

WRITING GUIDE

GRADUATE SCHOOL OF LAW

NAGOYA UNIVERSITY

SPRING 2025

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Chapter I: Introduction to Thesis Writing

1.1 Welcome

The Academic Writing (AW) team at the Nagoya University Graduate School of Law (GSL) welcomes all Master's students in this program to the field of academic writing. This guide will help candidates write a thesis that demonstrates their ability to think about and communicate ideas both to the university and others. Along with other universities around the world, Nagoya University expects a thesis to be well-organized, clear, and convincing. Learning to write clearly and convincingly will be of use in students' future careers because presenting complex ideas and structuring an argument coherently is essential to professional life in any language.

Regardless of the starting point, all students can improve their writing skills. Moreover, the faculty in GSL understand that this is a lifelong process that is just beginning. The department provides three AW courses, advice, tools, and resources that will help students complete their thesis. While some faculty might accept a doctrinal, non-doctrinal (quantitative or qualitative) or comparative approach, keep in mind that this degree program is aimed at the comparative method. In any event, the AW courses help students to organize and communicate insights and the legal recommendations that flow from them.

The AW team designed this guideline to help students, supervisors, and external readers to come to an agreement as to what will be the standard in terms of checking the final work. As such, the AW faculty will integrate it into each AW course. Regular interaction with the AW teaching faculty across the whole degree program is essential; that is, in classes, workshops, tutorials, and individual appointments. The AW principles taught in the GSL through all these learning opportunities will strengthen the candidate's ability to express formal discourse as well as help students to find their "voice" in legal writing. In turn, this should enable students to contribute better insights to the global discussion about the future direction of law. As the AW teaching instructors at the NU GSL have published work that complies with globally accepted conventions for academic writing, the AW team comprehends the challenges students face in academic writing in the legal

field. The AW team believes that supervisors will find that this guide useful as well, as a benchmark for academic and legal writing that makes it easier to evaluate student achievement.

Academic writing is different from other forms of writing, such as business, journalistic or even legal writing for documents. A student might be a strong writer in another context, or comfortable speaking English, but need to learn new ways to express legal ideas well in an academic paper. One thing academic writing has in common with all other forms of writing is that revision — not once but many times — is normal and the key to success. So, students must become comfortable with consistent comments aimed at revision. The GSL faculty hope that students will continue contributing to the global discussion about law, in English, and other languages. The AW courses teach how to comply with one primary writing “style” accepted in the academic world in order to prepare you to adapt later to the requirements of scholarly and professional journals.

Writing an academic paper is very different from phrases used in daily life or in documents prepared in business. Even native speakers must learn how to write academic papers. This is the GSL has our academic writing courses and staff. These academic writing courses are offered as regular courses in Research Methodology to students in the International Law and Political Science program. Academic Writing 1 is a required course for all Master’s students. Academic Writing 2 and 3 are optional, but we highly recommend you take these courses. Academic Writing 4 is also a required course where you will be mentored during your final thesis writing stage.

Table 1 below illustrates the basic path of the AW program for 2025 and 2026. As most students enter the program in the Fall semester, a majority of M1 students will start the program at this point and then proceed with AW II in the Spring and AW III the following semester. However, the classes are open to M2 and PHD students who may need further support in their writing. The AW team will announce other workshops through the GSL website as well as in class. Finally, during AW IV M2 students who are submitting will be assigned a “writing mentor” to assist in improving student’s overall writing, including organization and logic.

<i>PROGRAM</i>	Fall 2024	Spring 2025	Fall 2025	Spring 2026
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Classes for Students Entering Fall 2024	AWI	AWII	AW III	AW IV
Classes for Students Entering Spring 2025		AWII**	AW I + AWIII	AW II
AWIV Mentor Meetings (April – May)	For M2 Submitting Dec.	For M2 Submitting June	For M2 Submitting Dec.	For M2 Submitting June
AI/Plagiarism Final English Native Proofreading	June 1-20	Dec. 1-19	June 1-20	Dec. 1-19

Figure 1. NU GSL academic program.

Source: GSL Academic writing faculty.

1.2 Role of this guide

The GSL AW team developed this guide to assist everyone who writes or reads an NU GSL thesis, including students, supervising faculty, the AW teaching faculty, and others outside Nagoya University. Therefore, this writing guide is a key part of the NU GSL Academic Writing program, and students should download and begin using it immediately.

Ideally, students should have a clear grasp of their English writing ability when they enter the graduate school. However, many students enter the program with a variety of needs. The AW program instructs students to begin their research by refining their research topic into a research question.

Samples and examples in this guide are meant only as illustrations as one standard way to comply with the practices the guide recommends. Your thesis might look a little different from the patterns as seen in this guide, especially if supervisor feels that a different approach is appropriate. Students applying the common practices, checklists, and standards in this guide will save everyone time. The final product should be as close to this standard so that the supervisor, editor, and reader understand the coherency of the final work. The AW team also keeps a record of your participation at each stage of the AW Program to ensure you are receiving the help you need. Thus, the AW team encourages all candidates to participate in order to save time.

Chapter II: Basic Pointers

If the initial concept for a research project is the starting point, and the completed thesis is the goal, the research and drafting process is the path that connects the two. A good pathway has well-defined signposts to guide the traveler, but rough terrain and difficult obstacles may prevent the traveler (reader) from continuing. This chapter provides guidance on several fundamental matters that a writer should study and reflect upon before beginning a journey in order to avoid such obstacles and rough terrain.

This chapter divides the discussion into three sections, beginning with fundamental concepts that a student should grasp before planning their research. The first section will help the student gain a clear view of what constitutes a primary source for your project, so organizing your research will be easier. The second section gives a basic description of what is (and what is not) plagiarism so you can think forward to writing up your research with less stress and worry. The third section is on how to schedule your work on your journey so you meet the formal milestones set by GSL rules that you must pass along the way. This third section also includes a short checklist of the tasks you must finish in order to complete your program at the Graduate School of Law.

2.1 Sources

A research project aims to persuade the reader to accept the writer's view on a specific issue. The starting point is a shared body of accepted evidence. The evidence is open to differing interpretations. For example, some researchers may interpret a particular law on the state purchase of private land to be too favorable to developers, while others interpret it to be too favorable to residents. The writer has two tools to move a reader from one view to the other: logic and authorities. Authorities are statements made by others on a topic. They might support your favored view or take a different approach. Authorities related to your chosen topic are the “raw material” you start with to write a thesis. Linked together with your own logic, they make a finished thesis. Furthermore, an interview or survey produced by a researcher is a special type of evidence. This guide explains below how to handle this evidence carefully to have the force of authority.

2.1.1 Primary vs. secondary sources

Clear, careful presentation of primary sources is essential in academic argument whether the field is law, politics, or any other discipline. Primary sources are the foundation on which the writer's argument rests. In academia, arguments that do not clearly present and cite primary sources are weak and are unlikely to persuade the reader to adopt the writer's view. The researcher should mention the use of primary sources in the introduction of thesis. Figure 1 below may help the student to think about the distinction between sources.

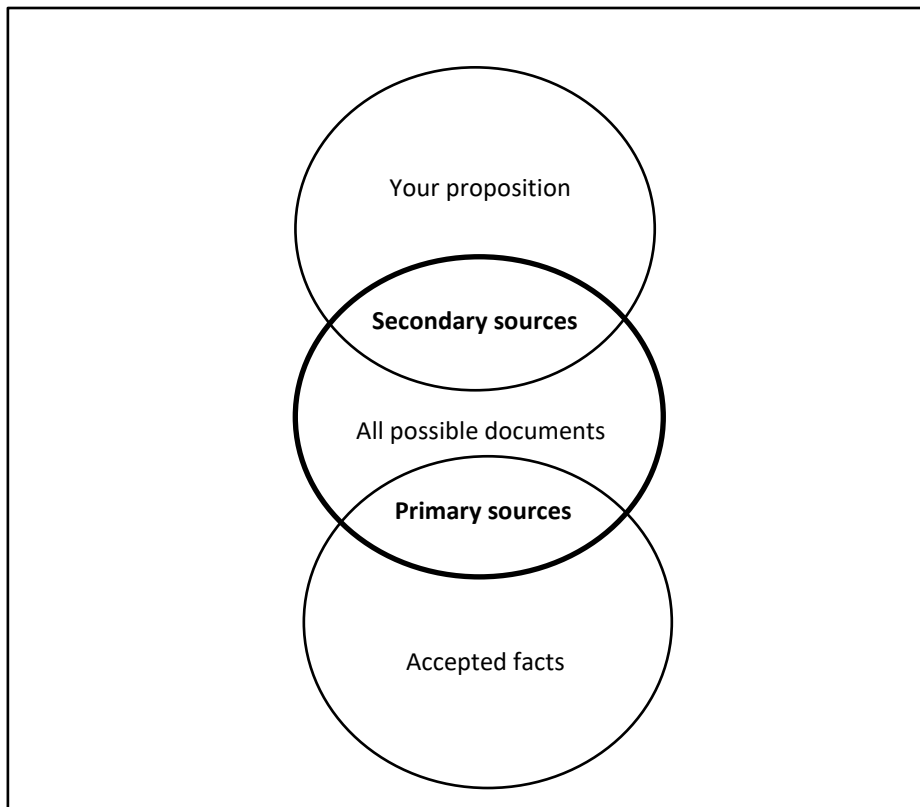


Figure 2. Primary and secondary sources.

Source: Academic writing faculty.

A researcher might describe the most important secondary sources briefly in a literature review in the introduction or in the background chapter, before the argument begins. This includes both secondary sources that support your view and those that do not. The writer should state clearly how each secondary resource is relevant to the research project.

In the field of law, many scholars use instrumental documents such as statutes, rules, and court judgments as a primary source. Other documents can be either primary or secondary, depending on how the author uses them in the logic of a thesis. The figure above might help you to consider a thesis about a point in labor law. If the scholar uses an 1899 article to defend a specific interpretation of a modern labor law, then the article is a secondary resource. But the same article will be a primary resource if the scholar uses it as evidence that support for the law existed in 1899.

2.1.2 Interviews and surveys

If a student intends to employ interviews or surveys as part of the research project, then consult with the academic supervisor on three points: 1) the form and content of the questions asked; 2) how the interviews work in the paper; and 3) written consent from the subjects for use of the results. The principles underlying survey methods are beyond the scope of this writing guide. However, one observation should guide your work in preparing this form of evidence. Because you are offering the results as “accepted facts” in the written work, you must pay very careful attention to honesty, transparency, and objectivity in order to gain the trust of the reader.

The researcher should establish the questions or issues explored in an interview or survey in advance, in consultation with your supervisor, and this information should be included in the appendices of your finished thesis. Loose interviews that pose only general questions are a weak form of evidence when the writer simply adopts the position of the interviewee without critical reflection. For surveys, the questions, the method of the survey, and the sample population (i.e., the people to whom the survey will be administered) should be settled in consultation with your supervisor. The writer must defend these three issues (questions, method, and sample) in the text of the thesis with particular attention to possible objections of bias.

These caveats should not discourage the student from using interviews and surveys as part of the evidence for a thesis. However, the student should be aware that these research methods do require extra time and planning. Finally, you should obtain the written consent of subjects to use evidence gathered from interviews or surveys in your research. Again, consultation with your

supervisor early in the planning process will avoid potential difficulties in the use of this important evidence in your finished thesis.

2.2 Copying from the work of others

This section concerns the copying of text written by other authors. The acceptable boundaries of copying vary between countries and even between educational institutions. Though some may see copying of other's work as acceptable in some environments, this department has firm and clear policies about the copying of other people's work (plagiarism), as described below. As a student of the Nagoya University Graduate School of Law, the faculty will expect you to know these policies and respect them.

This chapter began by comparing a thesis to a journey. The effort required for the journey is important because that is where learning and personal growth takes place. The finished thesis is evidence that students have invested the necessary effort to complete the journey. The student demonstrates integrity and the value of a degree from Nagoya University by refusing to take short cuts such as with plagiarism. This discipline of building a reputation for integrity applies to all of us: to students, to academics, to universities, and to national education systems. In sum, doing your own work shows that you have the will to grow and that others should consider your work seriously.

2.2.1 Plagiarism defined

The definition of plagiarism offered by the Council of Writing Program Administrators provides a starting point for this term: "...plagiarism occurs when a writer deliberately uses someone else's language, ideas, or other original (not common knowledge) material without acknowledging its source."¹ Note that plagiarism is not simply "copying;" it is copying without citation. This applies to text tables, figures, illustrations, and other creations. Here are some examples of things that would clearly constitute plagiarism in a finished thesis:

¹ *Defining and Avoiding Plagiarism: The WPA Statement on Best Practices*, accessed June 26, 2013, (Council of Writing Program Administrators, 2003), <http://wpacouncil.org/node/9>.

- 1) Copying and pasting phrase or sentence-length text without quotes or without correct citation;
- 2) Copying-and-pasting paragraphs, followed by changing only a few of the words, with or without correct citation;
- 3) Use of tables or figures without correct citation;
- 4) Use of the logic of another author without correct citation; and
- 5) Use of the conclusions of another author without correct citation.
- 6) Ghostwriting: that is, allowing someone else or AI technology to write your work for you.

2.2.2 Copyright material

In education and law, the idea of copyright is tied to the “fair use doctrine.” This rather flexible doctrine gives scholars some latitude in working with sources. The basic principle is that researchers must cite anything used or drawn from the work of another. This holds true for tables, figures, photographs as well as text. In addition, this point is true whether or not the original work is marked with the © sign. In general, scholars avoid this problem by properly using a form of citation that acknowledges where the original or text comes from.

Whether the writer’s specific use of another work is a violation of copyright depends upon two main factors: 1) how much the second writer used; and 2) the intent of the borrower. At times, the researcher may need to seek permission for something. The *Chicago Manual of Style* provides some examples for when permission for use may be required. In general, students should not cut and paste tables and figures from other sources but learn to make their own from existing data with proper sourcing (see section on Tables and Figures). A good rule of thumb is that if the student reproduces a table, figure, or photograph *exactly* then you should seek permission from the original author. If quotes of text are not excessive then permission is unnecessary. If in doubt, consult with a member of the AW team or your supervisor.

2.2.3 Use of AI technology

The president of Nagoya University has stated that generative AI like ChatGPT can be used for research purposes, but not for the generation of ideas or written text for theses and dissertations. While further instruction on this issue will be given in the AW classes, students should consider the use of any AI program to generate written text as ghostwriting, which is a form of plagiarism. Such a violation is not acceptable in the AW courses nor in the final writing of a thesis or dissertation. Generative AI technology may be used in some cases during the search and writing process to improve the basic language of a student's prewritten text. However, AI cannot replace research tasks including creating ideas, drawing conclusions, or making recommendations. Generative AI is not a primary source, it often produces content from tertiary sources, like Wikipedia, and can provide incorrect or incomplete information. Students are responsible for ensuring the content in their thesis is sourced responsibly and accurately.

2.3 Scheduling

Because a few students enter this program in April rather than October, the specific deadlines for final submission may vary. Refer to your NU GSL *Handbook* for details on the specific deadlines for your own cohort. Managing these deadlines is your responsibility. The two preparatory submissions you must submit, the *Research Proposal* and *Mid-Term Report*, are an important foundation for moving forward with your work. These reports are also a valuable opportunity to exercise and improve your writing skills by following these guidelines.

The student should allocate sufficient time to write carefully. For many students, writing with correct citation is a slow process, especially in a second or third language, which explains one of the reasons why there is a strict length limit of 20,000 words for LL.M. theses. The faculty want shorter theses of a higher quality as a matter of conciseness as well as to reduce costs (it costs money to read, edit and publish a work). Because criticism and revision are necessary component of the writing process, the prospective candidate will need to schedule this time into full planning of the

project. For an LL.M. thesis, for example, the AW team recommends allowing a full month for revision prior to submission for final English proofreading.

During the last stages of thesis writing, the student may be working with a writing mentor to assist in ironing out problems with structure, organizing and general writing issues. After this stage, the student should obtain approval from the supervisor for a final English proofread. Students may be using other software programs to format and structure their paper such as *Juris-M*, *Zotero*, *LibreOffice*, or *Scrivener*; this is fine. However, problems can arise when sending and sharing files between computers with different operating systems. In order to reduce problems in the last stages, all students must ensure that the content approved draft of the thesis be placed into a *Word* document file before sending it in for the final English proofread. In general, it can take 2-3 days to proofread a 15,000 word thesis (a week for a 30,000 word dissertation). In turn, the Master's student may need an additional 2-3 days to correct the final draft (longer for doctoral students).

2.3.1 Research Proposal and Mid-Term Report

The *Research Proposal* and *Mid-Term Report* are preparatory submissions that give an opportunity for student and supervisor to develop a shared understanding of the content and direction of the research project. This section offers some advice on preparing these documents. Ideally, the student should consult with the supervisor in good time before the deadline for each submission. Both the *Research Proposal* and the *Mid-Term Report* should address three central elements: the problem; the method of investigation; and the proposed outcome (see Appendix A for example of possible mid-term report). Some faculty may ask for a literature review as well or even to develop a specific research question. The precise content of each element will vary depending on the research topic and objectives, but each is indispensable to a description of the project and your progress.

Turning to the first element, your problem statement, this is a concise statement of why your thesis is necessary. This statement should present a choice or a controversial proposition. Examples

of acceptable types of statements might be: “There are conflicting proposals to use either increased transparency or criminal sanctions as a means of reducing court delay in Country X;” or “The ‘case or controversy’ requirement for judicial review is incompatible with the judicial traditions of Country Y.” The statement must do more than describe a general problem or need. A statement like “Country Z does not have a law on city planning” is inadequate.

Moving to the second element, your method of investigation, in most cases you will need to prove several things to the reader in order to respond to the problem you have identified. Your work should indicate how you intend to go about proving the points in the paper. The writer should be as specific as possible in describing your method of investigation. General statements such as “The study will gather materials and analyze them” are inadequate. A stronger or more effective way is to cite specific primary and secondary authorities that are particularly important to your project.

Describing the third element, your proposed outcome, means explaining the particular conclusion you expect to reach in your research. These expected results are included in your problem statement for clarity but be aware that this is not binding. Systematic investigation often leads to unexpected results, and you will most likely need to adjust your conclusions as your research progresses.

While the *Research Proposal* presents the three elements above as best as possible at the start of the project, the *Mid-Term Report* is an opportunity to explain your progress on the specific steps you have proposed as your “method of investigation.” This might lead to modification of the problem, or to your proposed outcome. The student might make further adjustments during the write-up of the finished thesis but, as always, in consultation with your supervisor.

These two submissions are an opportunity to work closely with your supervisor to set the content and direction of your thesis as well as to become familiar with the guidelines. The candidate should also work closely with the supervisor when preparing oral presentations and the final draft of the thesis. During the M2 year, the student will have opportunities for individual appointments with a writing mentor who can advise on questions about issues related to clarity, coherency, and consistency. Upon completion of the mentoring period, the student must submit their entire thesis as

a word document to the AW team. The AW team will check each thesis with a software called *iThenticate* to ensure there is no plagiarism or use of AI. If plagiarism or use of AI is discovered, the student's supervising faculty will be alerted, and the student will be required to make corrections before the Native English proofreading can begin. The student must be sure to obtain approval from their supervising faculty prior to submitting their thesis to the AW team.

2.3.2 Checklist: Basic scheduling tasks

- 1) Meet with your supervisor early, and arrange for regular communication;
- 2) Review this writing guide;
- 3) Consider special requirements (interviews, surveys, skills) early, and plan accordingly.
- 4) Familiarize yourself with the proper use of all the research and writing tools covered in the writing workshops (like *Juris-M*, word processing software);
- 5) Begin building and organizing your references section early;
- 6) Draft and revise your *Research Proposal* well before the due date;
- 7) Draft and revise your *Mid-Term Report* well before the due date;
- 8) Draft your thesis slowly, carefully applying the skills taught in the AW courses;
- 9) Allow a month to revise your thesis before submission for the preliminary check; and
- 10) For the final English check and review, makes sure to send the thesis in a Word file.

Chapter III: Style and Presentation

The term “style” has several meanings in academic writing. Writing style can refer to the “voice” of a piece of writing or to other conventions. For example, in spoken English or in personal letters a writer may use the first-person pronoun “I” or “me” and contractions such as “can’t” or “won’t,” but many disciplines restrict or avoid such usage for academic papers. A page style (or convention) can refer to the formatting requirements for printing or typesetting, including margins, font, typeface, and numerous other details of presentation. A citation style provides detailed rules for formatting individual citations and a list of references.

This writing guide illustrates the page style appropriate for a thesis and other written work submitted to the faculty. In general, the *Chicago Manual of Style* (CMS) provides the basic recommended style and format expected for the Master’s and dissertations. The student can explore this resource further in the library or online as it provides a wealth of guidance on the publishing process and all aspects of manuscript preparation and the production of final, camera-ready copy for publication. However, the student should note that this writing guide overrides the *Chicago Manual*. In some areas the CMS is too technical or vague for our purposes at the NU GSL, so this guide adopts a simpler, more specific approach in many areas. The three Academic Writing courses taught in this program will provide more detail.

3.1 Citations

The purpose of a citation is to identify the cited resource by its essential details. A citation style sets down rules for arranging the citation of a resource in a compact, readable form. This is one example showing a citation as a footnote as well as how it should appear in your final reference section:

As a footnote:

Adam Smith, *The Wealth of Nations* (New York: Simon & Brown, 2012), 25-27.

As a final reference:

Smith, Adam. *The Wealth of Nations*. New York: Simon & Brown, 2012.

The citation above follows the rules of the “Chicago Full Note” form of referencing described in the *Chicago Manual*. The example identifies the book *The Wealth of Nations* by Adam Smith, as reprinted by the publisher “Simon & Brown” in 2012. The reader knows that it is a book because the title is in italics.

In contrast, the title of a journal article is set in “quotation marks” in the Chicago Full Note style. Here is an example:

As a footnote:

William M. Landes and Richard A. Posner, “Citations, Age, Fame, and the Web,” *The Journal of Legal Studies* 29 (2000): 319-44.

As a final reference entry:

Landes, William M., and Richard A. Posner. “Citations, Age, Fame, and the Web.” *The Journal of Legal Studies* 29 (2000): 319-44.

This Chicago Full Note form (also known as “Notes and Bibliography”) is the form the NU GSL prefers for most references in student theses, with some minor modifications described below. Chicago Full Note is a descriptive citation style that writers use to cite a wide range of material. The student should notice and become familiar with some general patterns; for example, with footnotes *commas* are used in separating the information while in final entry *periods* are used in providing the same information. In turn, Chicago Full Note refers to the rules of *The Bluebook: A Uniform System of Citation* for guidance on how to cite some American and international legal materials as primary sources. The student should stick to CMS when citing secondary sources.

Theses may cite materials from non-English languages. For clarity, readability, and simplicity in composing the bibliography, references to material in languages other than English should include supplementary information. The Chicago Full Note does not cover all types of legal materials. Each country has different citation conventions for its legal system, and no guide provides complete coverage. For each country, you should follow the citation rules of the leading legal citation style for that jurisdiction. The AW teaching faculty and your supervisor can provide guidance on special cases.

Personal names

Personal names in non-Roman scripts should be Romanized, followed by the name in the original script, in parentheses.

Institution names

Institution names in non-English languages should be written in English translation. For institutions commonly referred to in English by their Romanized name, use the Romanized form.

Titles and journal names

Titles in non-English languages should be written in English translation, followed by the title in the original script, in square braces. Follow the same pattern for journal names, series names and the like.

Omit supplementary information from subsequent references. The examples below show the basic patterns for citation of first references, subsequent references, and the bibliography (note that The Juris-M reference manager can produce correctly formatted multi-language citations):

First-reference

1. Fumio Sensui (泉水文雄) et al., *Economic Law* [経済法] (Yūhikaku, 2010).
2. Shūya Hayashi (林透弥), “The Economic and Legal Theory of Market Delineation in Competition Law” [競争法における関連市場の確定基準], *Minshō Hō Zasshi* [民商法雑誌] 126, no. 1 (2002): 23–44.
3. Shizuoka Motor Boat Racing Association, *Thirty Years of the Hamanako Boat Races* [浜名湖競艇と共に 30 年] (Araichō, Shizuoka: Shizuoka Motor Boat Racing Ass’n, 1983).
4. Keidanren Secretariat, Commentary on the Expansion of International Trade Act of 1962 [1962 年通商拡大法解説], *Keidanren Panfuretto* [経団連パンフレット] (Tokyo: Fed’n of Econ. Organizations, 1963).

Subsequent reference

1. Shizuoka Motor Boat Racing Association, *Thirty Years of the Hamanako Boat Races*.
2. Keidanren Secretariat, Commentary on the Expansion of the International Trade Act of 1962.
3. Hayashi, “The Economic and Legal Theory of Market Delineation in Competition Law.”
4. Sensui et al., *Economic Law*.

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Hayashi, Shūya (林透弥). “The Economic and Legal Theory of Market Delineation in Competition Law” [競争法における関連市場の確定基準]. *Minshō Hō Zasshi* [民商法雑誌] 126, no. 1 (2002): 23–44.

Keidanren Secretariat, ed. Commentary on the Expansion of the International Trade Act of 1962 [1962 年通商拡大法解説]. *Keidanren Panfuretto* [経団連パンフレット]. Tokyo: Fed’n of Econ. Organizations, 1963.

Sensui, Fumio (泉水文雄), Tosa Kazuo (土佐和生), Miyai Masaaki (宮井雅明), and Hayashi Shūya (林透弥). *Economic Law* [経済法]. Yuhikaku Publishers, 2010.

Shizuoka Motor Boat Racing Association, ed. *Thirty Years of the Hamanako Boat Races* [浜名湖競艇と共に 30 年]. *Araichō, Shizuoka: Shizuoka Motor Boat Racing Ass’n*, 1983.

3.2 Checklist: Common issues

- 1) Refer to this writing guide for guidance on general structure, sentence and paragraph development, and formatting details.
- 2) For more general guidance on organization and style, refer to the *Chicago Manual of Style* 17th ed. (CMS).
- 3) Do not use a previously submitted thesis as a template. Standards have changed and will continue to change. This writing guide, and advice from the AW teaching faculty and your supervising faculty are your best source of guidance.
- 4) Do not use published articles as a template. The format and citation conventions of a journal differ significantly from the requirements of the GSL program. Moreover, not all published articles are well-structured or well-written.

- 5) Use a 10.5-point font size throughout the main text, and 10-point size for footnotes and captions, as in this writing guide. The AW team recommends Times New Roman. Thesis must be legibly printed single-sided on A4 size paper.
- 6) Footnotes supplement the main text; they should not ordinarily dominate a page. As a rough guideline the main text should make up at least 75% of a page unless there is a strong reason for using an exceptionally long footnote.
- 7) Use bold typeface in headings and labels only. Do not use boldface in regular text.
- 8) Use italics sparingly, for the following specific individual words and phrases: foreign terms (e.g. *res ipsa loquitur*); the names of cases (e.g. *Marbury v. Madison*); the names of all legislation (including international legal instruments, constitutions, laws, regulations and rules); and the titles of published books or periodicals (e.g. *The Wealth of Nations*). The writer may use italics for rare occasions (consult AW faculty). Do not use italics or block quotes or other large runs.
- 9) Do not use uppercase for names or titles (i.e., write John Smith, not John SMITH).
- 10) Use double quotation marks for quotations, with single quotes for inner quotations (e.g., Mark Twain wrote: “The Public is merely a multiplied ‘me’.”).
- 11) Limit the use of parenthesis and dashes. They interrupt the reader. (If you wish to place text inside parentheses inside further parentheses, which are called “nested” parentheses, then use [square brackets]).
- 12) Do not use words with slashes (e.g., write “he or she,” not “s/he,” and use “or,” not “and/or”).
- 13) Always enclose the words of other authors in quotation marks and provide a citation to the original source. The writer should use quotations for one of two purposes: (1) to show the exact words used in the original source before analyzing the wording; or (2) to show that an influential commentator has made the quoted statement.
- 14) In general, spell out numbers less than 10 except for dates, decimals, fractions, percentages, prices, scores, statistics, and times (e.g., write “There are three branches of government,” not “There are 3 branches of government”).

- 15) Do not mix date formats (i.e., write “May 23, 1997” and “December 1, 2001”, not “May 23, 1997” and “1 December 2001”).
- 16) Use the Anglo-American format for numbers, not the European format (i.e., write “1,234.5” not “1.234,5”).
- 17) Set your word processing software to use American spelling conventions consistently throughout the text (except for quotations, which should match the original text).
- 18) Do not use first or second person outside the Acknowledgements section (i.e., write “This study explores the views of officials through interviews,” not “I explored the views of officials through interviews”).
- 19) Use “he or she” where the subject may be male or female or repeat the generic description of the subject in order to achieve gender-neutral writing.
- 20) Avoid using rhetorical questions for emphasis (i.e., write “The policy of the Ministry is unclear,” not “What is the policy of the Ministry?”).
- 21) Do not use the word “shall” in ordinary text. It is both ambiguous and an inappropriate word for use in persuasive argument.
- 22) Write “cannot” as single word throughout the text (i.e., write “Water cannot be dry,” not “Water can not be dry”).
- 23) Do not use “etc.” or the phrase “and so on” in ordinary text.
- 24) Spell-out the abbreviations “e.g.” (“for example”) and “i.e.” (“that is”) when used in the main text outside parentheses.
- 25) Avoid unnecessary repetition of the same word in a sentence or paragraph. This is a sign that the writer can simplify the sentence or paragraph.
- 26) Use acronyms for institutions only if they are widely used. For other institutions with long names, use an abbreviation. Specify both acronyms and abbreviations in parentheses when you first mentioned the institution. That is, write:

... the Organization for Economic Cooperation and Development (OECD) and the Working Party on Territorial Policy in Urban Areas of the Territorial Development Policy Committee (Urban Area Working Party) within the OECD...

A poor example would be as follows;

...the Organization for Economic Cooperation and Development (the Organization) and the Working Party on Territorial Policy in Urban Areas of the Territorial Development Policy Committee within the Organization [WPTPUATDPC]...

- 27) Provide a List of Abbreviations at beginning of your thesis, if your thesis contains more than five acronyms and abbreviations.
- 28) Make sure that all tables, figure, and appendices are correctly listed in your Table of Contents.
- 29) Avoid using phrases that add no meaning, such as “It is important that...,” and “One should note that...”

Chapter IV: Structure and Formatting

This chapter is divided into three sections. The first section explains how to organize the large-scale structure of your thesis (what elements and chapters you need and how to order them). The second describes the small-scale structure of your thesis (how to use logic to build sentences, paragraphs and sections that showcase your legal argument). The third section discusses how to format your thesis according to NU GSL requirements.

This guide explains a typical thesis structure, but sometimes there are good reasons for a different structure. Students should consult with both the AW teaching faculty and their supervisors as they write. This will ensure that you use the structure best suited to your topic. The following provides the generally accepted form of thesis that the GSL faculty might expect of the student.

4.1 Large-scale structure

The standard organization of a thesis consists of five chapters and follows the fundamental essay design: an introduction, several body chapters, and a conclusion. However, a thesis is not just a long essay because it includes additional elements. In the NU GSL. A thesis is an in-depth evidence-based study of a specific legal problem, which makes concrete recommendations for change. The large-scale structure recommended here is the standard way academic writers integrate the evidence into their central argument and recommendations.

4.1.1 Length, order, and balance

The NU GSL has a strict length limit of 20,000 words for LL.M. theses. The NU GSL will pay for a certain number of words to be professionally proof-read, according to budget allowances. When writing their final draft, students should confirm the word limit the GSL will pay for. However, if the supervising faculty requires the student to write more than this number of words, the supervising faculty's direction must be followed. As of 2024, the GSL budget is 15,000 words from cover page to bibliography. Students who try to write longer theses often find they do not reference their work properly, or it contains a large amount of repetitive or irrelevant information. The faculty

is looking for quality, not quantity. They are not looking for you to write a textbook in your field, therefore, write less, avoid repetition, and reference more.

The researcher should achieve balance when allocating pages to each element of the thesis structure. Figure 3 below is a quick guide to the elements of a thesis and what the page allocation in a typical thesis might look like. While the section will explain the details, the student should be aware that only the acknowledgment and appendices are completely optional while all the other elements are compulsory. A poorly structured paper hints at a problem of coherency. Finally, most academic journals impose length limits so learning to achieve the right balance in this thesis will be good practice for publication later in your career.

Title Page	Follow NU GSL requirements	1 page (not numbered)
Acknowledgment	Brief, optional	1 page (Roman numerals start)
Abstract	300-word limit	1 page (ii)
Table of Contents	Automate in WORD	2 pages (iii, iv)
List of Abbreviations	If thesis contains more than five	1 page (v)
Chapter I Introduction	Roughly 5% of LL.M. thesis	4-5 pages (Arabic numerals start)
Chapter II	Background	roughly 12 pages
Chapter III	Comparison	roughly 12 pages
Chapter IV	Analysis	roughly 12 pages
Chapter V Conclusion	Roughly 10% of thesis	4-5 pages
Appendices	Optional	varies
References	Use Juris-M	varies
	Total	50-60 pages

Figure 3. Elements of an NU GSL ILL.M thesis.

Source: Academic writing faculty.

4.1.2 Title page

The title page is a required element of your work. This page is unnumbered but included in the total page count. To meet the needs of the university library, this page must include the following: 1) main title; 2) the student's name; 3) the name of the program that the student has entered (Program in Law and Political Science or the Program for Professionals); 4) the student's identification number; 5) the name of the student's academic supervisors; and 6) the submission date. Do not add borders, underlining, italics, figures or photos. The font type and size should be the same as the base text but put all words that are part of the title in bold capital letters (see front page of this guide as an example).

4.1.3 Abstract

The abstract is a crucial element, which acts like a signboard, describing your way of solving the problem in your thesis in a succinct, appealing way. A clear and concise abstract is imperative in academic writing as it helps the reader to gain a basic summary of the work. The NU GSL limits abstracts to 300 words but published academic journals may set lower limits. Your abstract is a brief summary, not an introduction to your thesis, and as with the remaining text, should be in the “neutral voice.” An abstract concisely explains the context of your work, the problem, your answer or central thesis, previous answers, why those answers failed, why your analysis is better and the importance of your work. The abstract does not include quotes or citations and does not go into detail. The writer never repeats the same sentences in the introduction.

4.1.4 Acknowledgement

The acknowledgment is the only part of your thesis where you can write in the “subjective voice.” This means you can write in the first person, using expressions like “I wish to express my appreciation for the help provided by” Students can express appreciation in this element to those who supported or assisted them in their studies. However, you should avoid excessive, flowery language and a long list of messages of appreciation. There is no formal word limit, but students usually write half of a page or less. You can also omit this element in order to save on word length.

4.1.5 Table of Contents (TOC)

The table of contents (TOC) is a required element that every reader needs to navigate around your thesis, which is a rather long word document. You must learn how to create an automatic TOC using word software. If you set your computer style to “Chicago” and limit the headings to three levels, then this will make it easier on you in the end.

A step-by-step guide to doing this for PC users is available either via *You Tube* or in the AW course. By following this technical procedure, your headings and page numbers in the thesis should be listed automatically in neat, precise order. As you revise and edit your work, the TOC will automatically update. The elements to include in your TOC include everything from the abstract to the reference section of the thesis. You should not include the title page nor repeat the thesis title in this section.

4.1.6 List of abbreviations

A list of abbreviations helps the reader. There is no set rule on how many abbreviations and acronyms you can use, but a reasonable working number would be under 25, listed on one page. If there is a well-known abbreviation use it, do not create a new one. If you do need to create an abbreviation, choose one that is 1) short, 2) informative, and 3) distinctive. See the *Checklist* at the end of Chapter III for some examples.

4.1.7 Introduction

The first chapter of any standard thesis is the introduction. About 5–10% of your thesis length is enough. In a NU GSL thesis, the introduction should cover five topics. First, the thesis paper requires the development of a clear thesis statement or hypothesis. These statements represent the central element of a study and provide a clear guide for the reader as to the point of the research. A thesis statement is an argument or claim, while a hypothesis is a predictive statement. Students will learn how to develop these statements in the academic writing classes.

Second, the introduction should explain the problem and answers or recommendations the thesis provides. This section of the thesis should mention the primary sources and important secondary sources the thesis uses to reach the student's answer. If the thesis uses comparison, then this part must expressly defend your choice of comparison jurisdictions. Third, the introduction should make the student's aims and perspective clear. This means writing about the goals you hope to achieve by writing about this topic and making your standpoint clear. For example, two students could write very different theses about a labor law problem with one writing from the perspective of workers, and the other writing from that of the employers' perspective.

Fourth, the introduction should include a definitions section. The field of law is rich in terminology, be careful with such usage. Clarifying or defining such terms helps not only non-lawyers ("lay" people) but also other lawyers who are unfamiliar with terms in your area of law. The writer should not assume that all readers will understand your usage of technical terms. Therefore, you should provide brief explanations of a handful of terms that are important in your work. Last, the introduction should include a "road map." This map is a paragraph, usually at the end of the introduction, which tells the reader what each chapter is about.

4.1.8 Body chapters

These chapters present the 1) background to the problem; 2) evidence gained from research, which in the GSL is often comparative evidence from other jurisdictions; and 3) analysis and recommendations for addressing the problem. Each chapter must have an overview or foreword at the start. This does not have its own heading. The overview or foreword explains the highlights that will follow in the chapter. Each chapter should include a summary section at the end, which does take a heading. The summary section briefly reminds the reader of the main points covered in the chapter.

The primary chapter should be in your analysis. In the earlier chapters you might have described a problem and summarized information well, but the analysis chapter demonstrates your creative ability to synthesize existing information. That is, your complete research into the facts and

law in a new way in order to make recommendations for resolving a real problem. In any event, the faculty awards a graduate degree based on the strength of the analysis chapter.

4.1.9 Conclusion

The aim of this part of the thesis is to tie the study together. This should be the easiest part of the paper if the writer has unified all the other aspects of the thesis. The challenge is to pull together, or synthesize, what has come before in a creative, insightful way and to avoid dull repetition. The right length is roughly 10% of your thesis. If your conclusion is too short, it is usually weak. Conclusions of a paper contain no new information, few citations, and rarely include quotes.

The conclusion has three core elements. These are 1) restating the problem, 2) drawing the reader's attention to your findings, and 3) reiterating the recommendations. The writer may find it useful to revisit the “word picture” or story used in the introduction here to show how your recommendations would change the outcome.

However, the best conclusion does more than restate the problem, findings, and recommendations, but it also fulfills four further roles. First, this section of your paper explains the significance or importance of the study. Second, the conclusion explores applications of the study in broader contexts. This might be in a different field of law in the same country, or in the same field of law in a neighboring country. Third, this last part of the paper acknowledges any limitations that affect the study such as peripheral questions you were aware of but could not address due to a lack of time, space, or data. Fourth, the conclusion makes suggestions for further research.

4.1.10 Appendices

An appendix is an optional section that is rarely used but is available for specific reasons. The appendices are placed before the references section and could contain unwieldy graphs, figures, tables, legal documents, or questions used in an interview process. If you use an appendix, you must mention it at the appropriate point in the text, not the footnotes. Label any appendices with capital letters (A, B, C) or numbers (1, 2, 3) and clear titles.

4.1.11 References

A systematic and coherent reference section is compulsory. The CMS provides comprehensive instructions for constructing a references section. The writing courses in NU GSL will also teach you how to use the Juris-M reference manager to make this process easier. There is no limit to the number of sources you can include, but the rule in the NU GSL is that you can only list the sources you actually cite in your work. The page numbering in this area of your thesis follows on consecutively from the earlier elements.

The student needs to become familiar with the CMS in the first semester, and to learn the meaning of the terms “footnote,” “citation,” and “reference.” The CMS explains how to cite and reference many kinds of sources. The student can access CMS through any search engine for some of the basic examples, and there a few examples in this guide (pages 15 and 16).

4.2 Small-scale Structure

This section discusses punctuation, sentencing, paragraphing, and other technical elements like headings and quotations. These are the building blocks for each chapter of your work. The student should pay close attention to these small building blocks as they greatly enhance their writing. This is often the area of greatest difficulty for many students.

4.2.1 Sentences

The student should avoid lengthy, overly complex sentence structures. Some key issues in good sentencing are making sure the subject is clearly identifiable; restricting the use of the passive; keeping your average sentence length at three lines or less; and clearly linking each sentence in order to build a tight logical thread through your argument. Also, you should double check for spelling (American style) and ensuring that the writer does not mix verb tenses.

4.2.2 Punctuation

Punctuation is important. Even a change in the placing of a comma can change the meaning of a sentence. A basic rule is that emphasis comes from the words you write in academic writing, not from punctuation. You should use periods, commas, semi-colons, and colons often, and dashes, parenthesis, and ellipses (in quotes only) occasionally. In addition, most disciplines frown on the use of exclamation marks (!) and question marks (?) are used only rarely (primarily only for the research question. Students who use dashes rather than parenthesis should ensure that they do not confuse the —*em* dash and –*en* dash and realize that the use of these dashes are awkward (not all keyboards are set up for this usage and you may need go the symbols section found in the ribbon above of your computer).

4.2.3 Paragraphs

All paragraphs are to be indented, there should be no gaps between paragraphs, except for before headings (as exemplified in this guide). The typical paragraph will include a topic sentence, support sentence and conclusion or transitional sentence. There are three key concepts that are important with understanding paragraph structure: unity, coherence, and direction.

First, a paragraph is a group of sentences that all relate to one idea. This concept is called paragraph “unity.” Meanwhile, the “topic sentence,” usually found at or near the start of the paragraph, will provide the core idea for the paragraph. The writer should connect all the other sentences in the paragraph to support this one core idea. Ideally, if the writer removed all the detail sentences from their paragraphs, the remaining topic sentences should form an excellent outline of the argument.

Second, there should be a smooth, logical flow between the sentences in a paragraph. This concept is called paragraph “coherence.” You can achieve this by “overlapping” the content of each sentence with the content of the next sentence, or by using transition words (such as however, moreover, furthermore).

Third, there are several directions to which a paragraph may flow from a topic sentence. The writer might organize the paragraph spatially, chronologically, or by issues of importance. The

student should make every effort to avoid jumping around in a paragraph. The exercise in the MWL will help in developing this skill of organizing a good paragraph and essay.

4.2.4 Titles and headings

Simplicity and clarity are essential for good titles and headings. Good titles and headings have little or no punctuation (only colon), consist of brief clauses, focus on one specific topic, and are spaced equally throughout the paper with an additional double space from the preceding paragraph (as shown in these guidelines). These headings “stand alone” (as shown in this guide). This means that each title or heading stands on its own; the word or phrase used is not part of the first sentence that follows. If you intend to number headings (1.1.1) then make sure that they are consistent in usage of Arabic numbers, they are restricted to no more than three levels (not 1.1.1.1), and they are correctly punctuated (no full stop after last number). This also will make it easier when developing your headings on a three-level basis in your Table of Contents.

As the TOC is limited to two pages, this means there is a natural limit to the number and length of headings and titles you can use in your thesis. Too many headings throughout your thesis will chop your work up into a report; too few will leave your reader lost. As a general rule, each heading should cover material at least a page long. There should be no empty headings (all headings must follow with some text). You should follow the heading hierarchy and style recommended in the *Chicago Manual*. A heading must correctly accompany all tables, graphs, and figures.

Your thesis title should be less than two lines long and consist of no more than two brief clauses, perhaps joined by a colon or a dash. The clauses should describe the content to come clear and creatively, inviting the reader to follow your argument. Compare the impact of the following heading clauses.

Bland uninteresting heading:

Regulation and Compliance

Creative, descriptive alternatives:

Regulating to Promote Compliance

Regulations to Preventing Inconsistent Compliance

Regulation: The Compliance Dilemma

Regulation: Reducing Compliance Burdens

4.2.5 Quotations

There are three basic types of quotations: partial, embedded, and blocking. A “partial” quote can be anything from a single word or phrase to a partial sentence and usually requires a citation. An “embedded” quote is a full sentence that reflects the direct opinion of some authority and is always followed by a citation. Writers should “block” a quotation when more than 40 words are quoted. This means you must indent the quoted material. Block quotes should not italicized, do not take quotation marks (“ ”), but do need an authority and citation. The GSL requires single spacing for block quote as shown in the example below. According to *The Chicago Manual of Style*:

Block quotations, which are not enclosed in quotation marks, always start a new line. They are further distinguished from the surrounding text by being indented (from the left and sometimes from the right)....²

There is no limit on how many quotes you can use. However, the writer should avoid simply “stringing” quotes together to create paragraphs. This is poor scholarship and shows that you do not know how to explain or paraphrase. A good rule to follow is 3 x 3; that is, no more than three embedded quotes per page and no more than one block per three pages. The punctuation for all quotes should come before the quotation marks in this style of writing (the rule is punctuation, quotation, footnote number).

4.2.6 Quotation marks

There are differences between the British and American uses of quotation marks. You will need to be careful not to confuse the two systems. The NU GSL uses the American standard. In this

² *The Chicago Manual of Style: the Essential Guide for Writers, Editors, and Publishers*, 16th edition, Edited by University of Chicago, (Chicago: The University of Chicago Press: 2010), 623.

usage the double quotation marks (“ ”) refers to the exact material in the source, so the words quoted inside those marks must be exactly the same as what is in the source, even if there is an error or oddity in the words quoted. You must note the error or oddity by inserting [sic], which means “as is” following the error. In the American usage single quotation marks (' ') are used solely to indicate that a quote was present within the original text. Words used in a “special” sense are given double quotation marks; do not italicize this special words.

There are three styles of quotation marks: curled (“New Times Roman”); slanted (“Verdana”); and straight (older typing models). You should not mix these in your paper. The curled or “smart quote” is the standard for most academic writing. If you have trouble with this, you can correct the style of your quotation marks using the “Find and Replace” function in the [Editing] group on the [Home] menu in *Microsoft Word*.

4.2.7 Citations, footnotes, and references

A citation refers to the place where a reader may find a specific source, and often includes name of the author, the title as well as the page number (unless *Ibid* is used). Citations can appear in one of three forms. They can appear as endnotes, footnotes, or in-text citations. A footnote is placed at the bottom of the page. An endnote appears at the end of all writing, usually just before the references section. The in-text citations are found inside parentheses within the sentence (these are not used in your thesis).

The student should only cite and reference those sources used in the text of the paper. Each entry contains many kinds of information a reader can use to find the source for themselves. There is no rule about the minimum number of footnotes you should have. Instead, the important thing is academic integrity. You must cite all facts, data, ideas, words, and quotations you obtained from other sources.

There are no rules about the maximum number or length of footnotes. However, a heavily footnoted paper that is often weakly argued and full of distractions for the reader. You do not need to add your own commentary to every footnote and many notes can be combined. The student should

avoid having many footnotes within a sentence as this is a serious distraction for the reader. Just acknowledging the source you have relied on is usually enough. As a guide, footnotes should not dominate the page; they should be no more than 25% of a page.

4.2.8 Use of translated text

Students should be very careful when translating documents or other texts from non-English sources. A writer might translate in the form of a summary, paraphrase, or quote, which would require a footnote explaining that a writer is translating a text. All direct translations should include proper quotations, citation and comment stating that you translated from another source. The faculty or reviewers might consider that any aspect of a translated text that does not follow these procedures is plagiarized, resulting in serious issues in terms of you completing a submission or even from graduating. Furthermore, the 3 X 3 rule still applies as the writer must avoid extensive use of translated text.

4.3 Formatting

This section explains some formatting issues you need to know to set up your thesis. The term formatting refers to the detailed rules about what a thesis looks like on the page. With good formatting, your thesis or paper will show enhanced quality and presentation of the research work (not just this time but in future as well). Publishers are strict about formatting as they must adjust a paper to the limited space available within their publication. Therefore, students will find it worthwhile to begin learning basic requirements discussed here.

4.3.1 Margins

Margins can be set in the “Page Layout” menu in Microsoft WORD. The student can go to the “Page Setup” group and click on the “Margins” item. Choose the “Normal” setting. You should

be able to set for standard A-4 paper, in centimeters. The top margin will be set at 35 mm, while the other margins will be set at 30 mm. All paragraphs and block quotations should align with the indentation.

4.3.2 Justification

The term “justification” refers to how the text is aligned on the left and right margins. A writer has the option of “left-justified” (ragged on right), “right justified” (ragged on left), and “fully-justified” (blocked). This guide provides an example of the option preferred in the NU GSL, the “left-justified” document. You can choose this option in the [Paragraph] group on the [Home menu] in *Microsoft Word*. When you reach the revision stage of your paper, make sure to double-check that all margins follow these recommended standards.

4.3.3 Pagination

The term “pagination” refers to the correct order and placement of numbers within a document. There are many different formats. Please follow the numbering format shown in this guide. This means using small Roman numerals (i-x) for all pages before your introduction, except for the title page, which is not numbered. After the TOC, the student will use Arabic numerals (1-10) for all the rest of the pages in the thesis, right through to the final page of the references section.

The title or cover page is not numbered. The writer must center and place all page numbers at the bottom of the page (for both sets of numbers), throughout the thesis (including bibliography and appendices). The thesis should begin each chapter on a new page but follow the pagination from the chapter before (as shown in this guide). The student should not use a further or secondary page numbering system within your chapters.

4.3.4 Line spacing and fonts

The student should take keen notice of the line spacing and sentence development within these guidelines. You should use single spacing for chapter headings, block quotations, tables,

figures, graphs, the Table of Contents, footnotes, and the references section. For between sentences, use double spacing, including for the “gap” between paragraphs. The new paragraph that follows a sub-heading is double spaced for all headings except the space between chapter titles and the first sentence of each chapter which should be set at 2.5 spacing. The references section text should be set at 3.0 from the heading. References are single spaced within entries and double spaced between entries. This guide provides an example of the line spacing that AW team recommends.

Use a 10.5-point font size throughout the main text, and 10-point size for footnotes and captions, as in this writing guide. The AW team recommends Times New Roman.

4.3.5 Tables, graphs, and other figures

The CMS will help you to place tables, graphs, and other figures into a paper. These types of entries should not exceed the margins of a page or expand beyond a single page. If you want to include a large or complicated figure, then put it in an appendix. All figures must include a heading and a source. The student must create their own tables and figures and make sure they are properly explained (do not cut and paste tables and figures). If you need to use a map, consult with an AW mentor or your supervisor. The heading for such entries goes at the top for tables and at the bottom for other figures. The font should stay the same for headings, but the font size within the framed display should be smaller than in the main text, as with footnotes which are 10-point size.

4.3.6 Widows and orphans

A “widow” is a short line or single word that ends a paragraph on one page but appears alone at the top of the next page. An “orphan” is a heading or sub-heading that appears at the bottom of a page with the text belonging to it beginning on the following page. Widows and orphans detract from appearance and readability of your thesis. You should make a final check of your paper just before submission to make sure it does not contain these issues. Word processing software can be set to automatically prevent both “widows” and “orphans.”

Chapter V: Conclusion

Regardless of personal background, the writing of an academic paper is often a new skill that a research writer must learn. Simply being a good “writer” is not enough to satisfy the expectations in academic writing because it requires an understanding of how to integrate and express difficult research ideas into a more readable paper. Whether you intend to enter an academic or a professional field, writing skills need constant development and practice. Such practice is even truer when working in a second language. The writing of a thesis is one of the fundamental stages in learning how to structure and organize a paper as part of this practice.

In actuality, there are many ways to write and present a paper, but the writer must work within expected guidelines of a respected discipline. Editors, reviewers, or faculty do have such expectations to curtail creativity but to ensure consistency with a field of study so that the writer and reader might reach an understanding and agreement. After all, much writing at this level includes complex or abstract ideas not just as information but to persuade the audience of their importance. Thus, the AW Team developed these guidelines to assist the student in this endeavor.

These guidelines represent a general standard of expectation written in an instructional way. There were several aims in developing this guide. The first aim was to provide the student with a mental picture of a thesis that much of the faculty hope to see by the end of the study. The second aim was to help students understand many of the details related to style, format, and organizational issues related to writing an academic paper. Because there are many styles and formats, a student would easily become lost if left to go through all the different books dealing with the topic of writing academic papers. Thus, the AW team elected to follow a style and formatting similar to The Chicago Manual of Style. The third aim in developing this guide was to establish a standard of consistency and coherency between the writer, the supervisor, checker, and the reader. While the guidelines are a work in progress, the AW team hopes that this guide in combination with the classes will answer most of the needs of the students in pursuit of a Master’s degree in the GSL department.

In order to assist students and the final Native English proofreader with processing a full reading of a thesis, the guide provides a check list on the following page that the student should consult prior to final submission of the thesis. The student should consult with the supervisor that all content and structure are set before submitting the paper. Before the final English check is initiated, the AW team will check each thesis with a software called *iThenticate* to ensure there is no plagiarism or use of AI. If plagiarism or use of AI is discovered, the student's supervising faculty will be alerted, and the student will be required to make corrections before the Native English proofreading can begin. Students may need to make corrections to the paper before actually receiving a complete English check.

5.1 Checklist: Before submission of preliminary check

1. Does your Title Page include all the necessary information, required by the Library?
2. Is the word count less than 20,000?
3. Is the Abstract less than 300 words?
4. Do the titles and page numbers in the Table of Contents match the titles in the main text?
5. Did you use American spelling and grammar?
6. Did you use the spelling and grammar check function in your word processing software?
7. Is the subject clear in each sentence?
8. Did you reduce passive verb forms down to 10%?
9. Is your average sentence length 20 words?
10. Does every paragraph have a clear, single topic sentence?
11. Do all other sentences in each paragraph support the clear, single topic sentence?
12. Does every paragraph contain a clear, logical “transition” word or phrase?
13. Did you check for mixed verb tenses?
14. Did you check for word repetition?
15. Do all your quotes have an authority and citation?
16. If you used block quotes, are they correctly aligned and properly cited?
17. If you used tables, figures, or appendices, are they properly labeled?
18. Do your citations follow the Chicago Manual of Style (or The Bluebook as needed)?
19. Is your font the same throughout and at 10.5 pt. for text and 10 pt. for footnotes?
20. Did you provide a List of Abbreviations?
21. Did you define key terms in your Introduction?
22. If you used surveys and/or interviews, did the supervisor clear them?
23. If you used surveys and/or interviews, did you explain them in text?
24. Does your reference section follow *The Chicago Manual of Style*?

Appendix A: Mid-Term Report

The Problem of Incorporating References into Commercial Contracts in Vietnam

Since 1958, 146 countries have signed and ratified the *Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*. The primary reason for such a convention was to protect international business contracts from the interference of domestic courts. However, problems have emerged concerning the nature and concept of how some nations use Article II of this *New York Convention* (NYC).

Article II refers to the concept and recognition of arbitration agreements in writing; however, the Article does not clarify how an arbitration clause should be incorporated in documents by reference. A majority of countries that have signed the convention have no direct issue with Article II, but some countries question the validity of the concept of arbitration agreements in writing. The problem of incorporating by reference is a legal issue in Vietnam. The objective of this research proposal is to assist in understanding the design of the final thesis by explaining the problem, the purpose, and the thesis statement.

Problem statement

The essential problem concerns the issue of how Article II of the NYC does not specify clearly how business contracts should incorporate arbitration clauses by reference. Historically, companies seeking to do international business did not need an arbitration agreement but rather depended directly on domestic courts in a dispute. Arbitration emerged as one way to protect business from domestic courts. However, governments failed to clarify arbitration laws, which led to the development of the *New York Convention*. Article II remains problematic with regard to the validity and nature of arbitration agreements in writing. Vietnam has attempted to update its law regarding arbitration, but the issue needs clarification.

The present debate on Article II centers on three points. First, some legal scholars feel this Article is unclear because it only applies to circumstances where the documents exchange by the parties might (or might not) include the arbitration clause. Second, other experts wonder if the Article applies to these first circumstances and to the concept of *relatio perfecta*. This particular concept of *relatio perfecta* means that the contract might not have an arbitration clause in the same agreement makes reference to such clause in a separate document. Third, other commentators question whether or not Article II applies not only to the first circumstances but also to the concept of *relatio imperfecta*. This final concept of *relatio imperfecta* means that the document exchanged by parties did not contain an arbitration clause but made reference to adopting a document containing such a clause.

The United Nations Commission on International Trade Law convened and passed the *New Model Law* in 2006 to response to these three views of Article II of the NYC. According to Pietro (2006), much of the historical case law supports the view that Article II includes the first circumstances and *relatio perfecta*. However, much of the recent debate centers on the concept of *relatio imperfecta*.

The aim of this study is to focus on some countries that have used the *New Model Law* (2006) to assess if it clarifies Article II and specifically problems associated with *relatio imperfecta*. The study focuses on Vietnam as a country with problems associated with *relatio imperfecta*. In Vietnam, the legislators passed the *Law on Commercial Arbitration* (2010). However, this newer legislation still does not conform precisely to the *New Model Law* (2006).

Thesis statement

Many nations have begun to adopt Article VII, paragraph 6, of the *New Model Law* (2006), which takes a broader approach than the NYC. Article VII speaks directly to the issue of incorporating arbitration clauses by reference into business contracts. While not compelled to adopt any aspect of the *New Model Law*, Vietnam has recently attempted to respond to this issue of

incorporation by reference in 2010. Vietnam promulgated the *Law on Commercial Arbitration* (2010), which includes a provision on incorporation by reference, Article 16.

However, this thesis analyses the weakness of this recent reform. In Vietnam, subtle differences between the recent reform and the *New Model Law* could result in future problems with regard to arbitration. Basically, the present reading of the new provision in this law in Vietnam could handicap some business that fail to see these differences. Finally, misreading of this provision could actually lead to a refusal of arbitral awards.

For example, in the United States such a problem arose in the case of *David Threlkeld v. Metallgesellschaft Ltd.* (2d Cir. 1991). In this case, the opinion of the Supreme Court was that the relevant arbitration clauses had been incorporated by reference and “became part of the contract” between the parties. In another case, in Switzerland the arbitral tribunal considered whether or not an arbitration clause in the main contract referred to the sub-contract. In India, there was a similar case between *M.R. Engineers & Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.* (2009) where the High Court rejected the application of the appellant on the ground that there was no arbitration agreement. Therefore, the problem remains in the area related to *relatio imperfecta* that some countries do not implement precise provisions on how to incorporate arbitration clauses by reference.

Purpose

The purpose of this research is to explore and understand the *Law on Commercial Arbitration* (2010) in Vietnam as it relates to the problem of incorporating by reference. Through these means the study provides evidence as to how such an incomplete reform could be problematic for future international business. Therefore, this study includes evidence from other countries such as the United States as to how such subtle differences between legal provisions in this area affect arbitration.

The analysis covers several points: 1) the key laws and terms in the field of arbitration; 2) a discussion of the reform in Vietnam; and 3) a comparison of countries with similar issues, in particular those that have employed the *New Model Law* (2006). The research includes an

explanation of the NYC, the *New Model Law* (2006) and the Vietnamese *Law on Commercial Arbitration* (2010). Furthermore, the study provides a present look at countries such as the United States, which have issues with their arbitration law. The thesis looks at nations such as Singapore, Switzerland, and Japan because they have implemented law that is more in line with the *New Model Law*.

As a result, of using a more precise definition of incorporation by reference, these three nations have decreased the number of problems related to the authority of an arbitral tribunal or court to resolve disputes between parties and the refusal of arbitral awards. Therefore, the evidence from this research suggests that nations such as Vietnam could avoid *relatio imperfecta* disputes by framing their arbitration law to more closely follow the provisions of the *New Model Law*.

Conclusion

In conclusion, the objective of this proposal was to explain the problem, thesis statement, and purpose of the research proposal for the reader to comprehend the research design of the thesis. The basic problem concerns how some nations interpret Article II of the NYC with regard to how a business contract should incorporate arbitration clauses by reference. In this study, Vietnam provides a clear example of the problems that currently arise in this area. The thesis statement for this study maintains that countries that fail to implement exact provisions on how to incorporate arbitration clauses by reference will only make it difficult for future commercial transactions. The purpose of the thesis is to explore possible solutions to the weakness of the Vietnamese *Law on Commercial Arbitration*. The method followed will include archival research that eventually brings together these key points into a five-chapter thesis.

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Sample Thesis

Note to students: The following “sample thesis” is an excellent example of an actual study recently completed by a student in the GSL department. While not perfect, the student in many every effort to fulfill all of the guideline concerns. This example illustrates the ideal structure and style of expression needed to communicate an effective thesis, and the AW team is not providing this as statement about the content or theme.

Nagoya University
Graduate School of Law
Master's Thesis:

**PUBLIC INTEREST PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS AS A
TOOL TO SAFEGUARD AND FOSTER THE GENERAL WELFARE**

Student ID Number: 231604213

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Name of the Program: LL.M (Comparative Law) Program in Law and Political Science

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Date of Submission: June 18, 2018

Abstract

Because of a growing number of investor-state dispute settlement (ISDS) cases in public interest areas, some countries began to review their international investment agreements (IIAs). In fact, there are both substantive and procedural issues that have caused ISDS cases in the general welfare fields. However, many current IIAs have deficiencies in their content that leads to ISDS and inconsistent decisions of investment tribunals. These deficiencies include vague terms and the absence of legally binding public interest clauses. This research focuses on substantive problems and ways to overcome these issues. One of the most effective tools to improve IIAs is inclusion of public interest provisions. This tool primarily addresses public welfare matters and helps to safeguard the regulatory rights of host states.

This thesis analyzes implications of public interest provisions in IIAs and ways to increase effectiveness of such provisions. First, this research examines the background and current state of public interest clauses in international investment law (IIL). Next, this study reviews data on the effectiveness of public interest provisions in protecting and fostering the general welfare and looks at other possible impacts of the provisions. The thesis then scrutinizes the provisions in more than 30 IIAs to discover shortcomings that might hinder their effectiveness and suggests ways to overcome these shortcomings.

This research finds that (1) in general, public interest clauses in IIAs positively impact the public welfare and do not harm foreign direct investment (FDI) inflows, host states' regulatory rights, and the level of investment protection, (2) deficiencies in some of the current public interest provisions can diminish their effectiveness, and (3) clear formulation and proper enforcement mechanisms are necessary to improve the provisions. These findings lead to the conclusion that carefully drafted and properly implemented public interest provisions are an effective tool to safeguard and promote the general welfare.

List of Abbreviations

BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
CAFTA-DR	Central American-Dominican Republic Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILO	International Labor Organization
ISDS	Investor-State Dispute Settlement
ITUC	International Trade Union Confederation
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
RTA	Regional Trade Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
U.S.GAO	United States Government Accountability Office

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Chapter I: Introduction

The relationship between the general welfare of people and regulatory rights of host states, on the one hand, and rights of foreign investors, on the other, is a pressing issue under international investment law. A major issue is to find an effective way to protect regulatory rights of host states and promote the public welfare without violating foreign investors' rights. This issue is important for the contemporary international investment framework, because the number of investor-state dispute settlement cases has dramatically increased in recent years. In 2016, for instance, investors filed 62 cases and challenged measures of host states including, new tax laws and legal reforms in environment, public health, and renewable energy sectors.¹

1.1. Problem statement

Substantive shortcomings of IIAs, such as the ambiguity of several terms have made investors question host countries' measures, for example adoption of new laws or minimum wage increases, in general welfare areas.² Owing to high arbitration fees, a respondent state in ISDS cases can face considerable financial expenditures even when an investment tribunal decides in favor of the state. Furthermore, the disputes might be a barrier to improvements in public interest areas and lead to an insufficient level of general welfare in these countries. Some scholars share a view that irrespective of the ISDS results, the threat of arbitration on the general welfare matters per se can cause regulatory chill in host states.³ Therefore, many host countries undertake measures such as

¹ *United Nations Conference on Trade and Development 2017, Investor-State Dispute Settlement: Review of Developments in 2016*, IIA Issue Note, no. 1 (UNCTAD/DIAE/PCB/2017/1): 2-4, accessed April 9, 2018, http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf.

² The term "international investment agreements" in this thesis refers to, as defined by the United Nations Conference on Trade and Development (UNCTAD), Bilateral Investment Treaties (BITs) and other economic agreements, for example, Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs) with investment-related clauses or chapters. *United Nations Conference on Trade and Development 2016, Taking Stock of IIA Reform*, IIA Issue Note, no. 1 (UNCTAD/WEB/DIAE/PCB/2016/3): 4, accessed June 9, 2018, http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d3_en.pdf.

³ For example, Mitchell and Casben argue that claims of the investor against tobacco plain packaging requirements of Australia in *Philip Morris v. Australia* can lead to regulatory chill in public health issues in other host countries. Andrew D. Mitchell and Jessica Casben, "The National Interest in Trade and Investment Agreements: Protecting the Health of Australians," in *Australia's Trade, Investment and*

reformulating contents of IIAs by including new provisions in order to safeguard their regulatory rights and protect public interests.

Public interest provisions are a prime example of such novel provisions. There are many ways to design these provisions, and so even the provisions that refer to the same area of the general welfare might have different wordings. For instance, a public interest clause on environment in the Austria-Tajikistan BIT (2010) has the following wording: “The Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic environmental laws”⁴ In comparison, a public interest provision that also refers to environment in the US-Oman FTA (2006) has a different formulation:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies.⁵

The environmental clause in the Austria-Tajikistan BIT only prohibits lowering existing environmental standards in a host country, whereas the public interest provision in the US-Oman FTA reaffirms regulatory rights of a host state over domestic environmental matters and promotes enhancement of environmental regulations.

At present, there is no universal consensus about the scope of “public interest.” Instead of the term “public interest,” some scholars use the terms “general welfare, community interest,”⁶ and “non-economic interest.”⁷ In general, public interest covers concerns in the areas of environment, public services, security, labor, public health, cultural heritage, sustainable development, and human

Security in the Asian Century, eds. John Farrar, Mary Hiscock and Vai Io Lo (Singapore: World Scientific, 2015), 9. Kelsey also states that the threat of investment arbitration caused regulatory chill in tobacco plain packaging legislation of New Zealand. Jane Kelsey, “Regulatory Chill: Learnings from New Zealand’s Plain Packaging Tobacco Law,” *QUT Law Review* 17, no.2, (November 2017), 44.

⁴ Article 4, Austria-Tajikistan BIT 2010, accessed May 16, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3308>.

⁵ Article 17.1, US-Oman FTA 2006, accessed May 16, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2718>.

⁶ Christoph Schreuer and Ursula Kriebaum, “From Individual to Community Interest in International Investment Law” in *From Bilateralism to Community Interest: Essays in Honor of Judge Bruno Simma*, ed. Ulrich Fastenrath (Oxford: Oxford University Press, 2011), 1079-96.

⁷ Giorgio Sacerdoti et al., *General Interests of Host States in International Investment Law* (Cambridge: Cambridge University Press, 2014), 165.

rights. In this research, the term “public interest provisions” refers to clauses that fall into either of the following categories:

- (1) provisions which declare public interest protection as one of the aims of the parties to IIAs;
- (2) those which prohibit lowering public interest standards (for instance, labor or environmental standards);
- (3) those which exclude some public policy areas from investment protection obligations or from the general investor-state dispute settlement mechanism;
- (4) those which reaffirm the regulatory rights of host states or obligations of parties related to public interest areas; or
- (5) those which encourage stronger cooperation in public interest areas.

Despite the fact that the number of IIAs with public interest provisions is increasing, some scholars have negative views towards these provisions. For example, Bhagwati claimed that environmental and labor clauses are just a part of protectionist policies of developed countries and that these provisions were “a way in which the fearful unions seek to raise the costs of production in the poor countries as free trade with them threatens their jobs and wages.”⁸ Chauvel has voiced concern on the general exception clauses for public purposes by arguing that these clauses would have an adverse effect on the host states’ right to regulate and limit their policy space.⁹ In addition, some countries remain reluctant to use public interest provisions as a method to safeguard and foster the general welfare within their territories, because they lack tools to implement the provisions and fear to lose foreign investments. As such, this study will include several research questions and a central thesis statement.

⁸ Jagdish Bhagwati, “Trade Liberalization and ‘Fair Trade’ Demands: Addressing the Environmental and Labor Standards Issues,” in *Writings on International Economics*, ed. Vudayagi Balasubramanyam (Delhi: Oxford University Press, 1997): 757.

⁹ Louis-Marie Chauvel, “The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law,” *Revista de Direito Internacional Brasília (Brazilian Journal of International Law)* 14, no.2 (November 2017): 150-152.

1.2. Research questions and thesis statement

A number of reports and surveys of international organizations and scholars provide empirical evidence of the effectiveness of public interest provisions in safeguarding and promoting the general welfare. However, there is also data that shows cases in which limitations of some of the provisions diminished their effectiveness. This study argues that public interest provisions can contribute to the better protection and promotion of public interests and suggests the ways to address deficiencies of these provisions. This thesis sets out the following research questions:

- (1) What are the implications of public interest provisions for host countries?
- (2) What are the shortcomings of current public interest clauses that reduce their effectiveness?
- (3) What are the ways to increase the effectiveness of public interest provisions?

The originality of this research lies in the following point. Much of the literature on ISDS cases in public interest areas and the relationship between investments and the general welfare discusses both substantive and procedural aspects simultaneously.¹⁰ However, procedural issues such as bias or inconsistent decisions¹¹ are closely related to the contents of the relevant IIAs including ambiguous provisions and lack of proper safeguards of host states' regulatory rights. Therefore, this research puts stress upon substantive issues of IIAs only, for example, on vague terms or non-binding nature of clauses, and does not elaborate on procedural problems, such as an excessively broad jurisdiction of investment tribunals and insufficient transparency in investment arbitration. This chapter includes a research map to assist with an understanding of the overall direction of the thesis and what elements will assist with the reader with a complete picture of the study.

¹⁰ For example, Yannick Radi, "Labor Provisions and Dispute Settlement in International Investment Agreements - An Inquiry into the Politicization of the Settlement of 'Labor Disputes'," in *Yearbook of International Investment Law and Policy 2014-2015*, ed. Andrea K. Bjorklund (New York: Oxford University Press, 2016) and Asa Romson, "Environmental Policy Space and International Investment Law," (PhD diss., Stockholm University, 2012).

¹¹ Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (October 2005): 1558.

1.3. Research map

This research consists of five chapters. Chapter II highlights trends of inclusion of public interest clauses in international investment agreements, then analyzes the reasons behind negative attitudes of host states towards such provisions. Although the number of IIAs with such provisions is increasing, there are still many states that do not include these provisions in their agreements. For example, South Africa terminated some of its BITs rather than amending their contents, because the country faced a large number of investor-state disputes.¹² Many developing states are still reluctant to introduce substantive changes in their IIAs due to their weak bargaining power and the fear of losing investment attractiveness. Chapter III elaborates on the influence public interest provisions in IIAs have on the general welfare. This chapter demonstrates impacts of the provisions on the general welfare in countries such as Mexico, Peru, and Cambodia. This chapter then examines other potential implications of public interest clauses, such as the influence of the clauses on investment inflow, the regulatory rights of host states, and the level of investment protection. Chapter IV identifies deficiencies and key concerns about current public interest clauses in such international agreements. This chapter highlights such issues as unclear scope and the non-binding nature of some public interest provisions as well as problems with their drafting and implementation. Chapter IV also examines methods to overcome these issues and improve current public interest clauses to raise their efficiency. Chapter V summarizes findings of the research and presents major conclusions and recommendations of the thesis.

¹² Mohammed Mossallam, "Process Matters: South Africa's Experience Exiting its BITs," *GEG Working Paper* 2015/97, (January 2015): 12.

Chapter II: Background of Public Interests in International Investment Law

In 2014, the United Nations Commission on International Trade Law (UNCITRAL) adopted the *Rules on Transparency in Treaty-based Investor-State Arbitration*¹³ and in 2016, the United Nations Conference on Trade and Development (UNCTAD) designed the *Road Map for IIA Reform*.¹⁴ Today these two instruments represent the response to two pressing issues concerning sustainability, responsibility, and transparency in international investment law: first, safeguarding public interests and regulatory rights of host states and, secondly, protecting investments. In particular, the *UNCITRAL Rules* is an attempt to integrate public interests in the current international investment regime. The *UNCTAD Road Map* puts forward protection of investments and regulatory rights of host states as well as development of responsible investments among major reform areas. This chapter will examine the historical trends of inclusion of public interest clauses in these two IIAs.

2.1. Public interests in international investment law since 1980

Some older investment treaties already began to include public interest clauses as early as 1980s. For instance, the China-Singapore BIT (1985) prohibits limiting the parties' right to apply measures for public health protection and pest prevention in plants and animals.¹⁵ The Czech Republic-United States of America BIT (1991) encourages promotion and improvement of living standards and labor rights.¹⁶ There are chronological differences in the first inclusion of various

¹³ Lise Johnson and Nathalie Bernasconi-Osterwalder, "New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps," International Institute for Sustainable Development, September 18, 2013, accessed May 26, 2018, <https://www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2/>.

¹⁴ "UNCTAD's Road Map for IIA Reform", UNCTAD Investment Policy Hub, accessed April 19, 2018, <http://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/552>.

¹⁵ Article 11, China-Singapore BIT 1985, accessed April 26, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5377>.

¹⁶ Preamble, Czech Republic-United States of America BIT 1991, accessed April 24, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/994>.

types of public interest provisions. For example, labor clauses in IIAs started in the 1990s,¹⁷ whereas environmental provisions first appeared in the mid-1980s.¹⁸

However, a global trend in the inclusion of public interests provisions into IIAs started in the 2010s.¹⁹ According to the UNCTAD, only 10% of BITs concluded between 1962 and 2011 contain references to public interests in their preambles, whereas 65% of BITs concluded between 2012 and 2014 include these references.²⁰ These facts illustrate a dramatic increase of public interest clauses in international investment agreements.

However, the integration of public interest provisions in IIAs is a relatively new topic in international investment law. Some researchers have argued that inclusion of these provisions is beneficial for host countries. For example, Acconci states that inclusion of social concerns enhances investment climate of host states since “it would bring together the various attitudes and interests of the different parties.”²¹ Likewise, Choudhury claims that a particular type of public interest provisions, namely exception clauses on human rights, is an effective way to counter imbalances between rights of states and rights of foreign investors as well as promoting human rights in host countries.²² Titi argues that IIAs’ clauses which safeguard regulatory rights of host states in the general welfare areas help to make the international investment system “more legitimate and sustainable.”²³

¹⁷ International Labor Organization 2016, *Assessment of Labor Provisions in Trade and Investment Arrangements* (Geneva: International Labor Office, 2016): 22, accessed May 2, 2018, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf.

¹⁸ Kathryn Gordon and Joachim Pohl, “Environmental Concerns in International Investment Agreements: A Survey,” *OECD Working Papers on International Investment* 2011/01 (January 2011): 5.

¹⁹ The UNCTAD named this period an “era of re-orientation.” *United Nations Conference on Trade and Development 2015, World Investment Report 2015: Reforming International Investment Governance*, (UNCTAD/WIR/2015): 124, accessed March 28, 2018, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

²⁰ UNCTAD 2016, *Taking Stock of IIA Reform*, 9.

²¹ Pia Acconci, “The Integration of Non-Investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?” in *General Interests of Host States in Current International Investment Law*, ed. Giorgio Sacerdoti (Cambridge: Cambridge University Press, 2014), 165-193.

²² Barnali Choudhury, “Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements,” *Columbia Journal of Transnational Law* 49, no.3, (June 2010): 671.

²³ Catharine Titi, “Embedded Liberalism and IIAs: The Future of the Right to Regulate, with Reflections on WTO Law,” forthcoming in *20 Years of Domestic Policy Under WTO Law: The Embedded Liberalism Compromise Revisited*, ed. Gillian Moon and Lisa Toohey (Cambridge: Cambridge University Press, 2018), 11.

Other scholars have raised concerns about public interest clauses. For example, Romson states that the majority of public interest provisions on environment are only of symbolic nature and do not make a considerable change in international investment framework.²⁴ Chilcoat argues that labor provisions can be effective only if they address country-specific labor issues and refer to enforceable labor standards. He also recommends that countries avoid trite language when drafting labor clauses.²⁵ Mitchell and Casben claim that public interest provisions such as exceptions on public health matters do not guarantee regulatory autonomy of states and do not always protect their policy space.²⁶ There are also researchers who argue that there are no deficiencies in the content of IIAs and that some public interest provisions, for instance, labor clauses, are inconsistent with the spirit and purpose of investment agreements.²⁷

The number of ISDS cases involving the general welfare matters is becoming quite common. These cases concern areas such as financial regulation, provision of public services, protection of environment, labor rights, cultural heritage of a host state, and public health.²⁸ In these disputes, the investors have claimed indirect expropriation and breaches of principles of fair and equitable treatment, national treatment, and minimum standard of treatment by the host states. Investment tribunals have addressed public interests in different ways, and not all of them have considered these interests.²⁹

In sum, the inclusion of public interest provisions in IIAs is a new trend. This trend engages

²⁴ Romson, "Environmental Policy Space and International Investment Law," 300.

²⁵ Elizabeth B. Chilcoat, "Pinkie Promises or Blood Oaths? Using Social Clauses in U.S. Free Trade Agreements to Eradicate Child Labor," *Washington University Global Studies Law Review* 7, no. 2, (January 2008), 329-330.

²⁶ Mitchell and Casben, "The National Interest in Trade and Investment Agreements: Protecting the Health of Australians," 74.

²⁷ Radi, "Labour Provisions and Dispute Settlement in International Investment Agreements - An Inquiry into the Politicization of the Settlement of 'Labour Disputes'," 83-85.

²⁸ *United Nations Conference on Trade and Development 2017, Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA Issue Note, no. 2 (UNCTAD/DIAE/PCB/2017/3): 4, accessed May 22, 2018, http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf.

²⁹ See, for example, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8). Instrument invoked: Lithuania-Norway BIT (1992). Status: decided in favor of the state. Award dated 11 September 2007, <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf> and *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (PCA Case No. 34877). Instrument invoked: Ecuador-United States of America BIT (1993). Status: decided in favor of the investor. Final award dated 31 August 2011, <https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf>.

various countries irrespective of their size, location, and the level of economic development.

Although many host states suffered from disputes on the general welfare matters, some of them have a negative attitude to inclusion of public interest provisions in IIAs as a safeguard of their policy space. The following section elaborates on factors that concern this attitude.

2.2. Host states' views on substantive reform of international investment agreements

Many countries have had a negative experience with ISDS cases in which foreign investors challenged the host countries' regulation in public interest areas. According to the UNCTAD, the majority of ISDS cases have been brought under so-called "old-generation treaties," or IIAs concluded before 2010.³⁰ Introduction of public interest provisions in such IIAs may enable host states to take some regulatory measures without breaching the IIAs. Some researchers even claim that inclusion of public interests in IIAs is advantageous to states, because it improves relationships between them, brings support from civil society, and balances economic and social progress.³¹ However, despite huge financial expenditures due to lost disputes, many states are still reluctant to amend their IIAs and integrate public interests into them. This section analyzes the reasons behind reluctance or negative attitudes of host countries towards the amendment of investment agreements.

ISDS cases concerning public welfare issues increased dramatically during the 2000s. In 2015, the number of cases reached seventy, a new record for a single year.³² In many of these cases, foreign investors challenged measures of host states such as legislative reforms related to development of renewable energy sector (at least 20 cases), protection of environment and indigenous areas.³³

³⁰ UNCTAD 2017, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, 4.

³¹ Jean-Marc Siroën, "The Use, Scope and Effectiveness of Labor and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements," report mandated by the European Commission, (September 2008): 9, accessed April 24, 2018, <file:///C:/Users/USER/Downloads/final%20report%20English.pdf>.

³² United Nations Conference on Trade and Development 2016, *Investor-State Dispute Settlement: Review of Developments in 2015*, IIA Issue Note, no. 2 (UNCTAD/WEB/DIAE/PCB/2016/4): 2, accessed April 24, 2018, http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf.

³³ *Ibid.* 6.

In response to these ISDS cases, countries have begun to take measures to safeguard their regulatory rights. Some countries, such as Indonesia, started to improve the substantive content of their IIAs through the reformulation of terms and the addition or exclusion of particular clauses.³⁴ Other countries decided to protect their policy space by terminating some of their agreements. For instance, South Africa terminated its BITs with Switzerland and Spain.³⁵ Bolivia and Ecuador opted for an even more radical measure, the denunciation of the International Centre for Settlement of Investment Disputes (ICSID) Convention.³⁶ Only some countries chose inclusion of new provisions in their IIAs as a way to protect their regulatory rights and promote the general welfare. There are a number of reasons behind negative attitudes of host states to investment treaty review in general, including novel clauses such as public interest provisions in IIAs in particular.

First, the level of economic development of a country and its status in international relations might influence the country's approach to investment treaty amendment for safeguarding regulatory rights. Countries that import capital may have a weak bargaining power in designing IIAs and, thus, be reluctant to change the contents of their agreements. In contrast, capital-exporting states, or home countries, might have a strong position in investment treaty negotiations, because they provide investments that are important for the host state. Thus, some researchers argue that "BIT negotiations are likely to occur on terms set by the home state. Its ability to obtain favored objectives should increase when it is clearly more powerful than the treaty partner."³⁷

However, the trend in IIAs' reform indicates that not only developed and large capital-exporting countries are in the process of investment treaty amendment. Many new IIAs between developing countries contain public interest clauses. For example, the Morocco-Nigeria BIT (2016)

³⁴ Abdulkadir Jailani, "Indonesia's Perspective on Review of International Investment Agreements," in *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, ed. Kavaljit Singh and Burghard Ilge (Netherlands: Both Ends, Madhyam & SOMO, 2016), 122.

³⁵ Mossallam, "Process Matters: South Africa's Experience Exiting its BITs," 12.

³⁶ United Nations Conference on Trade and Development 2010, *Denunciation of the ICSID convention and BITS: impact on investor-state claims*, IIA Issue Note, no. 2 (UNCTAD/WEB/DIAE/IA/2010/6): 1, accessed June 4, 2018, http://unctad.org/en/docs/webdiaeia20106_en.pdf.

³⁷ Todd Allee and Clint Peinhardt, "Evaluating Three Explanations for the Design of Bilateral Investment Treaties." *World Politics* 66, no. 1 (January 2014): 62.

and the Iran-Slovakia BIT (2016) include such clauses in their preambles.³⁸ Moreover, some developing countries in Africa have actively amended contents of their IIAs at the regional level. Therefore, only in some rare cases is the level of economic development a factor for investment treaty amendment.

Second, the complex nature of the treaty amendment process might also discourage states from including new provisions in their existing investment agreements. Revision of IIAs, especially multilateral ones, may take time. Certain steps are necessary before treaty amendments are implemented. Even if parties manage to reach a consensus on new clauses, they may not start the terms of the treaty, if, for instance, one of the parties does not fulfill a requirement of ratification. Moreover, the process of reviewing IIAs may require financial expenditures.³⁹

Third, some countries are reluctant to include public interest provisions because they cannot implement such provisions due to financial and institutional deficiencies. According to the United States Government Accountability Office (US GAO), partners of US FTAs such as Colombia, Peru, Guatemala, Oman, and El-Salvador have encountered difficulties in enforcing labor clauses because these countries lack the implementation capacity.⁴⁰ Therefore, the clauses remain on paper and do not protect the general welfare.

Fourth, some countries consider their ISDS experience as generally positive and, therefore, do not consider that the amendment of their existing IIAs is necessary. For example, Sattorova has analyzed the reasons behind the reluctance of Turkey and Uzbekistan towards IIAs reform and finds that “the current reticence with regard to modifying investment treaties can be attributed to the fact that both Turkey and Uzbekistan perceived their experience of investment arbitration as positive

³⁸ United Nations Conference on Trade and Development 2017, *World Investment Report 2017: Investment and the Digital Economy*, (UNCTAD/WIR/2017): 121, accessed May 8, 2018, http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

³⁹ Kathryn Gordon and Joachim Pohl, “Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World,” *OECD Working Papers on International Investment* 2015/02, (February 2015): 36.

⁴⁰ United States Government Accountability Office 2014, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed* (US GAO-15-160):18-22, accessed April 26, 2018, <https://www.gao.gov/assets/670/666787.pdf>.

overall.”⁴¹ From interviews with government officials, Sattorova concludes that since investment tribunals have dismissed some claims of foreign investors against Uzbekistan and Turkey, these countries have an impression that deficiencies in their IIAs do not pose any threat.⁴²

Finally, some researchers argue that large capital-exporting states are generally reluctant to include public interest provisions. For example, Dumberry claims that such states have a negative attitude toward provisions because their major aim in concluding a BIT is to “provide extensive legal protection to their national investors conducting business abroad.”⁴³ However, as mentioned earlier, an initiative to add public interest clauses has come from big capital-exporting countries such as Canada and the United States. Therefore, although there might be a reason for capital-exporting countries to oppose the inclusion of public interest provisions in IIAs, facts show that these countries tend to support these provisions.

In sum, various factors have influenced countries’ attitude towards the IIAs’ reform and public interest clauses. These factors do not apply universally. While one factor might apply to individual state, but it may not work with another. Thus, scholars in this area of law should consider a combination of factors to explain a state’s standpoint on public interest provisions in investment agreements, because each country case is different.

⁴¹ Mavluda Sattorova, “Reassertion of Control and Contracting Parties’ Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance,” in *Reassertion of Control over the Investment Treaty Regime*, ed. Andreas Kulick (Cambridge University Press, 2016), 59.

⁴² *Ibid.* 57-59.

⁴³ Patrick Dumberry, “Suggestions for Incorporating Human Rights Obligations into BITs,” in *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, ed. Kavaljit Singh and Burghard Ilge (Netherlands: Both Ends, Madhyam & SOMO, 2016), 230.

Chapter III: Public Interest Provisions in International Investment Agreements

The last chapter examined the historical background of public interest clauses and explained the current trends and motives behind introduction of the clauses in international investment agreements. This chapter discusses the impact and implications of public interest provisions in such treaties. More importantly, the chapter analyzes feasibility of such provisions in the inclusion of such agreements.

3.1. Influence on protection and promotion of public interests

The key aim of public interest provisions is to safeguard and foster the general welfare of people. Since inclusion of such provisions in IIAs is a relatively new trend, there is little data available on their impact. There is no single document that offers information on the global influence of public interest clauses on all areas of the general welfare. However, studies of governments, international organizations and scholars does shed some light on this issue. For example, the UNCTAD provides data on overall trend in inclusion of sustainable development clauses into international investment agreements. Other studies such as reports of the International Labor Organization (on labor provisions), the World Health Organization (on public health provisions) and various domestic institutions, contains data on the impact of public interest provisions on some general welfare areas in certain countries. This section analyzes these studies and examines implications of public interest clauses.

The two most important reports by the ILO on the effectiveness of labor provisions include the *Assessment of Labor Provisions in Trade and Investment Arrangements (Assessment)* and the *Handbook on Assessment of Labor Provisions in Trade and Investment Arrangements (Handbook)*.⁴⁴

⁴⁴ These two publications constitute part of the ILO's Studies on Growth with Equity publication series. The key purpose of the series is to provide evidence that social equity does not harm the economic development of countries. International Labor Organization, "Studies on Growth with Equity," accessed May 13, 2018, <http://www.ilo.org/global/research/studies-on-growth-with-equity/lang--en/index.htm>.

Both of these reports show that labor clauses in IIAs have some positive implications on public welfare. The ILO distinguishes between preliminary and final implications of labor provisions. Preliminary implications include changes in labor laws and regulations, ratification of labor-related treaties as well as establishment of special labor institutions and agencies. In contrast, final implications, on which this section focuses, refer to actual progress and improvement of labor conditions and workers' rights in host states.

Both reports indicate that labor provisions are positive. For example, the *Assessment* found that agreements with labor clauses have increased employment rates by 1.6 percentage in total for all countries included in the research. Moreover, the report has concluded that labor provisions make the job market more accessible, especially for working age females.⁴⁵ Meanwhile, the *Handbook* supports the *Assessment* in that labor provisions could reduce gender disparity in wages.⁴⁶

The US Government Accountability Office (GAO) also provides useful information about this issue. Reports by the GAO also indicate the positive implications of public interest provisions. For example, the report found that the government of Peru digitized systems to maintain data of labor inspections in response to labor clauses in the US-Peru FTA (2009), and these new digital systems significantly expedited adjudication of labor disputes.⁴⁷ Likewise, labor commitments in the Central American-Dominican Republic FTA (2004) helped the Ministry of Labor of Guatemala carry out frequent labor inspections and improve legal education of labor officials.⁴⁸ Also, references in this FTA to the protection of environment had positive effects on environmental conditions in Guatemala and El Salvador. In Guatemala, this FTA helped small and medium sized companies to join the country's cleaner production program that reduced excessive usage of electricity and water

⁴⁵ ILO 2016, *Assessment of Labor Provisions in Trade and Investment Arrangements*, 81-82.

⁴⁶ For example, labor clauses in the Cambodia–US Bilateral Textile Agreement (1999) helped to reduce the gender wage gap in the textile sector of Cambodia “from 32 per cent prior to the agreement to 6 per cent after its adoption.” International Labor Organization 2017, *Handbook on Assessment of Labor Provisions in Trade and Investment Arrangements*, (Geneva: International Labor Office, 2017): 3, accessed May 2, 2018, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf.

⁴⁷ US GAO 2014, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed*, 14.

⁴⁸ *Ibid.* 12.

resources.⁴⁹ In El Salvador, environmental commitments under this FTA stimulated adoption of the National Environment Policy and Strategy that addresses various environmental issues.⁵⁰

A number of researchers also have provided data on the effectiveness of public interest provisions for the promotion of the general welfare. Grimm argued that the North American Agreement on Labor Cooperation (NAALC) increased labor involvement of females in Mexican *maquiladora* factories.⁵¹ After examining 223 Regional Trade Agreements (RTAs) with and without labor clauses, and assessing their impact on labor standards in the states parties, Kamata has found that RTAs that contain labor provisions have a positive impact on labor earnings in middle-income countries.⁵²

The Commission for Environmental Cooperation provides information on the effects of public interest provisions in NAFTA on the environment in the parties. This commission conducted a study on the impacts of the North American Agreement on Environmental Cooperation (NAAEC) and states that environmental clauses in this agreement helped to enhance legislation and promote clean industries in Mexico, especially in such sectors as tanning, car production, and the electronics industry.⁵³

Although there is proof that public interest clauses helped to improve the general welfare in some countries, there is also data that demonstrates deficiencies and ineffectiveness of some of these clauses. For instance, labor provisions of the EU-Korea FTA have not substantially enhanced labor standards in Korea. The agreement provides that the “parties will make continued and sustained

⁴⁹ United States Government Accountability Office 2014, *Free Trade Agreements: Office of the U.S. Trade Representative Should Continue to Improve its Monitoring of Environmental Commitments* (US GAO-15-161): 17, accessed February 26, 2018, <https://www.gao.gov/assets/670/666782.pdf>.

⁵⁰ *Ibid.* 10.

⁵¹ Nicole L. Grimm, “The North American Agreement of Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras,” *American University Law Review* 48, no.1 (October 1998): 203. Grimm argues that “the NAALC offers women a new avenue for airing grievances and gaining relief from abusive employer or governmental practices in the workplace.”

⁵² Isao Kamata, “Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade,” *La Follette School of Public Affairs Working Paper Series No. 2014-002*, (February 2014): 29-30. Kamata did not provide information about the labor clauses’ influence on other labor matters such as gender discrimination, child labor or issues of occupational health and safety.

⁵³ Pierre Marc Johnson et al., “Ten Years of North American Environmental Cooperation.” *Report of the Ten-year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation* (Montreal: CEC 2004): 28.

efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as ‘up-to-date’ by the ILO.”⁵⁴ However, Korea has still not ratified a number of the ILO fundamental conventions, and the EU expressed concerns on the level of protection under Korean labor laws.⁵⁵

The EU-Korea FTA brought about some results in the labor sector of the European Union. In particular, this FTA helped to create effective institutional mechanisms to improve labor standards in the member countries. Nevertheless, according to the European Commission, the overall impact of the EU-Korea FTA on labor rights is neutral.⁵⁶ Shortcomings of labor provisions in this FTA such as insufficient enforcement mechanisms might be a reason for these results. Although Korea has failed to comply with its labor obligations, the country still enjoys economic benefits under the agreement. The European Union may invoke responsibility of Korea for non-compliance with the labor provisions if consultations between the parties do not yield fruitful results.

Implementation of labor clauses in the US-Oman FTA (2006) also encountered some difficulties. This FTA contains provisions on enforcement of labor laws and obligations of the parties as the ILO members. These labor clauses certainly brought about some positive results in Oman, which enacted laws on labor unions and provided the unions with rights to strike and to independently conduct their activities.⁵⁷ Nevertheless, according to the US GAO, foreign workers in Oman still cannot enjoy their labor rights and face issues regarding working conditions.⁵⁸

In sum, deficiencies and insufficient enforcement mechanisms may undermine the effectiveness of public interest provisions in investment agreements. However, some studies show

⁵⁴ Article 13.4 para 3, Free Trade Agreement between the European Union and the Republic of Korea 2010, accessed March 24, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2602>.

⁵⁵ European Commission 2017, *Annual Report on the Implementation of the EU-Korea Free Trade Agreement* (Brussels 2017): 11, accessed March 23, 2018, http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154699.pdf.

⁵⁶ European Commission 2017, *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea – Interim Technical Report*, (Brussels 2017): 176-177, accessed May 2, 2018, <https://static1.squarespace.com/static/5798bbd2be6594e06f727388/t/5950bcf0e4fcb533d1d45dd7/1498463505732/EU-Korea+FTA+Interim+Technical+Report+Part+1+-+2017-06-19.pdf>.

⁵⁷ US GAO 2014, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed*, 13.

⁵⁸ *Ibid.* 21.

that public interest clauses in IIAs have helped to enhance the public welfare in certain countries. Therefore, there is some empirical evidence that, if properly drafted and implemented, public interest provisions in IIAs are able to safeguard and foster the general welfare.

3.2. Other potential impacts of public interest provisions

From the literature it is evident that there are at least three potential impacts that public interest provisions have on investment and society. Public interest clauses in IIAs influence not only the general welfare, but they may also have an impact on investment inflows (3.2.1), the level of investment protection (3.2.2), and a policy space of host states (3.2.3). This section describes these potential impacts.

3.2.1. Influence on investment inflows

Some states voice concern that public interest clauses adversely affect FDI inflows and their investment attractiveness. In particular, advocates of the race to the bottom theory believe that the lower and weaker standards of the general welfare result in the higher FDI inflows.⁵⁹ However, much research shows that the level of public interest standards is not the main determinant of foreign direct investments. For example, through the regression analysis on the implications of labor standards on FDI in East Asia, Sarna finds that the overriding determinants of the FDI attraction in East Asia are “factors like maintaining competitiveness through superior technology, high levels of human capital, skilled labor force, agglomeration effects, dynamic growth and the role played by the state in strategically allocating FDI in the right sectors.”⁶⁰ Kucera also examined the impact of labor

⁵⁹ See William W. Olney, “A Race to the Bottom? Employment Protection and Foreign Direct Investment,” *Department of Economics Working Papers* 2011-02, (November 2010) and Ozay Mehmet and Akbar Tavakoli, “Does Foreign Direct Investment Cause a Race to the Bottom?,” *Journal of the Asia Pacific Economy* 8, no.2, (January 2003).

⁶⁰ Ritash Sarna, “The Impact of Core Labor Standards on Foreign Direct Investment in East Asia” (The Japan Institute for Labor Policy and Training, 2005), 28.

clauses and standards on FDI and concluded that “no solid evidence is found in support of the “conventional wisdom” that foreign investors favor countries with weaker worker rights.”⁶¹

Some country-specific data demonstrates a positive relationship between a public interest-friendly reform of IIAs and FDI inflows. For example, in 2014, when Indonesia reviewed its IIAs, it received a record high amount of foreign direct investments.⁶² In general, there is empirical proof that labor provisions in IIAs do not deviate FDI and do not decrease FDI flows in host states.

There is also research on the relationship between human rights standards and FDI inflows. For example, Garriga examined the relationship between human rights regulations and FDI inflows in 135 developing countries from 1982 to 2011. The author suggests that ratification of human rights treaties by host countries has a positive impact on FDI inflows, because foreign investors care about their reputation and favor countries with higher human rights standards.⁶³ Another study supports these results. Analyzing the correlation between human rights and FDI during 1980 - 2003 in non-OECD states, a couple of scholars argue that respect for human rights helps host countries to attract foreign capital. The scholars state that “while there are many potential instances of tension between economic interests and societal norms and values, our study suggests that respect for human rights is one area in which these values can actually serve to complement and reinforce the global economy.”⁶⁴ These sources suggest that better human rights protection is not an obstacle but rather an incentive for FDI inflows.

⁶¹ David Kucera, “The Effects of Core Workers Rights on Labor Costs and Foreign Direct Investment: Evaluating the ‘Conventional Wisdom’,” *International Institute for Labor Studies Working Paper No. 130*, (2001): 33. Kucera analyzed labor conditions and FDI inflows in 127 states and examined the correlation between freedom of association, child labor, and gender inequality on the one side and FDI on the other side.

⁶² Jailani, “Indonesia’s Perspective on Review of International Investment Agreements,” 119.

⁶³ Ana Carolina Garriga, “Human Rights Regimes, Reputation, and Foreign Direct Investment,” *International Studies Quarterly* 60, no. 1, (March 2016): 160-172.

⁶⁴ Shannon Lindsey Blanton and Robert G. Blanton, “What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment,” *The Journal of Politics* 69, no. 1 (February 2007): 153.

3.2.2. Influence on the level of investment protection

Though inclusion of public interest provisions in IIAs might have an adverse impact on the level of investment protection, there is no empirical proof of such a proposition. Public interest provisions usually co-exist with provisions which safeguard rights of investors. IIAs with public interest clauses generally provide that enforcement of the clauses should not undermine rights of investors. For instance, public interest clause of the Georgia-Switzerland BIT (2014) addresses both social concerns and investors' rights.⁶⁵ The first part of the article reaffirms the right of the parties to take necessary measures in public interest areas, whereas the second part provides that the general welfare measures of the host states are legitimate only if application of the measures was (1) necessary, (2) justifiable, and (3) did not restrict investments. The Canada-Jordan BIT (2009) also sets conditions for legitimacy of host states' measures in public interest fields. The treaty requires that these measures should not be applied "in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment."⁶⁶ Public interest clauses do not repeal commitments of host states to safeguard investments and to provide favorable conditions for investment activities. Requirements for legitimacy of states' actions in the general welfare areas help to maintain a proper level of investment protection.

3.2.3. Influence on a policy space of host states

Finally, some public interest clauses in IIAs might have implications on a policy space of host countries by limiting regulatory rights of states. For example, public interest clauses that prohibit to lower the general welfare standards, or non-lowering standards clauses, can be an obstacle for host states to soften their rigid regulations on public interests.⁶⁷ In contrast, other public

⁶⁵ Article 9, Georgia-Switzerland BIT 2014, accessed February 22, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4814>.

⁶⁶ Article 10, Canada-Jordan BIT 2009, accessed February 22, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/617>.

⁶⁷ For example, Romson states that "a rigid compliance might freeze the development of environmental regulations, as it would prohibit the state from softening a regulation that came out too harsh at first." Romson, "Environmental Policy Space and International Investment Law," 312.

interest clauses such as those that reconfirm the regulatory rights of states or exclude some public interest fields from investment protection obligations might have a positive impact on a host state's policy space. Such clauses not only safeguard but also foster host states' regulatory rights. As a result, public interest clauses might have both positive and negative effects on a host country's policy space.

GSL Sample

Chapter IV: Major Issues Regarding Public Interest Provisions

Chapter III pointed out that, in general, public interest clauses have a positive impact on the general welfare and do not harm investment attractiveness of states and rights of investors. However, shortcomings of some public interest provisions can lead to their ineffectiveness or limitation of a host states' policy space. Elimination of these shortcomings is important for the protection and promotion of the general welfare. Main shortcomings of public interest provisions relate to their formulation, implementation, and compliance with the provisions. This chapter addresses these shortcomings and proposes ways to improve the provisions.

4.1. Design and formulation of public interest provisions

In order to improve and formulate a better design for provisions regarding public interest clauses, several aspects need clarification that will understand some of the present deficiencies. First, policymakers should understand that the scope in such clauses is unclear and that standards need to be developed. Second, the nature of such provisions should be clarified as well as how treaties operate and can be modified. These issues will be discussed below.

4.1.1. Scope of Public Interest Provisions

The first deficiency of some public interest clauses is their unclear scope. For example, the China-Uzbekistan BIT (2011) emphasizes the desire of the parties to “improve the welfare of the peoples.”⁶⁸ The treaty neither provides a definition of the term “welfare” nor specifies the areas that fall under the scope of this term.

Some public interest clauses contain broad and unclear terms. For example, the Canada-EU Comprehensive Trade and Economic Agreement (Canada-EU CETA, 2016) and the Australia-China FTA (2015) both have public interest references in their preambles. However, there is a difference in

⁶⁸ Preamble, China-Uzbekistan BIT 2011, accessed February 22, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3357>.

terms of their clarity. The Canada-EU CETA “preserve[s] the right of the Parties to regulate within their territories and the Parties’ flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.”⁶⁹ This provision clarifies the general welfare areas that fall under its scope. On the other hand, the Australia-China FTA upholds “the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare.”⁷⁰ This clause’s scope is unclear, because the clause does not mention concrete areas of the general welfare.

Naturally, the more areas IIAs refer to, the wider the policy space host states enjoy over the general welfare. Investor-state disputes can involve various fields of the general welfare such as labor rights, environmental standards, and cultural heritage issues. If host states truly aim to protect and improve the public welfare and to promote sustainable development in their territories, their IIAs should cover a wide range of public interest areas. A mere reference to the term “public welfare” in IIAs is not sufficient to realize this aim, since arbitrators might interpret this term to cover only a limited number of fields. As stated in Chapter I, there is no universal definition of the term “public interest” or “public welfare,” so the public interest provision in the Australia-China FTA gives arbitrators a wide discretion to interpret the term “public welfare.” Ambiguous terms may cause problems of interpretation. Thus, IIAs should refer to exact fields of the general welfare as exemplified by the public interest clause in the Canada-EU agreement.

4.1.2. Standard under public interest provisions

The second concern about the design and formulation of public interest clauses is the standard of the general welfare under these clauses. For instance, the preamble to the Australia-China FTA (2015) expresses the parties’ commitment to enhance living standards of their people and to create new employment opportunities. However, this FTA does not clarify to what extent the

⁶⁹ Preamble, Comprehensive Trade and Economic Agreement between Canada and the European Union 2016, accessed February 23, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3593>.

⁷⁰ Preamble, Australia-China Free Trade Agreement 2015, accessed February 24, 2018, <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-agreement-text.pdf>.

parties should enhance their living standards. A public interest provision in the Canada-Panama FTA (2010) also contains vague terms. In the agreement's preamble, the parties agreed to safeguard and foster basic workers' rights, but the term "basic workers' rights" may refer to various labor standards under domestic and international legal instruments. The labor legislation of Canada itself includes several definitions of the phrase. For example, the basic workers' rights under the *Employment Standards Act* (2000) covers, among others, rights for the minimum wage, overtime pay, and vacation. The *Occupational Health and Safety Act* (1990) outlines three basic rights of workers: the right to refuse dangerous or unsafe work, the right to join the workplace health and safety activities, and the right to know about the hazards of the workplace. So, the term "basic workers' rights" can be very broad and include a wide range of labor rights. States should refer to concrete public interest standards or provide definitions of the terms in their IIAs to avoid difficulties of interpretation. Furthermore, there is a need to identify which public interest standards states should be included in their agreements. There is a question as to whether IIAs should address public interest areas generally or focus on only some areas (for example, only labor or human rights).

The first way to ensure certainty in relation to the general welfare standards or rights under the scope of public interest clauses is to specify the specific rights or standards. For example, the Austria-Tajikistan BIT (2010) provides a concrete list of labor rights, such as the right of association and the right to organize and to bargain collectively, that fall under the scope of its public interest provision (Article 5). The second way is to refer to instruments that establish public interest standards or rights. The Canada-Korea FTA (2014) makes reference to "human rights and fundamental freedoms as identified in the *Universal Declaration of Human Rights*."⁷¹ Finally, The US-Peru FTA (2006) clarifies public interest clauses by defining the term "environmental law"⁷² as well as providing a list of international instruments that establish standards of protection.

⁷¹ Preamble, Universal Declaration of Human Rights 1948, accessed March 2, 2018, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/udhr.pdf>.

⁷² Article 18.14, US-Peru Free Trade Agreement 2006, accessed March 2, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2721>.

4.1.3. Reference to treaties and the requirement to ratify

Another issue is whether public interest provisions in IIAs should refer to relevant treaties, for example the World Health Organization (WHO) Conventions, and require their ratification by the parties. Ratification of a treaty gives rise to obligations on the part of the states, and may contribute to the improvement of the general welfare in these countries. However, there might be problems concerning implementation of the treaty. Commitments of protecting and promoting the public welfare may remain on paper, and ratification of treaties per se does not guarantee improvements of the general welfare of people.

Moreover, the number of ratified conventions does not necessarily reflect the country's situation of the public welfare. For instance, although Libya ratified eight fundamental ILO conventions and the United States ratified only two, some surveys show that labor conditions in Libya are much lower than in the United States.⁷³ Nevertheless, the requirement to ratify treaties and references to global general welfare standards in public interest provisions have a number of advantages. They can help to avoid inconsistencies among the parties with regard to particular treaties concerning public interests.

The UNCTAD states that references to international standards or instruments in IIAs “play an important role in reducing fragmentation – and isolation – of different bodies of law and policymaking and can strengthen linkages between IIAs and international sustainability standards.”⁷⁴ Thus, this reference suggest ratificationWhen states resort to these methods in their IIAs, they should focus not on the number of global standards or ratified instruments but on the successful implementation of these instruments.

4.1.4. Nature of public interest provisions

The next discontent with public interest provisions in IIAs is a non-binding nature of some of these provisions. Generally, references to public interests in preambles of IIAs only express the

⁷⁴ UNCTAD 2017, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA Issue Note, no. 2, 16.

desire of the parties to safeguard and promote the general welfare and do not impose obligations on host states or investors regarding protection of public interests. For instance, the preamble of the New Zealand-Korea FTA (2015) provides a statement that “desire to enhance their co-operation on labor and environmental matters of mutual interest” between the parties does not impose any obligation concerning labor and environmental matters. Moreover, the agreement does not specify the form and modalities of such cooperation between the parties. The United States Model BIT (2012) acknowledges willingness of parties to reach their objectives “in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”⁷⁵ The mere recognition of the parties’ desire does not entail legal responsibilities regarding public interests. Therefore, effectiveness of such provisions is in doubt.

Many of the public interest clauses concerning environment, public health, labor rights, or sustainable development, which have rapidly increased since the 2010s, are placed in preambles of investment agreements.⁷⁶ For example, the Iran-Slovakia BIT (2016) makes reference to the protection of health, environment, and labor rights in its preamble. In fact, some investment tribunals considered preambles and stated that treaty interpretation has to be guided by the object and purpose of the parties expressed in the BIT’s preamble.⁷⁷

Certainly, preambles may clarify the object and purpose of the agreements. However, public interest clauses in preambles may not have as much influence as they should, because there is no guarantee that investment tribunals would take these clauses into account when enforcing the agreement. The preamble of the Armenia-Latvia BIT (2005) merely recognizes that enhancement of economic affairs between the two countries can foster respect for labor rights and does not specify

⁷⁵ Preamble, the United States Model BIT 2012, accessed May 28, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁷⁶ According to the UNCTAD, 56% of BITs concluded between 2011 and 2016 refer to public concerns in their preambles, whereas only 8% of old-generation BITs contain such reference in their preambles. *UNCTAD 2017, World Investment Report 2017: Investment and the Digital Economy*, 122.

⁷⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (2002) (ICSID Case No. ARB/02/6). Instrument invoked: Philippines-Switzerland BIT (1997), Status: settled. Award embodying the parties' settlement agreement dated 11 April 2008; *Siemens A.G. v. The Argentine Republic* (2002) (ICSID Case No. ARB/02/8). Instrument invoked: Argentina-Germany BIT (1991). Status: decided in favor of Investor. Award dated 6 February 2007. <https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>.

obligations of the parties or investors with regard to labor matters. Therefore, this provision would not effectively safeguard and foster labor rights in these states. So, the desirable measure is to put public interest provisions in the main text, not in the preamble, of an investment agreement.

4.1.5. Relationship with obligations under other treaties

The next concern about public interest provisions is that they might be incompatible with the parties' obligations under other treaties. Then, fragmentation of international investment law may occur. Since a state concludes several IIAs with other countries, its IIAs might contain different or even contradictory public interest clauses. In addition, states can also have public interest commitments under non-investment treaties such as the ILO or the WHO Conventions. Certainly, states must comply with their public interest obligations. The major issue in this regard is to ensure uniformity and consistency and eliminate any contradictions between all these obligations of countries. The UNCTAD suggests conclusion of a single multilateral investment agreement as an effective way to avoid issues of fragmentation and incoherent provisions in investment treaties.⁷⁸

Indeed, a universal investment agreement, as claimed by the UNCTAD, can be "the most efficient type of reform action as it brings about change 'in one go' for a multitude of countries or treaty relationships."⁷⁹ However, the probability of reaching such an agreement in the near future is very low in view of the difficulties with the conclusion and enforcement of mega-regional agreements like the Trans-Pacific Partnership (TPP) agreement, the Comprehensive Economic and Trade Agreement (CETA) or the Transatlantic Trade and Investment Partnership (TTIP) agreement. Therefore, countries should opt for other possible solutions, even though these solutions might be less efficient than a single universal investment agreement.

One of the possible solutions to improving this problem is to add into IIAs a clause that defines the relationships that a country has to the obligations under other treaties. For example, the Colombia-Korea FTA (2013) states that in case of inconsistencies between this FTA and other

⁷⁸ UNCTAD 2017, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA Issue Note, no. 2, 16.

⁷⁹ *Ibid.* 17.

agreements, the FTA prevails if there are inconsistencies.⁸⁰ The New Zealand-Korea FTA (2015) declares that if there are inconsistencies between this FTA and other agreements, both countries shall consult with each other to find a solution in line with customary rules of public international law.⁸¹ Clauses that clarify the relation of an IIA to other agreements help to deal with overlapping obligations of states under various treaties.

4.2. Compliance and dispute settlement

Policymakers seeking to improve or remedy some of the problems mentioned above will need to ensure that compliance and dispute settlements are handled to the satisfaction of all parties. Such a remedy will need to have a strong monitoring mechanisms as well as sanctions and incentives that help put force into the provisions. Furthermore, all public interest will need assurance that dispute settlement is legitimate with an arm of compliance. These elements of reform are discussed below.

4.2.1. Monitoring mechanisms

In order to secure compliance with public interest provisions, the parties to an IIA may establish special monitoring institutions or seek assistance from expert groups and relevant international organizations. Monitoring is crucial to assess the effectiveness and true impact of the provisions. Therefore, IIAs should provide for monitoring mechanisms and clarify participants and organization of the mechanisms.

First, involvement of stakeholders and experts of the relevant fields is necessary for effective monitoring activities. Stakeholders have an interest in compliance of host states and investors are concerned with public interest clauses and their successful implementation. Thus, stakeholders can carry out their work in a responsible and diligent manner. Experts have necessary

⁸⁰ Article 1.2, Colombia-Korea Free Trade Agreement 2013, accessed March 20, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2744>.

⁸¹ Article 1.2, New Zealand-Korea Free Trade Agreement 2015, accessed March 20, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5578>.

knowledge and skills in general welfare areas and can properly evaluate compliance with public interest clauses. Participation of stakeholders and experts in the monitoring process brings positive outcomes for the general welfare of people. Some of the current IIAs allow not only the parties but also investors and other stakeholders such as non-governmental organizations to take part in the monitoring process. For example, the CAFTA-DR allows public participation in monitoring procedures and in carrying out cooperative activities.⁸² According to the ILO, involvement of stakeholders in monitoring compliance with labor provisions in the CAFTA-DR agreement led to a rise in the number of labor inspectorates and enhancements in the labor legislation in the Dominican Republic.⁸³ Likewise, some scholars argue that monitoring by experts and stakeholders at the firm level in Cambodia helped to narrow the wage gap of male and female workers and increase wages.⁸⁴

Second, some IIAs provide for international monitoring in addition to such a process at a domestic level. The experience of the European Union on monitoring compliance with labor provisions in its IIAs shows that international monitoring provides a number of benefits. The first such mechanism was provided for in the EU-Korea FTA (2010). All IIAs of the EU concluded after the EU-Korea FTA provide for international monitoring. According to the European Parliament's Committee on Employment and Social Affairs, monitoring at the international level supports and encourages marginal stakeholder groups that do not have an opportunity to voice their interests at the national level.⁸⁵ The UNCTAD also favors international monitoring and states that a global multi-stakeholder monitoring body can bring positive results by “galvanizing promising initiatives to mobilize finance and spreading good practices, supporting actions on the ground channeling investment to priority areas, and ensuring a common approach to impact measurement.”⁸⁶

⁸² Annex 16.5, CAFTA-DR 2004, accessed March 26, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2693>.

⁸³ ILO 2016, *Assessment of Labor Provisions in Trade and Investment Arrangements*, 103.

⁸⁴ *Ibid.* 96.

⁸⁵ Ferdi De Ville, Jan Orbie and Lore Van den Putte, “TTIP and Labor Standards,” *Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy* (March 2016): 26.

⁸⁶ *United Nations Conference on Trade and Development 2015, Investment Policy Framework for Sustainable Development (UNCTAD/DIAE/PCB/2015/5): 145*, accessed February 22, 2018, http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

In order to make the monitoring process effective, IIAs should provide the above two elements. For instance, under Article 13 of the EU-Korea FTA, the Committee on Trade and Sustainable Development and the Domestic Advisory Group, which consist of stakeholders such as “independent representative organizations of civil society in a balanced representation of environment, labor and business organizations,” should monitor compliance with public interest clauses in this free trade agreement. Furthermore, this FTA establishes a Civil Society Forum for the purpose of discussing the agreement’s impact on sustainable development of the parties. The FTA also specifies the frequency of meetings of monitoring institutions. Inclusion of such provisions in IIAs can help to conduct monitoring activities in a proper manner.

4.2.2. Sanctions and incentives

Public interest provisions in some IIAs clearly impose obligations. The question in such a case is how to secure compliance with these obligations. For this purpose, countries generally adopt either the sanction-based approach and the incentive-based approach. The sanction-based approach, which the United States has adopted in its IIAs, intends to secure compliance by imposing penalties. In contrast, the incentive-based approach, which the European Union adopts in its IIAs, intends to secure compliance by providing certain benefits for compliance and suspending these benefits in case of non-compliance. Both approaches have their own advantages and disadvantages. The threat of sanctions might motivate host states and investors to comply with public interest provisions, but countries can perceive these sanctions as an attack to their sovereignty and policy space. The incentive-based approach, in turn, is less intrusive, but might be too soft and ineffective.

The EU’s incentives for compliance with labor provisions usually includes granting tariff concessions and access to the EU market for ratification of the ILO conventions or improvement of domestic labor laws by host states. However, though some countries such as Venezuela, El Salvador, and Bolivia ratified several ILO conventions and received the incentives, they have failed to properly implement the conventions in their territories.⁸⁷ On the other hand, the US has opted for

⁸⁷ De Ville, Orbie and Van den Putte, “TTIP and Labor Standards,” 20.

the sanction-based approach, but the country has rarely applied sanctions in practice. For instance, many IIAs of the US allow imposition of sanctions for non-compliance with labor provisions, but as for now only Guatemala was subject to these sanctions due to the failure to implement its labor obligations under the Central American-Dominican Republic Free Trade Agreement.⁸⁸

The incentive-based method for controlling compliance with public interest clauses is a softer option compared to sanctions. Therefore, inclusion of the incentive-based method into IIAs and its application is much easier than the imposition of sanctions. However, the mere adoption of the incentive-based method may not be effective enough to ensure compliance with public interest obligations. An optimum solution is to combine the two methods. States can use incentives as a primary method and apply sanctions only as an exception. The important point is to provide incentives only after confirmation of the fulfillment of requirements. In the case of treaties on the general welfare, countries should receive incentives only after ratification and application of measures to implement these treaties.

4.2.3. The settlement of disputes concerning public interests

A dispute settlement mechanism is yet another open question in relation to public interest clauses in international investment agreements. Today, along with the IIAs in which disputes on public interests are subject to the general dispute settlement mechanism, there are also investment agreements that provide for alternative ways to resolve public interest disputes such as consultations and ad hoc committees. The next matter that lacks clarity is openness to the public of the dispute settlement process. At present, some international organizations advocate transparency of ISDS and claim that openness of ISDS can foster public interests. For example, the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* provides that arbitration-related documents such as the statement of claim and the notice of arbitration should be available to the public.⁸⁹ In this respect, there is a need to determine the extent of such openness.

⁸⁸ *Ibid.* 35.

⁸⁹ Article 3, United Nations Commission on International Trade Law 2014, *Rules on Transparency in Treaty-based Investor-State Arbitration* (New York: United Nations, 2014): 7-8, accessed June 2, 2018,

In many IIAs, investor-state disputes on public interests are subject to the general dispute settlement mechanism. These agreements thus enable investors to challenge measures of host states in public interest areas and to question the states' regulatory rights. However, in order to protect the general welfare from investors' claims and avoid undue limitation of the host states' policy space, IIAs should contain provisions that exclude public interest areas from the general dispute resolution process. For instance, under the Australia-China FTA (2015) a general investor-state dispute settlement mechanism does not apply to "measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order."⁹⁰ Investor's claims on public interests are subject to consultations between Australia and China, and these countries should jointly determine whether the measures were legitimate and non-discriminatory.⁹¹ Such provisions empower host states to control the general welfare matters in their territories and safeguard the states' regulatory rights. The BLEU (Belgium-Luxembourg Economic Union)-Colombia BIT (2009) carves out measures for host states to improve environmental⁹² and labor conditions⁹³ from the ISDS process. Clauses that clearly identify the scope of the ISDS and apply alternative ways such as consultations between states to the general welfare matters are necessary to protect public interests.

4.3 Summary

In general, the means to improve public interest clauses in IIAs includes the elimination of vague terms, clarification of the scope of public interest provisions, inclusion of detailed clauses on monitoring compliance and implementation of the provisions as well as clear references to

<https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

⁹⁰ Article 9.11, para 4, Australia-China Free Trade Agreement 2015, accessed February 24, 2018, <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-agreement-text.pdf>.

⁹¹ *Ibid.* Article 9.11, para 5.

⁹² BLEU-Colombia BIT 2009, accessed February 25, 2018, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/342>. Article 7 discusses environmental conditions and Article 8 labor conditions.

alternative dispute settlement mechanisms for the general welfare matters. These means can help to enhance the effectiveness of public interest clauses in safeguarding and fostering the public welfare.

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Chapter V: Conclusion

Interaction of regulatory rights of host states, investment protection, and public interests is a pressing issue in the contemporary international investment regime. An increasing number of investor-state dispute cases in public interest areas and an active engagement of many countries in the IIAs' reform illustrates the issue. Integration of public interest provisions in IIAs is a tool of the reform. Public interest clauses are a relatively new method that host states use to improve contents of their investment agreements, so there is a limited number of academic researches on significance and implications of these clauses. This study contributes to the existing literature on public interest provisions in international investment agreements.

This thesis, first, examined the development, impact, and limitations of the public interest clauses in IIAs in order to identify their significance and then, proposed methods to refine the clauses. This research highlighted the present attitude towards public interest provisions in IIAs and identified deficiencies and limitations of some of the current provisions. The study analyzed the impacts of the provisions on the public welfare, FDI inflows, the level of investment protection, and policy space of host states.

After examining the background of public interest clauses in International Investment Law, this study found that, first, the clauses have been becoming more common in international investment agreements. There is an increase in not only the number of IIAs that contain public interest provisions but also in general welfare areas that these provisions cover. Chapter II indicated that IIAs concluded in 1980s mainly included only environmental clauses, whereas IIAs of 1990s contained labor provisions as well. Second, despite the risk of facing ISDS cases on the general welfare, some countries still have a negative attitude or show reluctance to the IIAs' reform and introduction of public interest clauses in their investment agreements. The reasons behind this attitude are financial issues related to implementation of these provisions, fear of losing investment attractiveness, and deficiencies in the structure and performance of governments.

Chapter III looked at the influence of public interest provisions on the general welfare and other possible impacts of the provisions. The chapter found that such provisions could better protect

and promote public interests and improve the contents of existing international investment agreements. Although there are cases in which deficiencies of some public interest clauses diminished their effectiveness, overall data shows that the clauses helped to enhance the general welfare. In particular, the chapter referred to reports and surveys of the ILO and US GAO as well as the results of some academic researches that indicate positive impact of public interest provisions on the general welfare in such countries as Peru, El-Salvador, and Mexico. Moreover, this study found that carefully drafted provisions do not harm FDI inflows, do not decrease the level of investment protection, and do not have an adverse effect on regulatory rights of host countries. Thus, inclusion of these clauses is advantageous for host states, and there is a need to address deficiencies of the clauses in order to increase their effectiveness.

Chapter IV of this thesis examined key problems concerning public interest provisions and proposed means to solve these issues. Through the analysis of the provisions in existing IIAs, this study found that some clauses have a number of shortcomings such as ambiguity of their scope and lack of references to proper enforcement mechanisms. The thesis then suggested methods to address these shortcomings and enhance effectiveness of the clauses. The first section of Chapter IV highlighted ways to improve design and formulation of public interest provisions. These ways include removal of ambiguous terms in IIAs and clarification of the relation of an IIA to other agreements. The second section referred to issues with compliance and dispute settlement in general welfare areas. In particular, this section proposed introduction of clauses that establish monitoring institutions and exclusion of public interest matters from the general dispute settlement mechanism as ways to enhance implementation of public interest provisions. Elimination of the shortcomings and improvement of public interest provisions might change a negative attitude of some scholars and host states to inclusion of the provisions in investment agreements.

In general, this research supports the feasibility of public interest provisions in international investment agreements. While the provisions cannot solely address all deficiencies of existing IIAs, they are an effective tool to protect and promote the general welfare in host states. Further research would complement this study by analyzing outcomes of ISDS cases on public interests that are

pending now. Moreover, more time is necessary to measure the impact of all types of public interest clauses and address deficiencies in some of the current clauses. Many countries have started to include public interest clauses in their agreements only recently, so merely partial results are available now. Therefore, a further study could look at the settlement of pending disputes or new and amended international investment agreements that come into use.

GSL Sample

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