISDS procedures, aligning them with contemporary trends in ISDS reform.

First, prior to the submission of a claim to arbitration, these three new IIAs require attempting an amicable approach to resolution of the dispute, such as consultation, negotiation or other third-party procedures.¹³⁷ What’s more, the Taiwan-India IIA again embraces the rule of exhaustion of local remedies under customary international law. Hence, the claimants can only bring a matter to arbitration after they have sought remedies from relevant domestic courts or administrative institutions of the host states, and have failed to reach a satisfactory resolution.¹³⁸ The rule of exhaustion of local remedies aims to show respect to the host state’s sovereignty by “affording its domestic legal system the opportunity to settle the dispute before the initiation of international arbitration.”¹³⁹ The

135. See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1523 (2005) (providing critical discussion of the “legitimacy crisis” in the ISDS system and how it could be minimized).

136. See, e.g., *id.* at 1582–87; Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A Comparative and International Constitutional Law Framework*, 20 *J. INT’L ECON. L.* 649, 653–54 (2017); Peter Nunnenkamp, *Investor-state Dispute Settlement: Are Arbitrators Biased in Favor of Claimants?*, 3–4 (Kiel Inst. For the World Econ., Pol’y Brief No. 105, 2017), <https://d-nb.info/112978939X/34>.

137. Taiwan-India IIA, *supra* note 82, art. 15.3; Taiwan-Philippines IIA, *supra* note 83, art. 14(4); Taiwan-Vietnam IIA, *supra* note 83, art. 18(4).

138. Taiwan-India IIA, *supra* note 82, art. 15.4.

139. Int’l J. Legal Sci. & Innovation, *Principles of International Law in International Investment Dispute*, IJLSI (June 27, 2019) (citing Ambiente

policy rationale of returning to this customary international law standard is to prevent foreign investors from recklessly challenging host states' public policies through investment arbitration.¹⁴⁰ In addition, numerous innovative provisions are found in the Taiwan-India IIA. For instance, a purely commercial dispute arising from an alleged breach of contract cannot be submitted to the arbitral tribunal.¹⁴¹ Moreover, the Taiwan-India IIA deprives investors of the right to bring investment arbitration if their investments were made through corruption or any other illegal behaviors.¹⁴²

Second, all three IIAs comprehensively stipulate the arbitrator's eligibility and impartiality in addressing concerns regarding a lack of impartiality or competence in arbitral proceedings. The negative qualifications for the arbitrators, which are primarily built upon the principle of preventing conflicts of interest, include indicating that the arbitrator shall not be of the same nationality as the investor or a national of the disputing party, shall not be affiliated with disputing parties, and shall not have an interest in the outcome of said arbitration.¹⁴³ The Taiwan-India IIA further points out that there is justifiable doubt as to an arbitrator's impartiality if he or she has been a representative of the appointing party in the preceding three years before the arbitration (namely, "double-hatting" or "dual role" issues), or if the arbitrator has publicly advocated a clear position on said dispute.¹⁴⁴ On the other hand, the positive qualifications for the arbitrator primarily highlight his or her professional background and experience, such as specifying that the arbitrators shall possess relevant expertise

Ufficio S.P.A. v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 602 (Feb. 8, 2013), <https://www.ijlsi.com/principles-of-international-law-in-international-investment-dispute/>.

140. India insisted upon the rule of exhaustion of local remedies during the IIA negotiations. See Prabhath Ranjan et al., *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?*, 29 (Brookings India IMPACT Series No. 082018, 2018). However, it is worth mentioning that Taiwan has striven to reduce the exhaustion of local remedies from five years (which is the default setting in Model Text for the Indian Bilateral Investment Treaty) to four years in the hope of shortening the duration of experiencing inefficient judicial process in India and inspire confidence in Taiwanese investors. Video Interview with Colleagues of the Office of Trade Negotiations, *supra* note 110.

141. Taiwan-India IIA, *supra* note 82, art. 13.3.

142. *Id.* art. 13.4.

143. *Id.* art. 17.1; Taiwan-Philippines IIA, *supra* note 83, art. 14(10); Taiwan-Vietnam IIA, *supra* note 83, art. 18.9-10.

144. Taiwan-India IIA, *supra* note 82, art. 18.10(b).

in public international law, international trade and investment law.¹⁴⁵ Moreover, the Taiwan-India IIA establishes an overarching mechanism and enacts a set of rules to manage the entire arbitrator appointment procedure, such as requiring arbitrators to disclose certain information to prove their independence or impartiality, regulating arbitrators' conduct during the arbitration, and addressing standards and procedures for disputing parties to challenge arbitrators due to a lack of impartiality or independence.¹⁴⁶

Third, the appeal of making investment arbitral proceedings transparent is also reflected in the Taiwan-India IIA. Efforts to enhance the transparency of ISDS can be set out in three approaches: (1) availability of documents and information, (2) access to hearings, and (3) third-party submissions and participation.¹⁴⁷ All of these options are adopted by the Taiwan-India IIA. For example, Article 21 of the Taiwan-India IIA obliges the respondent to disclose documents and written submissions relating to the dispute to the public, such as the notice of arbitration, pleadings on jurisdiction and merits, third-party submissions, and decisions or awards issued by arbitral tribunals.¹⁴⁸ Hearings shall in general be held in public, except for those involving confidential information and other matters, where the tribunal considers public access to a hearing infeasible.¹⁴⁹ Third-party participants, which include *amicus* submissions and expert opinions, are another indicator in evaluating the scale of transparency in investment arbitral proceedings. Although it is not specifically mentioned, Article 21.4 of the Taiwan-India IIA provides that the "non-disputing party" may make submissions regarding the interpretation of the IIA, which should also consist of relevant NGOs at stake and other potential *amicus curiae*.¹⁵⁰ Article 24 further empowers the arbitral tribunal to appoint experts to report on any factual issue raised by the disputing parties concerning the environment, health, safety, and other technical matters.¹⁵¹ By

145. *Id.* art. 17.1; Taiwan-Philippines IIA, *supra* note 83, art. 14.10(e); Taiwan-Vietnam IIA, *supra* note 83, art. 18.9(e).

146. Taiwan-India IIA, *supra* note 82, art. 18.

147. UNCTAD, International Investment Agreements: Key Issues, Vol. II, 75–77, UNCTAD/DIAE/IA/2011/6, U.N. Sales No. E.11.II.D.16 (2011), https://unctad.org/system/files/official-document/iteiit200410v2_en.pdf.

148. Taiwan-India IIA, *supra* note 82, art. 21.1.

149. *Id.* art. 21.2.

150. *Id.* art. 21.4.

151. *Id.* art. 24.

establishing a more inclusive arbitral proceeding, these provisions can assist arbitrators in adjudicating increasingly complicated investment disputes concerning both private and public interests.

Fourth, the substance of the final award issued by the arbitral tribunal and the subsequent enforcement proceedings are also addressed by these new IIAs. The three IIAs set restrictions providing that the arbitral tribunal can award monetary compensation for a breach of the obligations under the IIAs.¹⁵² Additionally, the new Taiwanese IIAs vis-à-vis India and the Philippines impose obligations on contracting parties to enforce the investment award rendered by the arbitral tribunal in accordance with their own countries' domestic legal proceedings.¹⁵³

Fifth, interactions between IIAs and other international legal domains are frequently triggered by disputing parties, arbitral tribunals and academia. Since international investment law is not a self-contained regime, the content of IIAs should be sufficiently inclusive to accommodate other international legal rulings if the investment dispute concerns not only the host state's obligation under IIA, but also public interests, such as environmental protection, public health, and sustainable development objectives of the host state. Aligned with the foregoing developments, all of the three new IIAs provide that the scope of the governing law for interpretation of the IIAs by the arbitral tribunal shall cover not only the IIAs, but also any applicable rules of international law.¹⁵⁴

Prominently, the Taiwan-India IIA further incorporates innovative provisions to prevent potential legal conflicts between the IIA and other international treaties. For example, when interpreting the provisions in the IIA, the arbitral tribunal shall have the presumption of consistency between relevant international agreements.¹⁵⁵ This provision is a reflection of Article 31.3(c) of VCLT, which highlights the importance of systematic interpretation by international adjudicators.¹⁵⁶

152. *Id.* art. 25.3; Taiwan-Philippines IIA, *supra* note 83, art. 14.16(a); Taiwan-Vietnam IIA, *supra* note 83, art. 18.16(a).

153. Taiwan-India IIA, *supra* note 82, art. 26.4; Taiwan-Philippines IIA, *supra* note 83, art. 14.18.

154. Taiwan-India IIA, *supra* note 82, art. 22.3; Taiwan-Philippines IIA, *supra* note 83, art. 14.20; Taiwan-Vietnam IIA, *supra* note 83, art. 18.19.

155. Taiwan-India IIA, *supra* note 82, arts. 22.3, 33.

156. *See* VCLT, *supra* note 78, art. 31.3(c) ("There shall be taken into account, together with the context . . . any relevant rules of international law

In addition, if the claimant files a claim under the IIA while simultaneously encouraging its home country to initiate a separate claim with the identical facts in another dispute resolution forum, the issue of parallel proceedings is implicated. Article 14 of the Taiwan-India IIA states that if two claims can have a “significant impact” on each other, the arbitral tribunal shall either delay its proceedings until the decision is made in another dispute settlement forum, or ensure that it would take into account any decision rendered by that dispute settlement forum in its own decision or award.¹⁵⁷ This provision represents the application of the principle of judicial comity, which authorizes the arbitral tribunal to exercise its own discretion to decide whether to stay its jurisdiction over the case if there is a parallel proceeding adjudicating the same issue.¹⁵⁸ Such a provision can assist different international judicial institutions in mediating potential jurisdictional and legal conflicts.¹⁵⁹

B. SUMMARY: INNOVATIVE IDEAS ARE INCREASINGLY
ADOPTED BY NEW TAIWANESE IIAS

The contextual analysis demonstrates that all three of the updated IIAs seek to draw a line between the breach of treaty obligations and legitimate regulatory actions, and in turn balance the host country’s public welfare and the investor’s interests. These regulatory schemes are in whole or in part aligned with the guidance recommended by the UNCTAD investment treaty reform package, which identifies the legal and policy reform options for states to conclude new-generation IIAs, such as “safeguarding the right to regulate”, “reforming investment dispute settlement”, and “ensuring responsible investment[.]”¹⁶⁰ The provisions on compliance with the laws of the host states and the introduction of the concept of CSR demonstrate Taiwan’s endeavor to ensure that foreign investment is responsible and accountable, and its desire to create a win-win scenario for foreign investors and host states. The chapter on the investor-state dispute settlement mechanism

applicable in the relations between the parties.”).

157. Taiwan-India IIA, *supra* note 82, art. 14.

158. See Thomas Schultz & Niccolo Ridi, *Comity and International Courts and Tribunals*, 50 CORNELL INT’L L. J. 577, 601–03 (2017).

159. *Id.* at 609.

160. UNCTAD, UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME 6 (2018).

is also significantly rewritten to specify the requirements before submitting the claim of arbitration, and it is inclusive to a much greater extent than prior IIAs. The investor-state dispute resolutions under these three IIAs—especially the Taiwan-India IIA—has considerably shifted from one side to the other on the spectrum: namely, from a commercial arbitration-like dispute settlement design to a court-like system with more formal and transparent procedures. Most importantly, the entire ISDS mechanism in these three IIAs is now much more effective when compared with previous versions by comprehensively laying out the procedural requirements for each stage and imposing legal obligations on contracting parties to enforce the arbitral award.¹⁶¹ With both substantive and procedural legal guarantees, these updated Taiwanese IIAs vis-à-vis its NSP counterparts will hopefully create better and mutual-benefits investment regimes for Taiwanese investors who would like to extend their investments abroad.

Notably, while isolated from the international community, Taiwan's recently signed IIAs raise awareness to the importance of enhancing the systemic relationship between the IIA itself and other branches of international law in order to prevent conflicts of law. Aside from the foregoing provisions, which can contribute to diminishing potential tensions between different legal domains in the arbitral proceeding; from a broader perspective, Article 33 of the Taiwan-India IIA explicitly addresses the relationship between the IIA and other international agreements. The first section of Article 33 reaffirms the non-hierarchical nature of different international legal orders by upholding that the present IIA shall not affect the rights and obligations of the treaty parties under any other agreements to which they are parties.¹⁶² Moreover, the second section of this Article stipulates that any inconsistency regarding the relationship between this IIA and other international agreements between Taiwan and India shall be resolved in accordance with the principles of international law.¹⁶³ These provisions are still rarely found in current IIA

161. For a description of prior Taiwanese IIA agreements, see generally Ciurtin, *supra* note 67, at 298–304.

162. Taiwan-India IIA, *supra* note 82, art. 33.1.

163. *Id.* art. 33.2; see Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONST. L. 671, 673–74 (describing the fragmentation of “specialized subfields of international law” within the ISDS system).

practices, which directly strive to harmonize the interpretation of IIAs with other international legal regimes.¹⁶⁴ Moreover, by highlighting the importance of maintaining the harmony of international legal systems, Taiwan presents its willingness to engage in international treaty-making and its capacity to make meaningful contributions to international investment governance.

Overall, the contextual analysis of the three IIAs and the interview results from the Taiwanese government officials provide a detailed picture of Taiwan's new-generation IIAs with NSP countries. The contexts of the three new IIAs with India, Vietnam and the Philippines are updated, consistent with the reform policy options suggested by the UNCTAD, which are largely reflected in the content of the IIAs. The IIA reform project in the context of Taiwan's NSP could enhance the protection level for Taiwanese investors who would like to establish their investments in NSP countries by clarifying the standard of treatment and reinforcing the function of the ISDS system. Moreover, the overall treaty design of these new IIAs is significantly different from Taiwan's prior IIAs, moving toward a more balanced model that can fairly represent Taiwan's perspectives regarding contemporary international investment governance.¹⁶⁵ The innovative elements incorporated in these three new IIAs between Taiwan and India, Vietnam and the Philippines are summarized below.

Table 3: Summary of Taiwan's updated IIAs vis-à-vis India, Vietnam and the Philippines

164. See Peters, *supra* note 163, at 688–89 (2017).

165. To date, over 50% of Taiwanese IIAs were signed before 2010, with comparatively plain provisions, from the perspectives of both investment protections and host states' right to regulate. See Ciurto, *supra* note 67, at 298–304.

	Taiwan-India	Taiwan-Vietnam	Taiwan-Philippines
Preamble Refers to the protection of treaty parties' public interests (e.g., public health, human rights, environment or sustainable development)	Yes	No	No
Scope of investment Include "legality clause" or emphasize the investment shall contribute to the host state's development	Yes	Yes (Only includes legality clause)	No
Standard of treatment (MFN, NT, FET, Full Protection and Security, Expropriation) Clarify the interpretation and application of these clauses	Yes (FET and MFN clauses are excluded)	Yes (But without clarifying the boundary of indirect expropriation and legitimate regulatory measures)	Yes
Non-derogation and exceptions Include general exception, security exception or similar clauses which aim to reserve policy spaces	Yes	Yes (But without non-derogation clause)	Yes (But without non-derogation clause)
Investors' obligations Introduce the CSR principles in the agreement	Yes	No	No
Dispute settlement Prevent abusive claims made by investors, improve the arbitral proceeding, introduce the appeal facility	Yes	Yes (But without introducing the appeal facility)	Yes (But without introducing the appeal facility)

IV. POLITICAL AND LEGAL IMPLICATIONS OF TAIWAN'S NEW IIAS, VIS-À-VIS NSP COUNTRIES, TO ITS FOREIGN POLICY

Building upon the international relations theories concerning treaty design and recognition, together with the contextual analysis of the three new Taiwanese IIAs vis-à-vis India, Vietnam and the Philippines, this article argues that aside from providing more favorable legal guarantee to the Taiwanese investors operating their businesses overseas, these three legal instruments strengthen Taiwan's legal competence in the international investment law regime and facilitate its statehood-building. Moreover, the successful conclusions of these three new IIAs, which contain numerous progressive IIA reforms, also serve as foundations for Taiwan to further extend its IIA network to cover other like-minded partners, such as the EU. The political and legal implications of these updated IIAs vis-à-vis Taiwan's NSP counterparts are ascertained in the following sub-sections.

A. DUAL ROLES OF TAIWAN'S NEW IIAS: PROTECTING TAIWANESE INVESTORS OVERSEAS AND EXPANDING TAIWAN'S INTERNATIONAL SPACE

The purposes for entering into IIAs between Taiwan and NSP countries are dynamic, comprising both economic and political considerations. From an economic viewpoint, concluding IIAs can provide strong support from the government and enhance Taiwanese enterprises' confidence in shifting their investments from China to Indo-Pacific countries. While the NSP countries provide numerous incentives for attracting foreign investments, their investment environment and political stabilities remain of great concern to Taiwanese enterprises in establishing their investments. Therefore, theoretically speaking, as an "exporter" of investment flows, which was demonstrated in the previous section, Taiwan's core roadmap for negotiating IIAs with India, Vietnam and the Philippines seems to be having an "investment-friendly" IIA, namely, highlighting the importance of investment protection and endeavoring to raise the protection level for Taiwanese investors. Nonetheless, from an international, political perspective, the whole story might be different. As mentioned above, having more international treaties or agreements is straightforward evidence

that strengthens Taiwan's statehood.¹⁶⁶ Nonetheless, when this goal becomes one of the constraints for negotiators from Taiwan, it will conversely weaken Taiwan's bargaining power, because counterparties also realize this "Achilles' Heel" and will hence obtain more leverage to add more provisions, which they favor.¹⁶⁷

As Krasner has indicated, states will still choose to enter into a treaty, even if the substance of the treaty itself would conversely offer negative net benefits.¹⁶⁸ For Taiwan, the rights and benefits that can be brought about by the conclusion of an investment treaty, such as protecting Taiwanese investors overseas or attracting FDI to Taiwan, are not the sole objectives for Taiwanese negotiators. Instead, finalizing another treaty is also a critical consideration for Taiwan, because the conclusion of treaties is among the most intuitive evidence to strengthen the independent status of Taiwan. The Montevideo Convention of 1933 provides conventional elements of the state to be considered as a subject of international law, which specifies that a state shall possess the following qualifications: "(a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relationships with other states."¹⁶⁹ For Taiwan, whether this island bears the "capacity to enter into relations with the other states" is the most controversial criteria.¹⁷⁰ The fact that Taiwan has the ability to conclude international agreements or treaties with other sovereign states may suggest that Taiwan does have the ability to establish relationships with other states.¹⁷¹ Hence, if necessary, Taiwan might be willing to make certain compromises to facilitate the IIA negotiation process. This cost of losing certain economic benefits in the treaty is worthwhile, because it may demonstrate the fact that Taiwan is effectively exercising its sovereignty by

166. Steve Charnovitz, *supra* note 28, at 409.

167. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 51; Zoom Interview with Colleagues of the Ministry of Foreign Affairs (Taiwan) (May 15, 2020) (on file with author). *See also* Ciurtin, *supra* note 67, at 302.

168. *See* Christina J. Schneider, *Weak States and Institutionalized Bargaining Power in International Organizations*, 55 INT'L STUD. Q. 331, 334–35 (2011).

169. Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

170. CRAWFORD, *supra* note 2, at 61.

171. Pasha L. Hsieh, *Rethinking Non-recognition: The EU's Investment Agreement with Taiwan Under the One-China Policy*, 33 LEIDEN J. INT'L L. 689, 710 (2020).

showing that Taiwan possesses the legal competence to sign IIAs.¹⁷²

The contextual analysis conducted above also supports the assertion of the contribution brought by concluding IIAs toward Taiwan's legal status, and can be explained by the theories of international relations. To elaborate, the reform of Taiwan's IIAs vis-à-vis NSP countries can finally address the weaknesses of prior investment protection mechanisms, as indicated by commentators¹⁷³ and through the clarifications of the scope of standard of treatments, the improvement of dispute settlement mechanisms, and the establishment of the joint committee to conduct periodic reviews of IIAs' implementation.¹⁷⁴ These efforts to strengthen the function of IIAs, based upon an institutionalist's perspective and rational design theories, could further reduce the transaction costs arising from the cooperation between Taiwan and NSP countries in the area of bilateral investment promotion and protection.¹⁷⁵

Moreover, we cannot overlook the contribution made by investors from Taiwan and its NSP counterparts, as well as their influence over the final results of the IIA negotiations, which is emphasized by liberal theorists. For Taiwan, during the negotiation of these new IIAs, Taiwanese government officials have been working closely with representatives from industries to better reflect their concerns and interests in the IIA context.¹⁷⁶ The embedding of the standard of full protection and security, the national treatment standard, and the clause regarding protections in case of riots, for example, were all legal guarantees that Taiwanese investors were eager to include in the new IIAs.¹⁷⁷ Eventually, these clauses were well manifested in Taiwan's new IIAs with India, Vietnam and the Philippines.¹⁷⁸

172. See NINA CASPERSEN, UNRECOGNIZED STATES 111–13 (2012).

173. See Liu, *supra* note 55, at 150–64; Hsieh, *supra* note 17, at 221.

174. See Taiwan-India IIA, *supra* note 82, art. 35; Taiwan-Philippines IIA, *supra* note 83, art. 21; Taiwan-Vietnam IIA, *supra* note 83, arts. 19, 20.

175. For more analysis regarding rational design, institutional and economic theories on treaty/IIA design, see generally Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'ORG. 761 (2001); Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AM. SOC'Y INT'L L. 482 (2019).

176. Zoom Interview with Colleagues of the Office of Trade Negotiations (Taiwan) (May 15, 2020) (on file with author).

177. *Id.*

178. See discussion *supra* Part III, Section 3.

Finally, the realist's perspective should not be neglected in explaining the questions of Taiwan's incentive to reform its IIAs vis-à-vis NSP countries, and to what extent each party's bargaining power is reflected in the IIA contexts. According to a government official from the Office of Trade Negotiations, Executive Yuan (Taiwan), who had participated in the negotiations regarding Taiwan's new IIAs vis-à-vis India, Vietnam and the Philippines, the process of negotiation with India was more challenging compared with the other countries.¹⁷⁹ Considering India's geopolitical significance in the Indo-Pacific region, Taiwan would like to establish a stronger framework through which both countries can strengthen economic exchanges and cooperate on traditional and non-traditional security issues, including the threat of expanding Chinese influence in this area.¹⁸⁰ Hence, during the negotiation of the Taiwan-India IIA, the importance of reaching an agreement outweighed the substance of the final treaty context. The result was that Taiwan basically accepted to proceed with IIA negotiations with India based on India's model investment treaty template. As a capital-importing country, India perceives extensive obligations in IIAs to be risky to its regulatory spaces, and therefore, many of the IIA reform policy options suggested by UNCTAD are embodied in their model investment treaty template, and in turn, constitute the primary substance of the Taiwan-India IIA.¹⁸¹ While these host state-friendly provisions in the IIAs might not precisely fit with the interests of Taiwan, which basically serves as the capital exporting country in Taiwan-India relations, embracing those innovative and progressive reform policy options in Taiwan's new IIAs vis-à-vis NSP countries could represent a fundamental method for gaining a positive reputation and increased international visibility. In other words, these new IIAs can manifest Taiwan's resolution to promote sustainable and accountable investments to persuade other governments to engage in further bilateral or even multilateral cooperation.

All in all, by means of signing IIAs with NSP countries,

179. Zoom Interview with Colleagues of the Office of Trade Negotiations, *supra* note 176.

180. Saheli Chattaraj, *India's Act East and Taiwan's New Southbound Policy are Win-Win*, E. W. CTR. (Oct. 2, 2019), <https://www.eastwestcenter.org/publications/india's-act-east-and-taiwan's-new-southbound-policy-are-win-win>.

181. Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements*, 64 INT'L STUD. Q. 919, 921 (2020).

Taiwan hopes to strengthen political and economic relations with NSP countries with geopolitical significance and reduce its economic dependence on China, which may further achieve the purposes of both blending Taiwan into regional economic integration and expanding Taiwan's international range. The conclusion of treaties could also help tackle Taiwan's unique status in international society.¹⁸² As scholars have argued, systemic engagement in the international community may result in valuable legal instruments, including bilateral trade and investment agreements, which would in turn accord gradual forms of recognition to an unrecognized entity, such as Taiwan, under the Westphalian international law system.¹⁸³ Specifically, compared to FTAs which are constantly opposed by China because they cover increasingly complicated matters and might have stronger implications for recognizing Taiwan's sovereignty,¹⁸⁴ the nature and scope of the IIAs are relatively specific and are more akin to purely mercantile agreements, with fewer sovereignty signals involved. Hence, Taiwan has advocated for IIA negotiations as the priority with other countries at this stage, and hopefully these IIAs can serve as the building blocks for deepening bilateral relationships, such as seeking the possibility to initiate FTA negotiations in the near future.¹⁸⁵ Reforming the IIAs accommodating policy options, supported by the progressive actors (i.e., developed economies) in the international investment legal regime, can convey Taiwan's goodwill in negotiating IIAs or other economic cooperation frameworks with other like-minded countries. In the end, Taiwan's identity construction under international law could be further enhanced, because the conclusion of IIAs with powerful sovereign states or regional organizations can increase the extent of international society's recognition of Taiwan's governmental authority to sign international treaties, as well as its authority to represent the territory and people of this island.¹⁸⁶ To conclude, from a geoeconomics perspective, these three new IIAs present an ambitious framework which is

182. See Li Kua-teng, *Is Taiwan For Sale? What Is Taiwan's Legal Status According to International Law, Japan, and the US?*, NEWS LENS (Dec. 2, 2019), <https://international.thenewslens.com/feature/taiwan-for-sale-2020/128242>.

183. Hsieh, *supra* note 171, at 694.

184. See Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 DIE FRIEDENS-WARTE 59, 76–77 (2009).

185. See Hsieh, *supra* note 171, at 690. See also Hsieh, *supra* note 17, at 221.

186. See Hsieh, *supra* note 171, at 712.

prompted by the need to avoid marginalization within the Indo-Pacific region.

B. GREATER IMPLICATIONS OF SOVEREIGNTY? WILL THESE
TAIWANESE IIAS, VIS-À-VIS THEIR NSP PARTNERS, BE
MORE “OFFICIAL” AND “ENFORCEABLE”?

Taiwan’s strategic engagement with international law was evidenced in the conclusion of international agreements by adopting creative approaches. As elaborated in Section II of this article, due to its unique international status, Taiwan does not have official diplomatic relations with most countries around the world.¹⁸⁷ Instead, many countries maintain “unofficial relations” by promoting commercial, cultural, and other interactions with Taiwan.¹⁸⁸ In addition, the economic, trade and/or cultural (or similar) offices, which are usually private nonprofit corporations, are established in Taiwan and counterpart states and are authorized by governments to act as *de facto* embassies.¹⁸⁹ These semi-official agencies sometimes represent the government from each side in negotiating and signing the “treaties” or “agreements,” with the purpose of avoiding sovereignty issues.¹⁹⁰ Since most of the previous Taiwanese IIAs do not specifically clarify the nature of these legal instruments themselves, some question whether such IIAs between Taiwan and its counterparts are treaties under international law in a strict sense, and thus impose legal obligations on contracting parties.¹⁹¹ This article contends that to answer this question, it is necessary to examine whether an unrecognized entity such as Taiwan has the capacity to conclude international treaties. Then, it must examine whether Taiwan, India, Vietnam and the

187. As of today, Taiwan only maintains official diplomatic relations with 14 countries. See *Diplomatic Allies*, MINISTRY FOREIGN AFFS. REPUBLIC CHINA (TAIWAN), <https://en.mofa.gov.tw/AlliesIndex.aspx?n=1294&sms=1007> (last visited July 10, 2022).

188. See Linjun Wu, *Limitations and Prospects of Taiwan’s Informal Diplomacy*, in 35 THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER 35–36 (Jean-Marie Henckaerts ed., 1996).

189. *Id.* at 35–40.

190. See Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 110–11 (2009).

191. Hungda Chiu & Chun-I Chen, *The Status of Customary International Law, Treaties, Agreements and Semi-official or Unofficial Agreements in Law of the Republic of China on Taiwan*, 27–28 (Md. Series in Contemp. Asian Stud., No. 3, 2007); see also Liu, *supra* note 55, at 145–46.

Philippines intend to perceive their IIAs as treaties governed by international law by observing the legal status and function of those non-state institutions representing their government to negotiate and sign IIAs, together with the IIA's language and formality.

Regarding Taiwan's capability to sign and conclude treaties under the meaning of international law, Professor Liu has correctly maintained that while Article 2 of the VCLT defines "treaty" as an international agreement concluded between "states,"¹⁹² an entity that fails to be universally recognized as a sovereign state may still be eligible to be a party to treaties and assume treaty obligations.¹⁹³ This argument is also supported by former ICJ Judge Sir Gerald Fitzmaurice, who highlighted that "*de facto* authorities in control of specific territory" may still possess treaty-making capacity.¹⁹⁴ Ciurtin further suggested that "the global community no longer adheres to a rigid understanding of sovereignty," it is an error to believe that only traditional sovereign states can engage in international treaties.¹⁹⁵ Applying these insights, this article is of the view that even if the issue of Taiwan's legal status is unsettled, the island is still a subject of international law and should be competent to conclude IIAs with any other state/non-state actors in the international community.

Given Taiwan's competence in meeting treaty obligations, the next question seeks to ascertain the *opinio juris* of Taiwan and its counterparts—namely, to examine whether both contracting parties perceive the new IIAs as treaties governed by international law. Scholars have raised several elements to examine in ascertaining whether agreements negotiated and concluded by private entities can be considered treaties under international law: the legal status of the representative entity and its relations with its government, whether terms used in the documents have implications for sovereignty, and the content of the agreement concerning the power that can only be exercised by the government.¹⁹⁶ According to a Draft Article adopted by

192. VCLT, *supra* note 78, art. 2.

193. Liu, *supra* note 55, at 145.

194. Shivani Sharma, *Subjects of International Law*, SLIDESHARE (Apr. 7, 2020), <https://www.slideshare.net/shivi2022/subjects-of-international-law-231565878> (discussing *Summary Records of the 462nd Meeting*, [1958] 1 Y.B. Int'l L. Comm'n 161, 164, U.N. Doc. A/CN.4/SER.A/1958).

195. Ciurtin, *supra* note 67, at 298; *see also* CASPERSEN, *supra* note 172, at 121–22.

196. *See generally* Chien-Huei Wu, *The Many Faces of States in*

the International Law Commission concerning State Responsibility (ILC Draft Article), states shall be responsible for the conduct enacted by those entities which are *de jure* state organs or *de facto* non-official agencies empowered to exercise governmental authority.¹⁹⁷ This rule of attribution has become customary international law, and its application should also extend to any legal actions—including negotiation and conclusion of the treaty/agreement—provided they are acting within the scope of such authorization.¹⁹⁸

Under this view, this article contends that the new Taiwanese IIAs vis-à-vis India, Vietnam and the Philippines should all be considered treaties governed by international law, and thus, both parties shall comply with the obligations imposed by these IIAs. First, regarding the legal status of contracting parties, these IIAs were concluded in the name of informal representatives for both Taiwan and its counterparts. For example, the Taiwan-India IIA was signed by the “Taipei Economic and Cultural Center” in India and the “India Taipei Association” in Taiwan.¹⁹⁹ As for the Taiwan-Vietnam IIA and the Taiwan-Philippine IIA, they were made between the “Taipei Economic and Cultural Offices” and the “Vietnam Economic and Cultural Office,” and the “Manilla Economic and Cultural Office,” respectively.²⁰⁰ From the perspective of Taiwan, both the “Taipei Economic and Cultural Center” and “Taipei Economic and Cultural Offices” are organs of the Taiwanese government, because Article 2 of the Organization Act of Diplomatic Missions of Taiwan stresses that the scope of “diplomatic missions” of Taiwan includes those “representative offices or offices set up by the government in countries with which the Republic of China

International Investment Law: Supranational Organizations, Unrecognized States, and Sub-State Entities, in THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 405, 414–16 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015) (examining IIAs concluded by Taiwan in the context of how they reflect Taiwan’s status as an anomaly to the state entity).

197. See Stéphanie Caligara, Attribution of Lawful Conduct in Investment Treaty Arbitration – The “It” Problem Solved? (June 8, 2019) (unpublished working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3390563 (discussing articles 4, 5, and 8 of the ILC draft articles).

198. See generally *id.* (discussing the custom of “attribution” in the context of whether a state’s entering into a contract can be attributed to it under the ILC Articles on State Responsibility).

199. Taiwan-India IIA, *supra* note 82, pmb1.

200. Taiwan-Philippines IIA, *supra* note 83, pmb1.; Taiwan-Vietnam IIA, *supra* note 83 (title).

(Taiwan) does not have diplomatic relations.”²⁰¹ Article 6.1 of the same Regulation further stipulates that diplomatic missions, including those representative offices, shall follow the directions of the Ministry of Foreign Affairs.²⁰² Moreover, the websites of these *de facto* organs of the Taiwanese government as well as their NSP partners, further specify that the functions of these representative offices incorporate consular services, visa services, and, most importantly, the negotiation and conclusion of agreements concerning trade or investment, which can only be performed by government authorities.²⁰³

Second, the language and terms used in Taiwan’s IIAs vis-à-vis India, Vietnam and the Philippines also bring greater implications for sovereignty and infer that the governments behind the semi-official institution will be bound by these three new IIAs. For example, all of these new IIAs use terms such as “territory,” “government,” and “authority,” which to a certain extent increase the sovereign implications of these IIAs vis-à-vis their previous versions.²⁰⁴ Further, the insertion of security exceptions in these three IIAs also results in significant implications for sovereignty. Article 32 of the Taiwan-India IIA, Article 14 of the Taiwan-Vietnam IIA, and Article 17 of the Taiwan-Philippine IIA, for example, all authorize treaty parties to take action in pursuance of obligations of protecting their own essential security interests or maintaining “international peace or security.” The IIAs between Taiwan and India and the Philippines further specify that such obligations originate from the United Nations Charter.²⁰⁵ Since only sovereign states can assume legal obligations under the United Nations Charter, the inclusion of security exception clauses strengthens the official charter of Taiwan’s new IIAs vis-à-vis its NSP partners.

In addition, the inclusion of certain institutional provisions in these IIAs may imply that these agreements are indeed

201. Organization Act of Diplomatic Missions of Taiwan art. 2, FAWUBU FAGUI ZILIAOKU [Laws & Regulations Database of The Republic of China], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=E0000017#:~:text=This%20Act%20is%20promulgated%20to,resources%20allocated%20for%20diplomatic%20affairs>.

202. *Id.* art. 6.1.

203. *Who We Are*, MANILA ECON. & CULTURAL OFF., <https://www.meco.org.tw/about-us> (last visited Jan. 30, 2022); *see also About Us*, INDIA TAIPEI ASS’N, <https://www.india.org.tw/contact> (last visited Jan. 30, 2022).

204. *See, e.g.*, Taiwan-India IIA, *supra* note 82.

205. *Id.* art. 32; Taiwan-Philippines IIA, *supra* note 83, art. 17.

treaties under international law. For instance, Articles 35 and 36 of the Taiwan-India IIA, Article 21 of the Taiwan-Vietnam IIA, and Articles 19 and 20 of the Taiwan-Philippine IIA mandate that both parties establish the joint committee or coordination mechanism by designating representatives from the relevant authorities of each party to review the implementation of these IIAs and conduct periodical reviews.²⁰⁶ According to Hsieh, it is foreseeable that such institutional mechanisms may lead to ministerial-level interactions between Taiwan and NSP countries, which could “yield a constructive psychological effect for recognizing the prestige of contracting parties.”²⁰⁷ Notably, the new Taiwan-India IIA employs a more sophisticated approach to settle inter-state disputes.²⁰⁸ Unlike its previous version, which failed to provide a sound dispute resolution mechanism, the state-to-state dispute settlement clause in the new Taiwan-India IIA comprehensively stipulates the specific timeframe for arbitral proceedings, the rules for composing arbitral tribunals, and the rules of arbitration.²⁰⁹ Notably, it also opens the possible involvement of the Permanent Court of Arbitration if disputing parties fail to appoint arbitrators.²¹⁰ These procedural arrangements have also led to greater sovereign characteristics of the Taiwan-India IIA.

Finally, all three new Taiwanese IIAs with India, Vietnam and the Philippines were signed and witnessed by senior government representatives from both sides. What’s more, the final provisions of these IIAs require each party to go through domestic legal procedures for entry into force of the agreements.²¹¹ For Taiwan, these three IIAs have all been submitted to the Executive Yuan (i.e., the executive branch of the Taiwanese government) and the Legislative Yuan (i.e., the congress of Taiwan) for review in accordance with Article 12 of the Conclusion of Treaties Act of Taiwan.²¹² The final provisions of these IIAs and the ratification procedure adopted by Taiwan, from the perspective of this article, can better clarify the status

206. Taiwan-India IIA, *supra* note 82, arts. 35, 36; Taiwan-Philippines IIA, *supra* note 83, arts. 19, 20; Taiwan-Vietnam IIA, *supra* note 83, art. 21.

207. Hsieh, *supra* note 171, at 711–12.

208. Taiwan-India IIA, *supra* note 82, art. 29.

209. *Id.*

210. *Id.*

211. *Id.* arts. 17.3, 29.4.

212. Conclusion of Treaties Act, FAWUBU FAGUI ZILIAOKU [Laws & Regulations Database of The Republic of China], art. 12, <https://law.moj.gov.tw/ENG/LawClass/LawHistory.aspx?pcode=E0020021>.

of these new IIAs under international law and render them attributable to respective governments.

Regarding the legal status of those semi-official agencies which negotiated and concluded the agreements, the language used and the institutional provisions in the new Taiwanese IIAs, these three new IIAs arguably represent treaties governed by international law and have more implications for Taiwanese sovereignty when compared with their previous versions.

C. A PATH FORWARD: THE PROSPECT OF IIA FOR TAIWAN IN THE FUTURE

The conclusion of three new IIAs with its NSP partners is a significant encouragement for Taiwan to further boost its presence in the international community. As argued above, these three new IIAs, which were signed by critically important nations in the Indo-Pacific region and embrace progressive reform policy options initiated by Western countries, have geopolitical implications and can serve as the “model” to demonstrate Taiwan’s attitude toward global investment governance. Taiwan would like to further extend its IIA network with more countries to enhance investment relations, provide greater legal guarantees to Taiwanese investors overseas, and, of course, buttress the construction of Taiwanese statehood in the international community.

Among those like-minded allies, the EU is now the most promising candidate for Taiwan to pursue another IIA. The EU has been Taiwan’s largest source of foreign investment flows, and Taiwan was the seventh-largest trading partner with the EU in Asia in 2018.²¹³ While politically the EU has adhered to the “One China Policy” and does not maintain diplomatic relations with Taiwan, both sides have actually manifested their goodwill in negotiating an economic cooperation framework.²¹⁴ Compared with other EU institutions, the European Parliament has served as the leading pressure group, aimed at promoting the EU’s relations with Taiwan beyond the common position of the “One China Policy” set by the European Commission and the Council.²¹⁵

213. *Countries and Regions: Taiwan*, EUROPEAN COMM’N, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/taiwan/> (last visited July 10, 2022).

214. *Id.*

215. See Thorsten Brenner, *Europe Is Doubling Down on Taiwan*, FOREIGN

For instance, in 2013, the European Parliament adopted a resolution titled “EU-Taiwan Trade Relations,” which stressed that agreements on investment protection with Taiwan would lead to a win-win situation for both economies, emphasized that such an agreement with Taiwan should include specific clauses respecting both sides’ capacities for pursuing public policy, and called on the European Commission to commence dialogue pertaining to an investment agreement between the EU and Taiwan.²¹⁶ Notably, the resolution stated that establishing closer economic relations between Taiwan and the European Union, “do[es] not in any way contradict the EU’s ‘one China’ policy,” given that both China and Taiwan are members of multilateral economic cooperation mechanisms, such as the Asia-Pacific Economic Cooperation (APEC) and the WTO.²¹⁷ In response to such an appeal, delivered by European Parliament, in 2015 the European Commission issued the “Trade for All” policy publication, which declared its plan to explore the possibility of negotiating an IIA with Taiwan.²¹⁸

Built on this foundation, in 2019, the Commissioner of the European Commission, Cecilia Malmström, in response to a question from the European Parliament, she confirmed that EU-Taiwan Investment Working Group meetings had been held several times.²¹⁹ Additionally, technical contacts had been initiated to form a better understanding of the foreign investment policies of each side, and to prepare for possible future negotiations.²²⁰ Consecutively, the first Public Hearing on “EU-Taiwan trade relations” was held by the European Parliament in the same year.²²¹ Finally, on 21 October 2021, the

POLY (Nov. 8, 2021, 4:11 P.M.), <https://foreignpolicy.com/2021/11/08/europe-is-doubling-down-on-taiwan/>.

216. European Parliament Resolution of 9 October 2013 on EU-Taiwan Trade Relations (2013/2675(RSP)), 2016 O.J. (C 181) 52, 55.

217. *Id.*

218. Eur. Comm’n, *Trade for All: Towards a More Responsible Trade and Investment Policy*, 31 (2016), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

219. *Parliamentary Questions, Answer Given by Ms. Malmström on Behalf of the European Commission*, EUR. PARLIAMENT (Jan. 16, 2019), https://www.europarl.europa.eu/doceo/document/E-8-2018-005498-ASW_EN.html (question reference E-005498/2018).

220. *Id.*

221. See Martin Banks, *Group of MEPs Throw Weight Behind EU-Taiwan Trade Agreement*, PARLIAMENT MAG. (Feb. 25, 2019), <https://www.theparliamentmagazine.eu/articles/news/group-meps-throw-weight-behind-eu-taiwan-trade-agreement>.

European Parliament passed an overarching resolution titled “EU-Taiwan Political Relations and Cooperation” with a majority of support (580 to 26).²²² In this resolution, the European Parliament strongly urged the European Commission to launch the negotiation of bilateral investment agreement between the EU and Taiwan by using the term “urgently” in the context of the appeal from the EU member states to have a coordinating EU-Taiwan policy and escalating tensions between Taiwan and China.²²³ These events cumulatively demonstrate a positive foundation for future IIA negotiation between the EU and Taiwan.

Concurrently, the progress of bilateral investment agreement negotiations between Taiwan and the EU is, unavoidably, intertwined with the development of EU-China relations. Traditionally, commentators perceive the interactions between the EU and Taiwan to be subordinated by EU-China relations.²²⁴ For example, while encouraging Taiwan’s accession to the WTO, the EU has still adhered to its “One China Policy,” which only supported Taiwan’s admission to the WTO as a “separate customs territory” as it did with Hong Kong and Macau, both of which are part of the Special Administrative Region of China.²²⁵ Moreover, the EU acknowledged the arrangement of the accession order insisted upon by China, namely, that Taiwan could only join the WTO after China obtained WTO membership.²²⁶ In the same vein, the EU officials

222. European Parliament Press Release 20211014IPR14926, EU-Taiwan Relations: MEPs Push for Stronger Partnership (Oct. 21, 2021), <https://www.europarl.europa.eu/news/en/press-room/20211014IPR14926/eu-taiwan-relations-meps-push-for-stronger-partnership>.

223. European Parliament Recommendation of 21 October 2021 to the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on EU-Taiwan Political Relations and Cooperation, 2022 O.J. (C 184) 170, 172.

224. Bertram Lang, *Taiwanese Lobbying in the European Union: “Workable Diplomacy” and its Limitations* 9–10 (College of Europe, EU Diplomacy Paper 08/2015), https://www.coleurope.eu/sites/default/files/research-paper/edp_8_2015_lang_0_0.pdf; Pasha L. Hsieh, *Facing China: Taiwan’s Status as a Separate Customs Territory in the World Trade Organization*, 39 J. WORLD TRADE 1195, 1207–08 (2005); see Chien-Huei Wu, *Toward an EU-Taiwan Bilateral Investment Treaty: A Roadmap*, in CHINA-EUROPEAN UNION INVESTMENT RELATIONSHIPS: TOWARDS A NEW LEADERSHIP IN GLOBAL INVESTMENT GOVERNANCE? 206, 213–14 (Julian Chaisse ed., 2018); see also Hsieh, *supra* note 171, at 705–06.

225. Chien-Huei Wu, *supra* note 224, at 213, 217; see also Eur. Comm’n, *supra* note 218, at 31.

226. CHIEN-HUEI WU, WTO AND THE GREATER CHINA: ECONOMIC

were employed to prioritize the negotiation of the EU-China Comprehensive Agreement on Investment (CAI) and were relatively passive about launching the negotiations for the IIA vis-à-vis Taiwan.²²⁷

However, in my view, recent clashes between the EU and China have appeared to gradually shift the EU's position to treat China as a systemic rival, which simultaneously has opened an opportunity for Taiwan to reverse the above disadvantageous scenario. The clashes between the EU and China have been escalated due to a series of disagreements on human rights abuses in Xinjiang, the investigation of the origins of COVID-19, and the clash of ideologies between authoritarianism and democracy.²²⁸ Even if the EU and China finally concluded the CAI at the end of December 2020, after seven years of negotiations, the European Parliament has overwhelmingly voted to freeze the ratification of this groundbreaking deal due to the sanctions imposed by China against several members of the European Parliament who denounced the Chinese government's involvement in "crimes against humanity" involving the Uyghur Muslims in the Xinjiang region and suppressions of democratic opposition in Hong Kong.²²⁹ More broadly, China's "Belt and Road Initiative" and the initiative of "Cooperation between China and Central and Eastern European Countries," both of which are considered as assertive strategies to tactfully engage with developing countries in Eurasia and weaken the influence of Western campaign,²³⁰ have triggered significant concerns from the EU Member states.²³¹ All in all, for the EU, the strengthening of its relationship with Taiwan can be a strategic counteraction given their concerns over, and

INTEGRATION AND DISPUTE RESOLUTION 14–15 (2012).

227. Hsieh, *supra* note 168, at 706.

228. Stuart Lau, *EU Slams China's 'Authoritarian Shift' and Broken Economic Promises*, POLITICO (Apr. 25, 2021), <https://www.politico.eu/article/eu-china-biden-economy-climate-europe/>.

229. European Parliament Press Release 20210517IPR04123, MEPs Refuse any Agreement with China Whilst Sanctions Are in Place, (May 20, 2021), <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-while-sanctions-are-in-place>.

230. See Heng Wang, *How May China Respond to the U.S. Trade Approach? Retaliatory, Inclusive and Regulatory Responses*, 31 COLUM. J. ASIAN L. 151, 153–54 (2018).

231. C. K. Tan, *Xi Vows Tighter Ties with 17 European States in Riposte to Biden*, NIKKEI ASIA (Feb. 9, 2021, 9:57 P.M.), <https://asia.nikkei.com/Politics/International-relations/Xi-vows-tighter-ties-with-17-European-states-in-riposte-to-Biden>.

dissatisfaction with, China's aggressive global expansions. Launching the negotiations with Taiwan seems to be a logical next step for the EU to satisfy needs arising from increasingly close economic ties between the EU and Taiwan. Moreover, strengthening the ties with Taiwan can facilitate cooperation in rebuilding global supply chains after the U.S.-China trade war based on shared values, such as democracy, the rule of law, transparency, and accountability.

From a legal perspective, as elaborated in the previous section, Taiwan's new IIAs with its NSP counterparts are designed to encompass the policy recommendations of IIA reforms, which aim to respect treaty parties' regulatory space. The contexts of these new IIAs between Taiwan and its NSP partners also correspond to the European Parliament's resolution on EU-Taiwan trade relations, which stresses that the IIA between the EU and Taiwan should "include a strong commitment by the parties to sustainable and inclusive development in economic, social and environmental terms, with regard to investment," and "respect the capacity for public intervention, in particular when pursuing public policy objectives such as social and environmental standards, human rights, security, workers' and consumers' rights, public health and safety and cultural diversity."²³² Further, it calls for "an effective corporate social responsibility clause and effective social and environmental clauses" in the future IIA between EU and Taiwan.²³³ From this article's perspective, the new Taiwanese IIAs vis-à-vis India, Vietnam, and the Philippines demonstrate that Taiwan's current investment treaty practice is compatible with the EU's investment policy scheme,²³⁴ while also showing that this island is a ready partner for an investment agreement with the EU.

Another area confirming that Taiwan's new-generation IIAs are compatible with the EU's high standards on IIA negotiations is Taiwan's willingness to establish an appellate mechanism to replace the current ISDS system. As the firmest supporter of ISDS reform, the appellate system was adopted in the EU's Comprehensive Economic and Trade Agreements (CETAs),

232. EU-Taiwan Trade Relations: European Parliament Resolution of 9 October 2013 on EU-Taiwan Trade Relations (2013/2675(RSP)), 2016 O.J. (C 181) 52, 56.

233. *Id.*

234. Regarding the discussions on the EU's contemporary investment treaty policy, see Eur. Comm'n, *supra* note 218, at 21–24.

concluded with Canada, Vietnam, and Singapore.²³⁵ In detail, the new “investment tribunal system” (ITS) was established to replace the traditional ISDS system in the investment chapter of the EU’s CETAs.²³⁶ Comprising the first instance tribunal and the appellate tribunal, the ITS aims to create “a modern and reformed investment dispute resolution mechanism,” which “strikes the right balance between protecting investors and safeguarding the right of a state to regulate.”²³⁷

The core reforms that differentiate ITS from the conventional ISDS system are found in several areas. First, the adjudicators in ITS come from a permanent list of arbitrators who not only must be bound by the ethical code of conduct provided by the CETAs, but also possess the specialties of public international law, international trade/investment law, or other relevant fields, and are competent to handle increasingly complicated investment disputes.²³⁸ Second, the principle of “party autonomy” rooted in the conventional ISDS system is significantly restrained, inasmuch that the default procedural rules are set and cannot be modified by disputing parties.²³⁹ Third, the entire ITS proceedings shall be transparent and open to the public in principle, and such transparency requirements also extend to both matters of third party submission and third party funding.²⁴⁰ Finally, with the authority to uphold, modify or reverse the legal and factual errors of the award rendered by the first instance, the establishment of the appellate tribunal functions as the higher court in the national judicial system to more carefully and comprehensively examine investment

235. Ameyavikrama Thanvi, *The Investment Court System Under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues*, 8 INDIAN J. ARB. L. 97, 100 (2019); see generally Hannes Lenk, *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada*, 1 EUR. PAPERS 665 (2016) (discussing the free trade agreement between the EU and Vietnam and the Comprehensive Trade and Investment Agreement between the EU and Canada).

236. See Thanvi, *supra* note 232, at 99.

237. Delegation of the Eur. Union to Viet., *Guide to the EU-Vietnam Free Trade Agreement*, 70 (2019), http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf.

238. See Elsa Sardinha, *The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement*, 32 ICSID REV. 625, 628–29, 633 (2017).

239. *Id.* at 629.

240. *Id.* at 666–68.

disputes.²⁴¹

The ITS is an innovative proposal initiated by the EU, and it has undertaken great efforts to persuade other partners to adopt this mechanism in replacement of the current ISDS system. . For example, Article 8.29 of the EU-Canada CETA states that the EU and Canada will “pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.”²⁴² Given this, Article 28 of the Taiwan-India IIA remains a channel for establishing an institutional mechanism to negotiate and develop appeals facilities after the agreement enters into force.²⁴³ In developing such a mechanism, this IIA depicts several forms of guidance for both contracting parties to take into account, including:

- (a) the nature and composition of an appellate body or similar mechanism,
- (b) the scope and standard of review of such an appellate body,
- (c) the transparency of proceedings of the appellate body or a similar mechanism,
- (d) the effect of decisions by an appellate body or similar mechanism,
- (e) the relationship of review by an appellate body or a similar mechanism to the arbitral rules, and
- (f) the relationship of review by an appellate body or a similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.²⁴⁴

While the current platform for Taiwan and India to further negotiate the establishment of an appellate mechanism is substantially modeled from the Model Text for the Indian Bilateral Investment Treaty,²⁴⁵ a government official from Taiwan’s Ministry of Foreign Affairs interviewed as part of this work suggested that this clause of developing appeals facility

241. *Id.* at 641–42.

242. EU-Canada Comprehensive Trade and Economic Agreement, art. 8.29, 2017 O.J. (L 11) 23, 69.

243. Taiwan-India IIA, *supra* note 82, art. 28.

244. *Id.*

245. *Compare* DEPT. OF ECON. AFF., MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, art. 29, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf, *with* Taiwan-India IIA, *supra* note 82.

may deliver a positive signal to the EU and may also compel the EU to launch negotiations for the Taiwan-EU BIA.²⁴⁶ In addition to demonstrating Taiwan's capability to conclude a high standard IIA vis-à-vis the EU, the inclusion of a novel ITS, in this article's view, may overcome the institutional disadvantage of award enforcements due to Taiwan's inability to accede either the ICSID Convention or the New York Convention because of its unique status. It may, in effect, provide better substantive and procedural legal guarantees for Taiwanese investors overseas.²⁴⁷

In summary, the implications of the prospective EU-Taiwan IIA are momentous. While the EU and Taiwan fail to fall within the traditional meaning of sovereign states under the classical system of state-to-state international law and international relations, the post-Westphalian understanding of international law opens a space for those unclassified entities, such as the EU and Taiwan, to participate in international society and assume treaty obligations.²⁴⁸ The EU's shifting position regarding its presence in the Indo-Pacific region and its ambitious initiative of investment treaty reform, together with the unique status of Taiwan and its diplomatic and non-diplomatic efforts to be integrated into international society, can enrich our understanding of international investment law from both international relations and legal perspectives.

V. CONCLUSION

Despite the extremely asymmetric political and economic powers that exist between the cross-strait, Taiwan has constantly endeavored to enhance its identity and status independent of China. Backed by its critical role in the global supply chain, Taiwan has striven to gain a novel form of recognition of its legal competence in the international economic field through the conclusion of economic agreements with other sovereign states. Taking Taiwan's new IIAs with its NSP partners as examples, this article examined the political and economic implications of the three recently updated Taiwanese

246. Interview with Colleagues of the Ministry of Foreign Affairs, *supra* note 167.

247. Chien-Huei Wu, *supra* note 224, at 206–07; Hsieh, *supra* note 171, at 710–11.

248. Ciurtin, *supra* note 67, at 309–310.

IAs vis-à-vis India, Vietnam, and the Philippines, with a special focus on how these IAs differ from their previous versions and can therefore better fortify Taiwan's legal status in international society. This article first explores how Taiwan's NSP deepens the personal and economic connections between Taiwan and countries in the Indo-Pacific region. However, the current Taiwanese IIA network with its NSP counterparts needs to be updated since it fails to provide adequate legal protection for investors from each side. As such, the new Taiwanese IAs with India, Vietnam, and the Philippines represents a preliminary milestone for the NSP, demonstrating Taiwan's diplomatic efforts (official and unofficial) against political and economic marginalization caused by China's suppression.

Through the contextual analysis, this article found that these three updated IAs afforded greater protection for Taiwanese investors by specifying the legal obligations of contracting parties and refining the ISDS mechanism to make it more effective. Additionally, the IAs between Taiwan and its NSP partners embed certain progressive characteristics that distinguish these agreements from their prior versions. Specifically, these three Taiwanese IAs reflect the recent advocacy for IIA reform that can strike a balance between investment protection and states' public interests. Legally, the context of the updated Taiwanese IAs, to a certain extent, represents Taiwan's contemporary policy toward IIA creation, which is consistent with the guiding principles of IIA reform proposed by UNCTAD. The international relations scholarship can also facilitate our understanding regarding questions relating to these three IAs, including the reason why Taiwan seeks to update its IAs with NSP counterparts using a certain approach, and an explanation of the variations between these three new updated IAs, to name a few. The interview results also support the above analysis and further reveal Taiwan's negotiation strategies toward IAs – namely, to reinforce the legal protections afforded to Taiwanese investors abroad, and, at the same time, to ensure compromise to conclude more treaties with other countries, if necessary. The latter consideration would to some extent influence the dynamics of bargaining power between Taiwan and its NSP counterparts.

The updated Taiwanese IAs vis-à-vis India, Vietnam, and the Philippines bring greater sovereign implications when compared with their prior versions after assessing relevant factors, including the legal status of non-state institutions, which are authorized to negotiate and sign IAs for each side,

the language and terms used in the IIA context, and the institutional provisions, together with the requirement of ratification. Therefore, we can fairly argue that these IIAs are treaties governed by international law and are more official and enforceable than their predecessors. Additionally, this article explored the idea that these updated IIAs represent the foundation for Taiwan to engage in future IIA negotiations with other countries and international entities to further extend its IIA network. Among the potential candidates, the EU seems to be an ideal counterpart for Taiwan to pursue another IIA conclusion, considering the increasingly close economic ties between Taiwan and the EU. The three updated IIAs between Taiwan and its NSP partners, especially the incorporation of specific clauses on respecting treaty parties' regulatory space and the evaluation of establishing novel ITS mechanisms, deliver a positive signal to the EU and demonstrate that Taiwan is a capable and ready partner in launching IIA negotiations with the EU. It is also the EU's contemporary foreign policy toward the Asia-Pacific region to establish a closer relationship with Taiwan and exert its influence in the Indo-Pacific region to counter China's rising power. Notwithstanding its "One China Policy," the European Commission has been mandated by the European Parliament to conduct an impact assessment of an IIA with Taiwan. Several forums and talks have also been held in preparation for future EU-Taiwan IIA negotiations. Overall, the implications of the new Taiwanese IIAs are truly profound. These legal instruments not only present Taiwan's commitment to embracing the new-generation IIA model to promote quality investments around the globe, but they also deepen the political and economic ties between Taiwan and its like-minded allies. Hopefully, these developments will enhance Taiwan's indispensable place in the Indo-Pacific region, despite its unique status in international law.