MISSING RESERVATION LISTS IN CHINA'S INTERNATIONAL INVESTMENT AGREEMENTS

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ABSTRACT

China has concluded several bilateral and multilateral international investment agreements (IIAs), but none has the reservation list attached. The literature on IIAs has neglected to consider the existence and causes of this phenomenon. China is now struggling to complete its first reservation list in history in its U.S.–China Bilateral Investment Treaty (BIT) negotiation. This article is the first study to highlight the issues regarding reservation lists in China's agreements and argues that ongoing legal reforms and failure in intra-government coordination impede completion of these reservation lists.

KEYWORDS: *international investment law, reservation lists, law and development*

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I. INTRODUCTION

On September 9, 2012, China signed the bilateral investment treaty (hereinafter "BIT") between its government and Canada. The BIT has a provision explaining the reservation list and its purpose (i.e., obligations in the main text of the BIT do not apply to the non-conforming measures listed in the Annex); however the treaty is signed without an actual list attached.[1] The existence of this provision indicates that the parties agreed to the necessity of such a list. Nevertheless, the readers of the BIT were unsure as to the economic sectors in China that fell under the ambit of its regulatory power and policy space since no reservation list was attached; assuming that the obligations in the BIT applied to all economic sectors in China without any exceptions. The problem also appears in the China–Slovakia BIT, the China–Switzerland BIT, and the China–Korea–Japan investment agreement, in which non-conforming measures were mentioned in the main text of the BIT, but no reservation list was actually attached. In addition to the above BITs and trilateral investment agreement, China also signed Preferential Trade Agreements (hereinafter "PTAs") with no reservation lists. Since international investment agreements (hereinafter "IIAs") have increasingly turned away from BITs and toward PTAs,[2] China has also begun signing PTAs to achieve a higher level of liberalization than with previously signed

[1] The provision explaining a reservation list is in Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 8(2), Sept. 9, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download, which reads as follows:

> Article 8
> Exceptions
> 2. Articles 5, 6 and 7 do not apply to:
> (a)
> (i) any existing non-conforming measures maintained within the territory of a Contracting Party; and
> (ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership or control of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;
> (b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or
> (c) an amendment to any non-conforming measure referred to in sub-paragraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 5, 6 and 7.

[2] *See* T. Srinivasan, *Preferential Trade Agreement with Special Reference to Asia*, SEMANTIC SCHOLAR (2002), https://pdfs.semanticscholar.org/9879/4fc5207beba84f5c05598613a84b9026837f.pdf.

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BITs.[3] China never concluded a reservation list in their previously concluded BITs but recently began drafting a reservation list under a negative list approach, with the aim at greater liberalization and rapid market opening.[4] In this regard, China recently signed two PTAs (a Korea–China Free Trade Agreement (hereinafter "FTA") and an Australia–China FTA) but postponed the completion of the reservation list and included a renegotiation clause instead.[5]

China is currently completing its first reservation list in its history through the U.S.–China BIT negotiation, but it is uncertain when and how the parties will reach a consensus. In fact, the U.S. dissident on China's reservation list is the primary reason for the delayed conclusion of the U.S.–China BIT.[6] Both parties exchanged reservation lists three times: first in June 2015, then in late September 2015 and again sometime after June 2016. Although officers have not publicly discussed the contents of the list, Ambassador Froman said China's latest offer was a "far distance from being

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[3] *See* Julien Chaisse & Shintaro Hamanaka, *The Investment Version of the Asian Noodle Bowl: The Proliferation of International Investment Agreements* 3 (Asian Dev. Bank, ADB Working Paper Series on Regional Economic Integration No. 128, 2014), https://www.adb.org/sites/default/files/publication/185564/reiwp-128.pdf.

[4] For more information, see ORG. FOR ECON. COOPERATION & DEV. [hereinafter OECD], *The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreement*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 241 (2008), https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471729.pdf; Patrick Low & Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization Under the GATS*, IATP (Oct. 11, 2001), https://www.iatp.org/sites/default/files/Is_There_a_Better_Way_Alternative _Approaches_t.htm.

[5] *See, e.g.*, Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, art. 9.9, ¶ 3, June 17, 2015, https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents:

> Article 9.9: Future Work Program
> 3. Unless the Parties otherwise agree, the Parties shall commence negotiations on a comprehensive Investment Chapter, reflecting outcomes of the review referred to in paragraphs 1 and 2, immediately after such review is completed. The negotiations shall include, but are not limited to, the following:
> (a) amendments to Articles included in this Chapter;
> (b) the inclusion of additional Articles in this Chapter, including Articles addressing:
> (i) Minimum Standard of Treatment;
> (ii) Expropriation;
> (iii) Transfers;
> (iv) Performance Requirements;
> (v) Senior Management and Board of Directors;
> (vi) Investment-specific State to State Dispute Settlement; and
> (vii) The application of investment protections and ISDS to services supplied through commercial presence; and
> (c) scheduling of investment commitments by China on a negative list basis.

[6] For a basic background to the ongoing U.S.–China BIT, see Shannon Tiezzi, *Are China and the US Close to Sealing an Investment Treaty?*, THE DIPLOMAT (Mar. 24, 2016), http://thediplomat.com/201 6/03/are-china-and-the-us-close-to-sealing-an-investment-treaty/.

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acceptable" to the U.S.[7] This article explains why China is struggling with completing its reservation list.

This article first sorts the possible reasons for this phenomenon into two categories. The first being China's on-going legal reforms and failures in intra-government coordination and cooperation. For instance, the complications that arose from China's on-going legal reforms included examining and arranging unsettled domestic measures, which generated challenges to completing these reservation lists. Following the Washington Consensus,[8] many developing host nations such as China reformed their domestic measures to establish the Appropriate Economic and Legal Policies (hereinafter "AELP") (i.e., economic and legal rules and regulations that fit the local context and socio-political cultures for further growth).[9] Since the rules and regulations are undergoing reform, it is difficult for the line ministries, other domestic institutions, and the negotiation teams to gather data and pinpoint which domestic laws should interrelate with the IIA and the laws to be drafted or reviewed.

In addition, failures in intra-government coordination and cooperation constitute another factor contributing to the missing reservation list. Limited coordination and cooperation between the negotiation team and the line ministries is a serious issue that results in missing reservation lists.[10] This recurring problem faced by the negotiation team and the lack of cooperation of the line ministries negatively impacts them because the ministries do not (or cannot) timely comply with a team's requests for information. Many ongoing bilateral and multilateral negotiations have deadlines, and the line

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[7] For more information on why negative list negotiation in the U.S.–China bilateral investment treaty (hereinafter "BIT") is not making any progress, see LAUREN GLOUDEMAN & NARGIZA SALIDJANOVA, POLICY CONSIDERATIONS FOR NEGOTIATING A U.S.-CHINA BILATERAL INVESTMENT TREATY 12-13 (2016), https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Policy%20Considerations%20for%20Negotiating%20a%20U.S.-China%20Bilateral%20Investment%20Treaty080116.pdf.

[8] Narcís Serra et al., *Introduction: From the Washington Consensus Towards a New Gobal Governance, in* THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 1, 5 (Narcís Serra & Joseph E. Stiglitz eds., 2008).

[9] Appropriate economic and legal policies refer to the policies that are tailored to local environments or to the culture of a society. *See generally* DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH 229 (2007); *see also* Dani Rodrik, *Second-Best Institutions*, 98(2) AEA PAPERS & PROC. 100, 100-04 (2008); DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 171 (2011); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 250 (2002); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 221 (2004).

[10] For more information on line ministries' coordination failure in trade policy in general, see generally RAYMOND SANER, TRADE POLICY GOVERNANCE THROUGH INTER-MINISTERIAL COORDINATION: A SOURCE BOOK FOR TRADE OFFICIALS AND DEVELOPMENT EXPERTS (2010). For more on line ministries' coordination failure in terms of trade negotiation perspectives, see Roberto Bouzas, *Mercosur's Experiences of Preparing Trade Negotiations with the EU: A Memorandum* 24 (European Ctr. for Dev. Policy Mgmt., Discussion Paper No. 50, 2004), https://ecdpm.org//wp-content/uploads/2013/11/DP-50-MERCOSUR-Experiences-Preparing-Trade-Negotiations-With-EU-2004.pdf.

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ministries have difficulty in completing all the requested tasks within the timeline set.

The article then introduces a concrete example of China's previously concluded FTA negotiations to illustrate how ongoing legal reforms and failure in intra-government coordination impede the completion of the reservation lists. This case study particularly shows how China's domestic legal reforms hinder the negotiation team and the line ministries in addressing carved-out sectors.

Lastly, the article examines the implication of the missing reservation list, explaining why China and other Asian countries choose the negative list approach knowing that they are not ready. Moreover, the article addresses the difficulties for counterparts to remedy these problems.

The rest of the article is as follows: Part II defines a reservation list; Part III examines the two reasons for completing the missing reservation lists; Part IV illustrates the China's concluded FTA negotiations; Part V shows implications of the missing reservation lists; and Part VI concludes the article.

II. RESERVATION LISTS

IIAs take two approaches to organizing a reservation list: the negative approach (NAFTA-inspired) and the positive approach (GATS-inspired type).[11] Negotiating partners may use a negative list approach, where the main text imposes a set of obligations and the reservation list contains the domestic measures to which these obligations do not apply. For instance, the NAFTA parties agreed to apply National Treatment (hereinafter "NT") to all foreign investments, but at the same time, each party listed those particular measures, sectors, and/or activities to which the Agreement's NT obligation does not apply, either in part or full. This approach is especially useful for developing host nations to produce a detailed inventory of all non-conforming measures for regulatory power.

The negative list approach model generally has a clear distinction between the investment chapter and the chapter on cross-border trade in services. The investment chapter acts as the depositary of, or controls, all

[11] Unlike the negative list approach, investment in services is covered in the cross-border trade in services chapter and therefore, the treatment of investment is influenced by the services concept from General Agreement on Trade in Services [hereinafter GATS]. While the investment chapter protects the asset-based definition of investment, the trade in services chapter does not define investment but relies on the concept of commercial presence (mode 3) (i.e., the supply of services through a business or professional establishment in the territory of the country in which the service is supplied).The positive list recognizes four "modes": 1) across borders (e.g., the Internet); 2) consumption abroad (e.g., tourists); 3) establishing a commercial presence (FDI); and 4) the temporary presence of a natural person to deliver a service. Governments can make different levels of commitment for each mode.

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investment provisions of both goods and services. Therefore, investments in services and trade are, according to Mode 3, commercial presence (i.e., the supply of a service through a business or professional establishment in the territory of the country in which the service is supplied) and thus covered by the investment chapter.[12] The cross-border trade in services chapter is only devoted to the liberalization of services provided without a commercial presence.[13]

Under the negative list approach, the main features of non-conforming measures must be specified in detail. These measures include: 1) the economic sector in which the reservation is made, 2) the specific industry in which the reservation is made, 3) the activity covered by the reservation, 4) the substantial or procedural obligation under which the reservation is made (e.g., Most Favored Nation (MFN) or NT), and 5) a description of the specific legislation, regulation or other measure for which the reservation is made. The following is an example of a complete reservation list in the Australia–U.S. FTA:[14]

Sector:	Communications–Radio communications
Obligations Concerned:	National Treatment (Article 11.3)
Level of Government:	Central
Measures:	47 U.S.C. § 310 Foreign Participation Order 12 FCC Red 23841 (1997)
Description:	Investment The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting.

The example shows that the U.S. reserves the right to refuse compliance with the NT (Article 11.3) in the radio communication industry. The reserved domestic laws (i.e., 47 U.S.C. § 310 and Foreign Participation Order 12 FCC Red 23841 (1997)) allow the U.S. to restrict ownership of radio licenses in

[12] Sébastien Miroudot, *Investment*, *in* PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 307, 311 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).
[13] OECD, *supra* note 4, at 245.
[14] *See* United States–Australia Free Trade Agreement, Austl.-U.S., annex I, May 18, 2004, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file350_3425.pdf.

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accordance with the reserved domestic laws in the U.S. The next section examines two reasons for concluding the missing reservation lists.

III. THE REASONS FOR STRUGGLING TO COMPLETE RESERVATION LISTS IN CHINA

This section classifies the reasons for this phenomenon into two categories: on-going domestic reforms and failure in intra-government coordination and cooperation. The following explains this in depth.

A. Ongoing Domestic Legal Reforms in China

Ongoing domestic legal reforms in China generate challenges to finalizing reservation lists. These reforms create problems for determining which measures are relevant and which should be carved out. Following the failure of the Washington Consensus policies (i.e., policies that focused primarily on privatization and liberalization), many Asian developing nations learned that market-oriented rules and regulations function only if their institutional capacities allow. In particular, they realized that establishing AELP (i.e., policies that reflect the local environment and sociopolitical culture) is critical for the success of further economic development. [15] Thus, instead of rapid market opening, Asian host developing countries including China are currently reforming their domestic laws to match their local contexts for gradual liberalization. When the rules and regulations are undergoing reform, line ministries (i.e., ministries that are responsible for completing a reservation list) and the negotiation team have a difficult time gathering data and pinpointing which laws interact with the IIA and which laws should be carved out. Essentially, they presumably want appropriate economic and legal policies to be carved out in the reservation list, but are simply not ready because their countries are in the middle of a reform process. Suppose a negotiation team asks the Ministry of Agriculture to prepare the reservation list. The Ministry should first examine their agriculture related domestic laws to sort out which of these should be carved out and inserted in the reservation list. But what if the domestic laws treating foreign direct investment are absent or currently in the process of reform? If the Ministry does not have an existing law on hand or the laws are constantly being revised and updated, this makes it difficult for the Ministry of Agriculture to pinpoint the exact laws that should be protected from the IIA. This would ultimately increase the difficulties in drafting the reservation list.

[15] *See* David M. Trubek, *Law and Development 50 Years On* 6 (Univ. of Wis. Law Sch., Legal Studies Research Paper No. 1212, 2012).

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The problem is aggravated when the newly reformed law is pending under the authority of the legislative body. The ministry cannot list the pending law in the reservation list and send it to the negotiation team hoping that the legislative body passes the law before the IIA is ratified. It is possible that the IIA enters into force while the pending law does not, which makes it difficult to determine the legal enforceability of the pending law in the reservation list.

In this regard, all these barriers that impede the ability to pinpoint specific domestic laws during the legal reform process make it difficult for the ministry and the negotiation teams to gather sufficient information to complete the IIAs. Consequently, they tend to leave the reservation list blank or postpone completing the list and wait for the domestic laws to be reformed and become well-established.

The ongoing U.S.–China BIT negotiation is a good example of how China is struggling to deal with their carved-out sectors from their existing domestic laws.[16] Instead of allowing significant liberalization of investment environments, China merely regrouped the industries in their Shanghai Free Trade Zone Catalogue and inserted an excessive number of domestic laws in the reservation list instead of removing the industries listed in the Catalogue.[17] Essentially, China failed to tease out what laws should be carved out from the existing domestic law.[18] Ambassador Froman warned, "A negative list that echoes the lists of the Shanghai Free Trade Zone . . . would be a major disappointment and a departure from China's stated ambition to use the BIT as a vehicle for economic reform and opening."[19]

Worse, China reformed their domestic laws even within the period of the U.S.–China BIT negotiation.[20] Concurrent with the U.S.–China BIT negotiation, on October 19, 2015, China's State Council declared it would explore a negative list system to be replicated nationwide in 2018, after piloting the approach in some regions between December 1, 2015 and December 31, 2017.[21] The new law would replace the currently governing foreign investment regulations in China with a unified set of regulations. Apparently, on 28 June, 2018, the National Development and Reform Commission and the Ministry of Commerce promulgated the Special Management Measures (Negative List) for Foreign Investment Access. This Negative List opens up twenty-two economic sectors to foreign investors by shortening the negative list for foreign investment access (in the forms of equity restriction and senior executive requirements) from ninety-five items

[16] *See* Gloudeman & Salidjanova, *supra* note 7.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 13.
[20] Shen Wei, *Evolution of Non-Discriminatory Standards in China's BITs in the Context of EU-China BIT Negotiations*, 17 CHINESE J. INT'L L. 799, 839 (2018).
[21] *Id.*

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(in the 2017 version) to forty-eight items (in the 2018 version).[22] The National Development and Reform Commission and the Ministry of Commerce then promulgated the Special Management Measures (Negative List) for Foreign Investment Access in the Free Trade Zones on 30 June, 2018 which provides for a negative list that is specifically applicable to the free trade zones in China with forty-five items.[23]

The U.S.–China BIT negotiation is on hold now, and it is uncertain whether China is capable of sorting out these reforms and reflecting on its reservation list. The next section explains how failure in intra-government coordination negatively affects the completion of the reservation lists.

B. Failure in Intra-Government Coordination and Cooperation

Limited coordination and cooperation between the negotiation team and the line ministries impede China from completing its reservation lists. Negotiations involve simultaneous negotiations at both the international level (i.e., between governments) and the intra-national level (i.e., between domestic entities).[24] The negotiation team gathers all the requests from various entities, including the line ministries, the legislative body, and citizens, and attempts to persuade negotiating partners as to why these requests should be carved out or reflected in the reservation list. If the negotiating partner does not accept this, the negotiation team repeats the domestic consulting phase.

A negotiation team struggles to complete the reservation list when it fails to receive an immediate response from the line ministries. Suppose the negotiation team requests, for instance, the Ministry of Agriculture to review the draft of a reservation list on Agriculture related measures, and the Ministry frequently postpones its feedback, delaying the negotiation process. The negotiation team likely has no expertise in respective areas and may have no choice but to leave missing reservation lists.

Line ministries may be uncooperative because the interests of the ministries are often at odds with those of the negotiation team.[25] If the team fails to persuade the negotiating partner and withdraws a certain policy

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[22] *Zimaoqu Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) 2018 Ban Fabu* [*Special Management Measures (Negative List) for Foreign Investment Access (2018 Version)*], WWW.CE.CN (June 30, 2018, 4:28 PM), www.ce.cn/xwzx/gnsz/gdxw/201806/30/t201806 30_29580 734.shtml.

[23] *Order of the National Development and Reform Commission of the People's Republic of China and the Ministry of Commerce of the People's Republic of China No.19 on Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2018 Edition)*, MINISTRY COM. CHINA (July 1, 2018, 4:26 PM), http://english.mofcom.gov.cn/article/policyrelease /aaa/201807/20180702765905.shtml.

[24] *See generally* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42(3) INT'L ORG. 427 (1988).

[25] *See generally* Saner, *supra* note 10; Bouzas, *supra* note 10.

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carve-out requested by the line ministry, then the ministry would rather prefer to leave a missing reservation list, by postponing seeking approval.

Moreover, each line ministry has its own prioritized tasks, and assisting a negotiation team is not any of their primary responsibility. The primary function of the Ministry of Agriculture is not to modify a sentence or add one more reservation to the reservation list of an IIA.

Lastly, the line ministries face difficulties in complying with all the requested tasks within the deadlines in many ongoing negotiations. For instance, they lack time to draft reservation lists because these are addressed only at the very last stage (i.e., after the main text and all of the substantive obligations of the IIA have been concluded). This burden becomes especially heavy in a multilateral negotiation format, where they have to come up with a different reservation list for each of the negotiating partners.

The next section illustrates a concrete example of China's previously concluded FTA negotiations to illustrate how ongoing legal reforms and failure in intra-government coordination impede the completion of the reservation lists.

IV. CASE STUDY: CHINA'S PREVIOUSLY CONCLUDED INTERNATIONAL INVESTMENT AGREEMENTS NEGOTIATIONS

China recently concluded a number of bilateral and multilateral FTA negotiations with various capital exporting countries but faced difficulties in completing the reservation lists in these negotiations. During the negotiation period, China and the counterparties focused on negotiating the framework of the reservation list alone as negotiating the modality of the reservation list takes up two-thirds of the total negotiation period.[26] Capital exporting countries (usually developed countries like Australia in the Australia–China FTA; Korea in the Korea–China FTA; Australia, Korea, Japan, and New Zealand in the Regional Comprehensive Economic Partnership (hereinafter "RCEP")) had a strong preference for the negative list approach, while China preferred the positive list approach. At the very last stages of these negotiations, the parties chose the negative list approach as the framework. Although these agreements were confirmed, drafting of the list did not begin immediately. Instead, they incorporated a renegotiation clause into the treaties, pledging to begin drafting the reservation list at a later date. These renegotiation clauses can be seen in Australia–China FTA, Korea–China

[26] There are two approaches for preparing reservation lists. One is the negative list approach ("top-down" approach) which lists exceptions to the general obligation of a main text of a treaty; the other is the positive list approach ("bottom-up" approach or "GATS" approach), which lists the specific sectors to which the general obligation applies. An advantage of the positive list approach is that it gives a great level of discretion over what to include and when. Politically sensitive industries can be kept outside the scope of the agreement. The negative list approach can automatically include new types of investment, while the positive list approach cannot.

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FTA, and the RCEP.

The extended period of time that the parties spent on the reservation list framework demonstrates how important the framework is to the negotiating parties. In principle, both positive and negative frameworks should yield the same legal consequences as long as all domestic measures are completely addressed.

Why did China prefer the positive list approach, while the counterparts preferred the negative list approach? [27] The negative list approach aims at greater liberalization and more rapid market opening, while the positive list approach seeks to preserve regulatory power and policy space for developing countries like China.[28] Although, theoretically, each framework yields the same legal consequences, the negative list approach requires the parties to examine their domestic laws and regulations thoroughly to sort out the laws that have to be placed on the negative list. Otherwise, the unexamined or unlisted laws must automatically conform to the obligation of the main text of the treaty. In contrast, the parties could still maintain their regulatory power on the unexamined and unlisted domestic laws under the positive list approach, which requires the parties to include only those measures that conform to the main text. If they fail to find and insert such measures, the unlisted measures do not have to conform to the highly liberalized text.

Home countries like Korea or Australia display the opposite behavior. They prefer the negative list because they are aware of the host countries like China's lack of capacity. They know that all of the host countries' unexamined and unlisted measures have to conform to the highly liberalized main text, resulting in uncertain market openings for different sectors of the economy.

Throughout the negotiation, China preferred gradual market liberalization because its ongoing domestic legal reform made it extremely

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[27] U.N. CONFERENCE ON TRADE & DEV., PRESERVING FLEXIBILITY IN IIAS: THE USE OF RESERVATIONS, at 28, U.N. Sales No. E.06.II.D.14 (2006), https://unctad.org/system/files/official-document/iteiit20058ch1_en.pdf (the document explains that the flexibility of policy space is readily available in the positive list approach, and this is why most host developing countries prefer the positive list approach). *See generally* Tomer Broude & Shai Moses, *The Behavioural Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations*, *in* RESEARCH HANDBOOK ON TRADE IN SERVICES ch. 15 (Pierre Sauvé & Martin Roy eds., 2016) (this chapter uses the concept of the framing effect in behavioral economics to explain the different preferences for the modality of the reservation list. It uses the example of TiSA to illustrate how developing countries as host countries prefer the positive list approach).

[28] For more information, see OECD, *supra* note 4, at 249. (The document introduces various arguments for why the negative list approach aims at liberalization more than the positive list approach does. For instance, when the negotiations failed to foresee the new evolving industries and exclude them from the negative list approach, such new investment areas were then subject to international investment agreements (IIAs). To draft a complete negative list, the parties not only need to examine the existing laws but should also foresee what industries should be carved out.) Low & Mattoo, *supra* note 4, at 19.

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difficult to analyze and pinpoint their domestic laws to draft the reservation list.[29] For instance, in the RCEP, China confessed that the IIAs it had concluded previously suffered from this missing reservation list problem. Only four concluded BITs mentioned the reservation list in the text, and none of them actually attached the reservation list.[30]

During the above negotiations, China explained how its domestic environment created obstacles that hindered its ability to draft the unified reservation list. First, China's domestic law on foreign investment, the Foreign Investment Industry Guidance Catalogue (hereinafter "Catalogue"), had been modified and amended frequently, making it difficult for China to sort out and transfer those domestic laws into the reservation list. The Catalogue was first published in 1995 and then amended in 1997, 2002, 2004, 2007, 2011, and 2015.[31] The Catalogue divides Chinese domestic industries into three categories: "encouraged," "restricted," and "prohibited." The "encouraged" category covers industries in which foreign investments are eligible to receive benefits. The "restricted" category is for industries that are subject to government scrutiny and restrictions such as ceilings on foreign ownership. The industries under the "prohibited" category are barred from foreign investment. The problem is that the Catalogue is fundamentally different from the negative reservation list because industries that are not expressly listed in the Catalogue are not completely open to foreign investment, whereas the measures that are not listed in the negative reservation list are automatically open to foreign investment and governed by the main text of the IIA. Under the Catalogue, the "encouraged" category also includes restrictions on and prohibitions against foreign investment. For example, accounting and auditing services fall under the "encouraged" category, but are still subject to a rule requiring the chief partner to have Chinese nationality.[32] Therefore, simply transferring the "restricted" category into the reservation list does not sufficiently encapsulate all the restrictions and prohibitions, as the government would also need to comb through the "encouraged" category to find measures that should be inserted into the reservation list. China emphasized that drafting the negative list would be a burdensome task not

[29] It is argued that domestic legal reform in China is the major hurdle keeping it from drafting the reservation list. *See* Jie Huang, *Challenges and Solutions for the China–US BIT Negotiations: Insights from the Recent Development of FTZs in China*, 18 J. INT'L ECON. L. 307, 310 (2015). For more information on China's legal reforms, see generally Monika C. E. Heymann, *International Law and Settlement of Investment Disputes Relating to China*, 11(3) J. INT'L ECON. L. 507 (2008).

[30] The four IIAs are the China–Slovakia BIT, China–Swiss BIT, China–Korea–Japan Investment Agreement, and China–Canada BIT.

[31] Huang, *supra* note 29, at 315.

[32] *See Waishang Touzi Chanye Zhidao Mulu (2015nian Xiuding)* [*Catalogue for the Guidance of Foreign Investment Industries (Amended in 2015)*], MINISTRY COM. CHINA (Mar. 10, 2015), http://images.mofcom.gov.cn/wzs/201503/20150317134821983.pdf (at art. 318 of the encouraged category).

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only because of the abundance of rules and regulations listed in the Catalogue, but also because these rules and regulations are constantly being amended.

In addition, China emphasized the practical hurdles in drafting a unified reservation list arising from the differing treatment of foreign investment among different regions. Different regions in the Free Trade Zone frequently publish their own restrictions on foreign investment, and these rules often come in conflict with each other. For instance, the Shanghai and Pingtan regions have different restrictions on foreign investment in construction. The Shanghai Free Trade Zone published its restriction rules in 2013 and amended them in 2014.[33] The Pingtan Free Trade Zone published its rules in 2014.[34] Pingtan sets no limitations or restrictions on inward foreign investment in the construction sector, while Shanghai sets restrictions ranging from limiting the amount of equity shares available to foreign investors while establishing a joint venture to requiring that the majority shareholder be a Chinese person.

In addition to ongoing legal reforms, failure in intra-government coordination aggravates the problems. For instance, both Korea and China agreed on the negative list approach four months before the conclusion of the FTA. Because the parties agreed on the timeline of the negotiation, they had to come up with all the articles and reservation lists in four months. The line ministries in China strongly complained about the tight deadline, which makes it difficult to sort out the Catalogue and reflect on the reservation list. After an extensive discussion between the negotiation team and the line ministries in China, China concluded that it was virtually impossible for its line ministries to complete the reservation lists in time and asked Korea to agree on inserting a renegotiation clause to complete the reservation list afterward.

Ultimately, both Korea and China decided to commence the renegotiation of the reservation list no later than two years after the ratification of the FTA, indicating that they shall endeavor to conclude the renegotiations within two years from the date on which they begin.[35]

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[33] *See* Sun Li, *Pingtan Pilot Zone Releases Negative List*, CHINA DAILY (June 4, 2014, 4:02 PM), http://usa.chinadaily.com.cn/business/2014-06/04/content_17562588.htm (in the June 2017 Catalogue of Industries for Guiding Foreign Investment ("2017 Catalogue") restrictions were set out for FDI in sixty-three economic sectors, as opposed to ninety-three in the 2015 Catalogue. Twenty-six of these set maximum foreign investor equity percentages in invested Chinese entities. These requirements are now to be reduced or removed for certain sectors, with details due in September 2017. Sectors currently covered by the restrictions, with potential for liberalization, are the manufacturing of automobiles, vessels, and planes, transportation services, telecommunication services, financial services, and culture and entertainment services).

[34] *Id.*

[35] The parties set a proposed deadline for the renegotiation in the paragraph on "Timeframe" in annex 22-A (Guidelines for Subsequent Negotiation) in the FTA. *See* Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of

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Apparently, China is currently renegotiating with Korea, Australia and other counterparts. These counterparties agreed to include renegotiation clauses to conclude the reservation lists. However, as China's negotiator noted in the RCEP, these on-going renegotiations will likely be completed after China concludes its first reservation list in history, through the U.S. in the U.S.–China BIT. It is presumed that China would draft a model reservation list with the U.S. first, and conduct a further renegotiation with other counterparts after. Once more, it is still uncertain when the U.S.–China BIT will be completed. China's unpreparedness, due to domestic legal reforms, is a good justification for postponing both the U.S.–China BIT and the renegotiation with the FTA counterparts.

V. FURTHER IMPLICATIONS

It is interesting to note that China took the negative list approach knowing that they could not successfully prepare a negative list. Although China strongly prefers the positive list approach, they took the negative list approach because they recognized the global pressures for the liberalization of investments. China's negotiators noted that China would want to maintain their reputation and signal to the international community that they are moving toward liberalization. China wants to be cooperative with the international community in terms of market opening and liberalization but at the same time, they knew the economic and legal consequences of non-compliance (postponing renegotiations) were insignificant. An inconsequential renegotiation clause may produce this effect.[36] China simply concluded an incomplete reservation list with a cheap renegotiation clause and continued to emphasize their unpreparedness to their counterparts.

It is worth noting that China is not the only country to insert a renegotiation and frequently postpone completing the reservation lists. Many other Asian countries conclude FTAs with a negative list approach to show their willingness to open the domestic markets for international reputation. However, these Asian countries face similar problems as they are in the process of legislative reform for further economic development, and their level of ministry coordination is still immature. For instance, ASEAN and India agreed to renegotiate the reservation lists in the ASEAN–India

Korea, China-S. Kor., annex 22-A, ¶ 8, June 1, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

[36] *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 13 (2008) (one problem with this notion is that there is no reason for states to avoid being seen as non-cooperative in relation to international law if international law has no impact on a nation's behavior. Moreover, engaging in the international law system is, in fact, expensive. Evidence suggests that international law affects a nation's behavior and encourages cooperation among countries).

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Comprehensive Economic Cooperation Agreement (CECA).[37] Article 6 (Work Programme) states that both parties shall enter into discussions to draft a reservation list and lays out procedures for its modification, indicating that it must be completed within three years from the date of ratification. The New Zealand–Malaysia FTA is another good example of an IIA in which the reservation list is missing.[38] In Article 10.17 (Work Programme), the parties agreed to enter into negotiations to determine non-conforming measures within three months of entry into force and conclude the negotiation process within six months of ratification of the treaty, unless the parties agreed otherwise.

The serious problem is that counterparts have no choice but to wait until China and these Asian countries resolve their internal problems. If China and these Asian countries request a renegotiation clause be inserted and even postpone the renegotiation, the counterparts have no options but to facilitate

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[37] *See* Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, ASEAN-India, art. 6, Nov. 12, 2014, https://aric.adb.org/pdf/ftas/fta3/ASEAN-India-Investment-Agreement-ASEAN-version.pdf. The renegotiation clause in the Investment Chapter of the CECA reads as follows:

> Article 6
> Work Programme
> 1. The Parties shall enter into discussions on:
> (a) Schedules of Reservations to this Agreement; and
> (b) Procedures for the modification of Schedules of Reservations.
> 2. The Parties shall conclude the discussions referred to in paragraph 1 of this Article, within three (3) years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Joint Committee on Investment established under Article 23 (Joint Committee on Investment).
> 3. Schedules of Reservations referred to in paragraph 1 of this Article shall enter into force on a date agreed to by the Parties.

[38] *See* New Zealand–Malaysia Free Trade Agreement, Malay.-N.Z., art. 10.17, ¶ 4, Oct. 26, 2009, ht tps://www.mfat.govt.nz/assets/Trade-agreements/Malaysia-NZ-FTA/mnzfta-text-of-agreement.pdf:

> Article 10.17
> Work Programme
> 1. The Parties shall enter into negotiations on Schedules of non-conforming measures within three months of entry into force of this Agreement, unless the Parties otherwise agree.
> 2. The Parties shall conclude the negotiations referred to in paragraph 1, no later than six months from the date of entry into force of this Agreement, unless the Parties otherwise agree. These discussions shall be overseen by the Committee on Investment established under Article 10.18 (Committee on Investment).
> 3. Schedules of non-conforming measures referred to in paragraph 1 shall enter into force by exchange of notes on a date agreed to by the Parties.
> 4. Articles 10.4 (National Treatment), 10.5 (Most Favoured Nation Treatment) and 10.11 (Non-Conforming Measures) shall not apply until the Parties' Schedules of non-conforming measures have entered into force in accordance with paragraph 3.

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the completion since reforming laws are completely within the discretion of these countries and the counterparts cannot help but wait until these countries resolve this internal issue. It is practically impossible for the Australian government to pressure China to accelerate the on-going legal reforms for completing the reservation lists. Simply put, to a certain extent, China and these other Asian countries have total discretion in determining the timing and stipulating the boundaries of regulatory power in their IIAs.

In sum, China and many Asian countries take the negative list approach knowing their unpreparedness because they want to keep their international reputation. They insert a renegotiation and sometimes even postpone the renegotiation due to their internal problems; however, their counterparts have no choice but to wait until these countries resolve their own internal issues and challenges.

VI. CONCLUSION

In conclusion, this article illustrates the missing reservation lists challenges faced by China. The article further emphasizes that scholars should pay more attention to the defective nature of the reservation lists itself. As mentioned above, some countries complete drafting reservation lists unlike China and some Asian countries. However, the reservation lists have many defective or missing parts, which result in transparency issues for domestic law. For instance, the Comprehensive Economic Partnership Agreement (EPA) between Japan and the Republic of India reveals that its reservation list of the investment chapter appears to include a series of unspecified domestic laws. It carved out regulations for the cigarette and tobacco industry but the "Industries Act of 1951 in India," as stated in the relevant domestic measure section The Industries Act of 1951 in India, contains a variety of regulations for several different industries and the cigarette and tobacco industry is merely one of the thirty-eight industries listed in the schedule,[39] among others such as the chemical, drug, food, commercial goods, and electronics industries.[40] The failure to specify

[39] The Industries Act has several regulations that include specific ones addressing direct management, liquidation, supply, and distribution. The Industries (Development and Regulation) Act, 1951, Gazette of India, Pt. II sec. 3(i) (Feb. 15, 1962), http://dipp.nic.in/sites/default/files/IndustriesAct_1951_11June2018.pdf.

[40] Unspecified domestic law in the reservation list in Japan–India EPA reads as follows:

Sector:	Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
Sub-Sector:	
Industry Classification:	NIC: 22 ISIC: 12
Type of Reservation:	National Treatment (Article 85) Most-Favoured-Nation Treatment (Article 86)

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sections and articles in the Act would allow a reader of the reservation list to interpret the Industries Act, in its entirety, as being carved out of the IIA.

This phenomenon can be extended to another chapter of FTA. In the service chapter of the Japan–Singapore Economic Partnership Agreement (JSEPA), [41] for instance, Singapore carved out policies regarding privatization but the legal source is missing and readers of the treaty have no way to determine which economic sectors allow privatization. The plain language approach tells us that Singapore carved out all the privatization related laws and policies, but it is unclear whether this is what the Singaporean government intended.

The incomplete reservation list problem is a widely known phenomenon among many treaty negotiators but has garnered little attention in academic literature. More research should be conducted with respect to understanding the causes and providing solutions to these problems.

Measures:	Article 73 of the Constitution of India read with Article 246 of the Constitution of India. Foreign Exchange Management Act, 1999 and all regulations/rules/orders issued thereunder. Press Notes and Circulars on FDI Policy issued by the Central Government. Companies Act, 1956 and all regulations/rules/orders issued thereunder. Industries (Development and Regulation) Act, 1951 and all regulations/rules/orders issued thereunder. Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 and all regulations/rules/orders issued thereunder.
Description:	FDI in manufacture of 'Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes' (Code 24.02 of Indian Trade Classification which follows the Harmonised Commodity Description and Coding System) is prohibited.

See Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, India-Japan, annex 8, Feb. 15, 2011, https://www.mofa.go.jp/region/asia-paci/india/epa201102/pdfs/ijcepa_x08_e.pdf.

[41] Missing measures in a reservation list of services chapter in Japan–Singapore JSEPA reads as follows:

> (a) Matter: Privatisation
> (b) Legal Source or Authority: N/A
> (c) Relevant Obligation: National Treatment (Article 73), Prohibition of Performance Requirements (Article 75)
> (d) Description: National treatment and prohibition of performance requirements shall not apply to the privatisation or divestment of assets owned by the Government.

See Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., annex V(B), Jan. 13, 2002, https://www.mofa.go.jp/region/asia-paci/singapore/jsepa-6-2.pdf.

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