



City Research Online

City St George's, University of London

Citation: Collins, D. A. (2022). Book Review: Incomplete International Investment Agreements by Tae Jung Park. *International Trade Law and Regulation*, 28(4), pp. 252-254.

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/28215/>

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to [City Research Online policy](#).

Book Review: *Incomplete International Investment Agreements: Problems, Causes and Solutions* by Tae Jung Park (Edward Elgar, 2022) 168 pp, hb, £67.50

David Collins, Professor of International Economic Law, City, University of London

This new book by Tae Jung Park, Assistant Professor at Incheon National University in the Republic of Korea delves into an important and under-explored topic within international investment law – the widespread phenomenon of international investment agreements (IIAs) which lack complete provisions. Gaps in treaty language are notorious among practitioners and academics, often leading to frustrating uncertainty among parties, judicial overreach, high transaction costs in the form of re-negotiation, not to mention lawyers' fees, and worst, a decline in foreign direct investment – the very purpose for which IIAs are negotiated in the first place. Among the most extreme examples of an incomplete IIA is the investment chapter of the China-Switzerland FTA which contains no provisions whatsoever, calling into question why the parties bothered putting an empty chapter into the treaty at all.

Park's prose as he unravels this topic is refreshingly clear and direct. Unencumbered by the baggage associated with the kind of protracted literature reviews found in many modern legal monographs, he engages with his subject head-on and provides extensive footnote support for his ideas and arguments, often with lengthy but illustrative excerpts from treaty text. The opening chapters of the book offer a succinct overview of international investment law as well as the underpinning logic of the law and economics approach to legal analysis, both of which give the reader the necessary background to appreciate the more nuanced points which arise later and without becoming too ponderous. This is followed by the author's presentation of four categories of what he terms unnecessary incompleteness in IIAs: missing text, missing articles, missing reservation lists and missing or unspecified measures in a reservation list. Compartmentalisation of the issues in this manner clarifies the ensuing analysis, enabling readers to grasp Park's points relationship to actual treaty texts, testimony to the author's deep knowledge of the field. Reflecting the author's background and experience as a treaty negotiator for the government of Korea, the book has a strong

focus on Asian IIAs, although the commentary is readily applicable to the IIA practice of other countries.

Throughout the book, Park deftly employs a law and economics-based examination of his subject, building upon familiar theories established in relation to incomplete contracts. He extends this discussion, with evident originality, to the sub-topic of marginal analysis, wherein it is theorized that parties will only negotiate additional provisions in an IIA up to the point that the utility of doing so is greater than the associated costs. It follows that there is an optimum level of completeness for each IIA. From here Park extrapolates that incomplete IIAs should not necessarily be viewed as “failures” (a term which he curiously uses frequently) but rather, and perhaps counter-intuitively, as strategic, informed choices reflecting the outcome of competing concerns, such as resources, flexibility and political realities. The author notes interestingly that while some lobby groups tend to be well-organized in their opposition to wider investment protections in IIAs, including the famously anti-IIA (or anti investor state dispute settlement, ISDS) academia, business groups that stand the most to gain from strong IIAs with ISDS have often neglected to make the case for stronger IIAs to governments. It seems that IIAs often receive much bad PR, hinting that governments may be failing to communicate the benefits of these instruments as well as they should.

Again drawing on his extensive experience as a treaty negotiator for the government of Korea, Park observes that there is often incongruity between the best interests of the state, as expressed by its negotiators, and the political imperative of the legislators, many of whom will be beholden to protectionist special interest groups which will have little appetite for the opening of various sectors to foreign investors. Park cites the example of the UK-Korea FTA, the ratification of which was strongly resisted by the National Assembly. This phenomenon is skilfully linked by the author to the deeply entrenched antipathy to international investment law’s alleged undue restriction on states’ capacity to enact measures which serve the public interest, such as those relating to the environment or culture. By omitting commitments of this nature in IIAs, for example by including a long or open-ended list of reservations, signatories can enlarge their “policy space” – permitting them to enact a range of socially-minded laws which might be hostile to foreign investors’ interests but which, because of the incompleteness of the treaty, are not prohibited or actionable under ISDS. ISDS is itself perhaps the most controversial of protections available under IIAs in terms of its potential to undermine the policy objectives of governments because of the risk of high damages awards

issued by arbitral tribunals. The UK, for example, has omitted ISDS entirely from their new IIAs, however it has left express room for ISDS to be included at a later stage, for example in its treaty with Japan – an example of what Park would consider strategic incompleteness.

In some of the book's most compelling sections the author discusses the pressing problem of a lack of institutional capacity which often unintentionally results in incomplete IIAs. This issue can be exacerbated by weak coordination between a state's negotiating team and the relevant governmental department. Governmental departments may be uncooperative because their interests are often misaligned from that of the negotiators. While Park does not cite the UK's experience in Brexit trade negotiations (both with the European Union and with third states after departure from the EU) his discussion of these kind of tensions recalls the resistance within the UK's civil service to broader liberalization in favour of closer ties with the EU and, latterly, protectionism in various forms. Park's commentary on the lack of sufficient technical expertise is also apposite to the UK's experience; the UK needed to establish necessary negotiating expertise from a starting point of complete absence. Park points out that the imbalance in technical expertise tends to favour developed country IIA negotiators, with developing countries often incapable of modifying their counterpart's model BIT and therefore stuck with its terms. He cites India, as powerful a developing country as there is, and its struggles with reservation lists in their Regional Comprehensive Economic Partnership (RCEP) negotiations as an example of these kinds of difficulties.

Having set out the common elements of IIA incompleteness and their causes, the book concludes by presenting some highly useful solutions. Park suggests that parties should make use of "side letters" to add missing terms or clarify language before ratification, lowering the transaction costs of a full, formal renegotiation. Side letters simplify the process of concluding specific parts of a treaty and provide immediate certainty in relation to a small number of issues. Side letters can also provide concise meanings for problematic concepts like indirect expropriation. Park suggests that side letters increase the predictability of domestic law as affected by an IIA, because they reflect the contents of last-minute deals, including those between government departments and their own negotiating teams. The concluding chapter goes on to examine re-negotiation clauses as solutions to incompleteness, noting that these provisions can be either partial (imposing few conditions, as in the EU-Korea FTA) or full (specifying a starting period and deadline, often in conjunction with a working group and agenda, as in the case of the ASEAN-Korea FTA). Full re-negotiation of IIAs entails significant transaction costs, such as those associated with establishing such

working groups and ensuring that their typical reporting requirements are fulfilled. As a last solution, the author discusses the need for institutional remedies, which essentially involve improving the coordination among IIA negotiators as well as augmenting the technical expertise of the negotiators. Citing the US Trade Representative as a model, Park suggests that the IIA's negotiating team should be established as a separate and independent entity with strong political power (with a direct link to the executive) and sufficient legal expertise. On this last point, he says that governments should hire legal experts who understand the legal consequences of each commitment, rather than diplomats or other re-shuffled civil servants. This strategy should be supplemented with specialized training programs with practical workshops, as was done in Korea. The author also urges that negotiators from developing states take advantage of their interactions with their developed state counterparts through an inquisitive, interactive "learning by doing" – developing skills which can be used in subsequent negotiations.

Incomplete International Investment Agreements is an excellent contribution to the scholarship on international investment law. It provides authoritative, practical guidance on a key element of IIAs that has been insufficiently analysed for some time and on which extensive resources have been spent by many countries in recent years. This book is therefore an important reference point for those studying the treaties which underpin international investment law and for those in government working on their (re) negotiation.