European Parliament

Investment rules in trade agreements

Developments and issues in light of the TTIP debate

IN-DEPTH ANALYSIS

EPRS | European Parliamentary Research Service
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Members' Research Service

September 2015 — PE 568.333

EN

EU foreign direct investment (FDI) stocks in the US amount to €1 651.6 billion, and US FDI stocks in the EU to €1 685.5 billion. Investment access and protection is critical to EU-US economic relations. Criticisms have been made on both sides of the Atlantic regarding the interpretation of some investment rules in free trade agreements (FTAs) and bilateral investment treaties (BITs), and their impact on the regulatory capacity of states. Both the US and the EU are revising these rules to ensure they are correctly interpreted.

PE 568.333
ISBN 978-92-823-7552-5
doi:10.2861/75779
QA-02-15-517-EN-N

Original manuscript, in English, completed in September 2015.

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EXECUTIVE SUMMARY

EU FDI stocks in the US amount to €1 651.6 billion and US FDI stocks in the EU to €1 685.5 billion. Investment access and protection are therefore critical to EU-US economic relations. However, the need for an investment chapter in the proposed Transatlantic Trade and Investment Partnership (TTIP), and an Investor-State Dispute Settlement instrument (ISDS), has been questioned repeatedly in the context of these two advanced economies. Concerns focus particularly on differing levels of legal protection for foreign firms, and on the potential impact of investment protection rules on the regulatory capacity of states. The main criticisms of substantive investment protection rules focus on both the vagueness of the legal provision – perceived to lead to expansive and inconsistent interpretations of protection standards – and the capacity of 'letterbox' companies to access protection under BITs. The public consultation launched by the Commission on investment protection in TTIP, currently under negotiation between the EU and the US, called for further reform of substantive investment protection clauses. Since the conclusion of the North American Free Trade Agreement (NAFTA), foreign investment provisions have also been criticised in the US. As a result, the US has revised its drafting of investment protection rules.

This analysis shows that investment-protection rules have been used as a safeguard against future changes in domestic protection levels. The US has investment-protection provisions in accords with 21 EU Member States; these may be very different, depending on the type of agreement used, and the time period in which the agreements were concluded. Among the agreements between the US and EU Member States, the most advanced investment-protection rules, including investor-state dispute settlement, are included in the BITs concluded between the US and nine Member States. In the recent agreement between the US and Australia, where no ISDS mechanism is foreseen, the investment chapter is still included as a guarantee in case the domestic situation should change.

Finally, both the US and the EU have taken measures to clarify the interpretation of the rules and avoid expansive application of protection standards, as well as to avoid frivolous claims or 'forum shopping'. These approaches are often fairly similar, and can even be complementary. Development of the rules tends towards a more balanced approach, allowing both protection of investment and legitimate regulatory changes. The main difficulty in this exercise is to make sure that additional clarity does not constrain states' actions, nor that the law loses the flexibility needed to cover all eventualities. A tentative EU answer to some of these issues has already been given by the Commission in its draft proposal for the TTIP investment chapter, published on 16 September. However, the draft EU proposal is still incomplete as several provisions have not yet been inserted and remain under discussion.

Both the EU and the US have, in the past, tackled the issue of 'forum shopping' by 'letterbox' companies established on their territories in their treaties. However, both the US and the EU investment protection rules are very different from the BIT models used in some EU Member States (such as the Dutch model) where foreign investment protection is both easily accessible and broad in scope. The problem of 'forum shopping' might therefore persist due to the continued application of intra-EU BIT, and the differences in investment protection standards applied in the intra-EU BITs and the investment chapters currently negotiated by the European Commission in EU FTAs.

TABLE OF CONTENTS

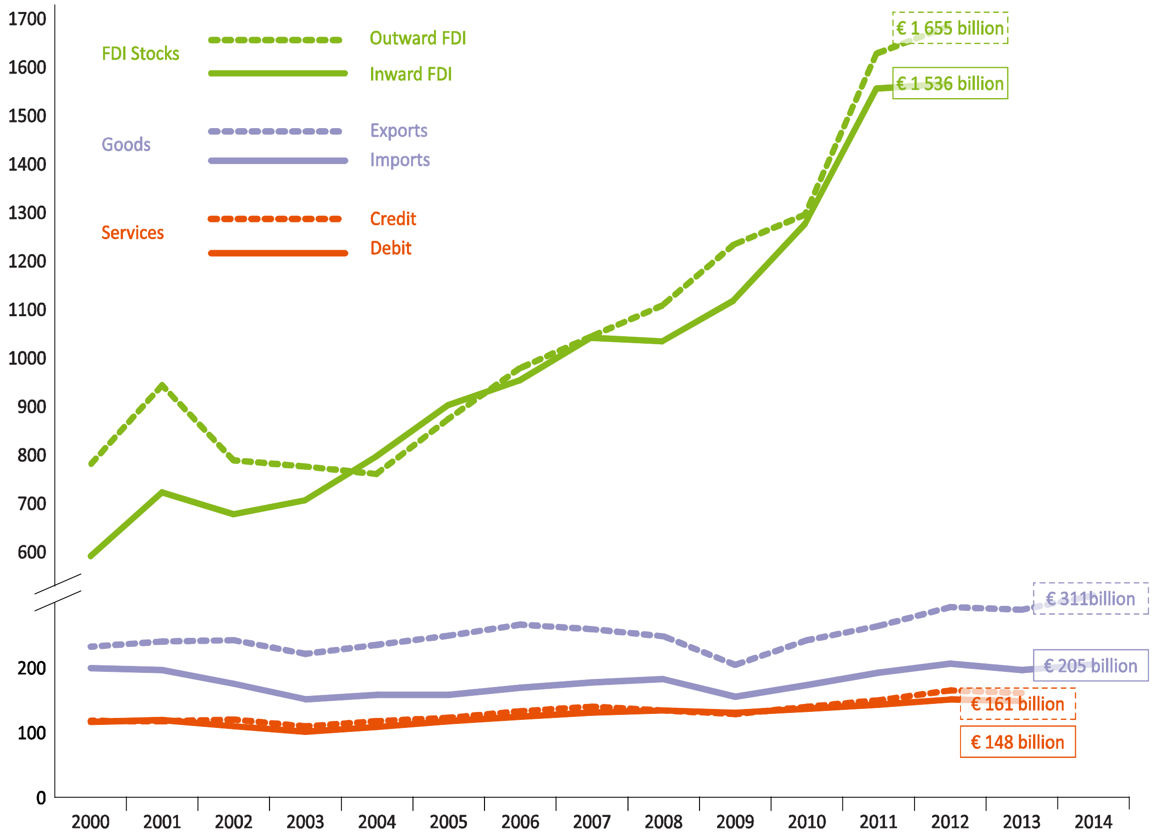
List of main acronyms used

- **AUSFTA:** Australia-US FTA
- **BIT:** Bilateral investment treaties
- **CETA:** Comprehensive Economic and Trade Agreement
- **FCN:** Treaty of Friendship, Commerce and Navigation
- **FDI:** Foreign direct investment
- **FET:** Fair and equitable treatment
- **FTA:** Free trade agreements
- **GATT:** General Agreement on Tariffs and Trade
- **IIA:** International Investment Agreement
- **ISDS:** Investor-State Dispute Settlement
- **NAFTA:** North American Free Trade Area
- **TPPA:** Trans-Pacific Partnership Agreement
- **TRIM:** Trade-related Investment Measures
- **TTIP:** Transatlantic Trade and Investment Partnership
- **WTO:** World Trade Organization

1 Introduction

EU foreign direct investment (FDI) stocks in the US amount to €1 651.6 billion and US FDI stocks in the EU amount to €1 685.5 billion.[1] Investment access and protection would therefore be critical to the EU-US economic relations. However the need for an investment chapter in the Transatlantic Trade and Investment Partnership (TTIP) and the inclusion of ISDS provisions has been questioned many times in the context of these two developed economies.

Figure 1: EU trade with the US in goods, services and FDI stocks



Source: EPRS, Giulio Sabbati, (2015).

International investment law has always been an arcane area of international economic law, known only to a handful of lawyers and legal scholars dealing with arbitration issues. The issue has received new public attention thanks to some controversial cases in which regulatory decisions of states were challenged as a result of provisions in International Investment Agreements (IIAs). As the EU acquired exclusive competence in FDI with the adoption of the Lisbon Treaty and a derived responsibility to negotiate future investment-protection rules with third countries, the focus of the discussion has moved from national to European level. In particular, the recent EU negotiations with Singapore, Canada and the US have brought the debate to the fore as the issue was particularly sensitive in some Member States.[2] The public consultation launched by the

1 Data can be found on the DG Trade website, page on the United States.

2 In particular, in Germany, criticisms of ISDS have led to lower support for TTIP. These criticisms have been heightened by the decision of the Swedish company Vattenfall to claim compensation from the Federal Government following its decision to discontinue nuclear energy power; Euractiv.com, 15 January 2015.

Commission on investment protection in TTIP, currently being negotiated between the EU and the US, called for the continuous reform of substantive investment protection clauses.[3] Since the conclusion of the North American Free Trade Agreement (NAFTA), foreign investment provisions have also been criticised in the US. Concerns have been raised in particular with respect to the capacity of states to change their regulatory framework without becoming liable under the BITs. The main criticisms of substantive investment-protection rules focus on both the vagueness of the legal provision, allowing for what is considered expansive and inconsistent application of the protection standards, and the capacity of 'letterbox' companies to access protection under bilateral investment treaties (BIT).[4]

Investment-protection rules have always been used as a safeguard against future changes in domestic protection levels. The US has investment-protection provisions with 21 EU Member States (see annex 5); these agreements may be very different, depending on the type of agreement and the date on which the agreement was concluded. Substantive investment-protection rules are even found in agreements with no ISDS (the most recent example being the Australia-US FTA). The US has constantly revised its drafting of investment protection rules[5] to clarify the interpretation of the rules, avoid expansive interpretation, and minimise frivolous claims and 'forum shopping'. With regard to substantive investment-protection rules, the EU and US concerns are relatively similar, and they have undertaken a series of reforms to achieve a more balanced approach allowing protection of investment, whilst also ensuring legitimate regulatory changes. As a consequence, the US and EU investment-protection rules diverge from the BIT model used in some EU Member States (such as the Dutch model), where investment-protection rules are considered the 'Gold Standard' for foreign investment protection.[6]

2 Investment protection in trade agreements

2.1 Overview of investment rules in international law

Rules on private investment in international law deal with the treatment of foreign investment in a country. They ensure that foreign investments receive a minimum of protection from the hosting states, and formulate rules that establish a balance between the host state's vested right to expropriate or to legislate, and the foreign investor's right to their property and to non-discriminatory treatment with respect to domestic investors.

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[3] European Commission public consultation on investment protection in EU-US talks.

[4] Marta Latek, Investor-State Dispute Settlement (ISDS) – State of play and prospects for reform, EPRS, 2015; see also: Ortolani & al., Legal Instruments and Practice of Arbitration in the EU, European Parliament - Policy Department on Citizens' Rights and Constitutional Affairs, 2014; Hindelang, Study on Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law, in Kuijper et al., Investor-State dispute settlement (ISDS) provisions in the EU's international investment agreements, European Parliament - Policy Department on External Policies of the Union, 2014.

[5] D. A. Gantz, The evolution of FTA Investment Provisions: from NAFTA to the United States-Chile Free Trade Agreement, American University International law Review vol. 19(4), 2003; K. Nadakavukaren Schefer, International Investment Law - Text, Cases and Materials, Edward Elgar Publishing, 2013.

[6] F. Fontanelli and G. Bianco, Converging towards NAFTA: an Analysis of FTA Investment Chapters in the European Union and the United States, Stanford Journal of International Law vol. 50, 2014.

Protection of foreign investors derives from specific provisions in bilateral investment treaties, in regional trade agreements, customary international public law, and General Principles of International Law.[7] States can invoke, for example, provisions from the International Law Commission Draft Articles on State Responsibility, such as the international public law concepts of *force majeure* and of necessity, to justify non-compliance with some investment treaty laws.[8] As with all treaty rules, rules on the protection of investments should obviously be interpreted following the rules of international treaty law as stipulated by the Vienna Convention on the Law of Treaties.[9]

The elements contained in investment treaties or investment provisions in trade treaties vary across agreements, but usually include: rules defining the investments covered by the protection; rules on expropriation; on monetary transfers; on general standards of treatment; and other rules (e.g. on operational requirements or pre-establishment rights).

- Firstly, **rules defining the investments and the definition of investors** covered by the provisions can set a broader or narrower scope of application of the investment treaty. They can impose temporal, territorial and sectoral limitations to the investment definition. The treaty can also simply provide an exhaustive list of investments covered, instead of applying a broad asset-based definition of investments. Further measures limiting the application of some investment provisions include sector-specific exceptions, economic integration exceptions (Regional Economic Integration Organisations – REIOs [10]), and general exceptions (such as for public order, security, health and morality), as well as exceptions for taxation or subsidies, or public procurement.
- One of the main investment provisions relates to the **conditions for legal expropriation**.[11] The rule was intended to find a balance between the vested right of the host state to expropriate properties, and foreign investors' right to property. Legal expropriation is expropriation for public purposes, following due and non-discriminatory process against proper compensation. The definition of proper compensation varies across treaties. The rule also provides protection against 'indirect expropriation', where host government actions, de facto have equivalent effect to expropriation.
- **General standards of treatment** include rules to guarantee certain treatment of foreign investors, including rules against discrimination and rules imposing

[7] J. W. Saracuse, The law of investment treaties, Oxford, 2010.

[8] M.C.H. Thjoernelund, State of necessity as an exemptions from State Responsibility for investments, Max Planck Yearbook of United Nations Law, vol. 13, 2009; The application of necessity as suggested by Professor Sacerdoti has been contested and arbitral tribunals have rendered contradicted judgements. See: G. Sacerdoti, P. Acconci, M. Valenti and A. De Luca, General Interests of Host States in International Law, OUP, 2014; On the ongoing debate: A. D. Mitchell and C. Henkels, Variations on a theme: comparing the concept of 'necessity' in international investment law and WTO law, Chicago Journal of International Law, vol. 14(1), Summer 2013; A. K. Bjorklund, Emergency Exceptions: State of Necessity and Force Majeure, in P. Muchlinski, F. Ortino, C. Schreuer, The Oxford Handbook of International Investment Law, OUP, 2008.

[9] J. W. Saracuse, The law of investment treaties, Oxford, 2010.

[10] REIO excludes the applicability of the principle of most-favoured-nation (MFN) treatment with regard to preferential treatment granted by members of a REIO to other REIO members and their investors. The REIO exception in MFN Treatment clauses, UNCTAD, 2004.

[11] Section 3.1 on expropriation.

standards of fair and equal treatment.[12] Non-discrimination rules are relative standards of treatment, as they imply an obligation to treat foreign investors similarly to other investor groups. There are two non-discrimination rules: the 'national treatment' (NT) rule, which requires the host state to grant similar treatment to both foreign and domestic investors, and the 'most favoured nation' (MFN) clauses, where a host government must grant the foreign investor treatment equal to that which it grants its most-favoured foreign investors of other nationalities. As opposed to relative standards of treatment, absolute standards of treatment should be granted regardless of the treatment granted to other groups. These absolute standards generally include the 'fair and equitable treatment' (FET) principle, and the full protection and security rule. These safeguard against changes in national law and establish a guaranteed minimum protection for the partner country's investments, even when domestic investors are no longer protected by national law. These principles cover protection from abusive or discriminatory state actions, fairness and transparency rules, as well as due process rights.

- **Rules ensuring capital transfers**, by banning host governments from restricting capital flows are particularly important for foreign investors, as they may rely on cross-border transfer of capital from/to the parent company, pay foreign obligations, or purchase foreign raw materials or components.[13]
- BITs also **prohibit legal requirements on some operational aspects of investments**. BITs always contain a clause prohibiting performance requirements: which may be local content rules or export quotas. The former are also prohibited under the WTO Trade-Related Investment Measures (TRIMS) agreement.[14] Export quotas are also prohibited via the application of article XI of the General Agreement on Tariffs and Trade (GATT) under TRIM, however some export quotas can be allowed under article XI GATT in certain circumstances.[15] Furthermore, BITs can also introduce prohibition of interference in foreign investors' management or human resources decisions.
- BITs may also contain **'umbrella clauses'** requiring the host state to respect any contractual obligations it assumed with regard to a specific investment.[16]

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12 Section 3.2 on general standards of treatment.

13 Clauses prohibiting restrictions on payments are commonly found in any trade agreement, indeed in order to allow for trade transactions (imports/exports) to take place, capital transfer for payments must also be allowed (for example article XI of the General Agreement on Tariffs and Trade (GATT)). Similarly, an investor needs to be able to make capital transfers between the place of investment and the parent company's place of origin, and vice versa, for: capital for further investments; paying investor dividends; profits; fees. J. W. Saracuse, The law of investment treaties, Oxford, 2010.

14 See article 2 of TRIM and WTO case-law: Indonesia-Auto case; India-Auto case and the Canada-Renewable Energy (Feed-in Tariff case).

15 See article 2 of TRIM and article XI of GATT.

16 J. W. Saracuse, The law of investment treaties, Oxford, 2010.

These rules are directed at foreign investment already present in the country, i.e. they are post-establishment rules. They do not in themselves mean a market is open to foreign investment. However, some investment agreements have begun to include entry condition rules or pre-establishment rights.[17]

2.2 Rationale for investment rules in international law

Protection of private property is an ancient constitutional right in many democratic systems (some could argue that the rule of law began with securing property rights). Balancing state rights to expropriate and the right to property is an important aspect of the application of the constitutional right to property. Alongside the development of domestic constitutional systems and of the right to property enshrined in constitutional provisions, the creation of international public law provisions establishing its own rules on the balance between the expropriation right of states and the property rights of foreign investors raises at least two questions. The first question relates to why foreign investment rules developed in international public law as a distinct system of protection, instead of relying solely on the development of domestic law rules on private property. The second question addresses why there has recently been a trend towards the incorporation of investment rules in FTAs. A third question that should also be raised is whether there is a link between promotion of investments and international treaty provisions protecting investments.

2.2.1 International treaty law as a safeguard against changes to domestic law

Rules aiming to protect investments began to appear in treaties as early as the 17th century,[18] and focused on the protection of merchants[19] and/or vessels.[20] At that time, these private-rights clauses appeared in post-war treaties trying to establish restitution of private goods (such as the Treaties of Westphalia).[21] The concept of foreign investment law was developed much later, in the 20th century.

International rules on foreign investments were further developed in reaction to historical events that made protection of investments important. **These events underlined the importance of international public law as an insurance mechanism against the political risk of changes in domestic policy and law.** In particular, the Bolshevik revolution created the need for stronger commitments to investment protection and ensuring that changes in government would not affect foreign investments.[22] The aftermath of the Second World War (WWII) signalled another peak in the conclusion of treaties, including investment clauses, in particular the Friendship, Commerce and Navigation (FCN) treaties between the US and European countries.[23] These treaties pioneered the foreign investment rules now included in BITs. Indeed,

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17 Idem.

18 C. Tietje and F. Baetens (2014), The impact of Investor-State-Dispute Settlement in the Transatlantic Trade and Investment Partnership.

19 See for example Treaty of Münster (1648): '*The subjects and residents of the lands of the aforesaid Lords King and States (...) shall also be permitted to enter and remain in each other's lands and there conduct their business and trade* ***in full security****, on the sea, in other waters, as well as on land.*'

20 See for example the Treaty of Amity and Commerce between France and the United States from 1778.

21 R. Lesaffer and E. J. Broers, Private Property in the Dutch-Spanish Peace Treaty of Münster (30 January 1648), Rechtsformen internationaler Politik, 2014.

22 J. W. Saracuse, The law of investment treaties, Oxford, 2010.

23 See annex.

while earlier US treaties mainly provided access to justice and application of private rights, as stipulated in domestic laws, to foreign citizens and legal entities,[24] the FCN treaties established rules on national treatment, equitable treatment (precursor of the FET clause) and expropriation rules. This development may result from the need, after WWII, for rebuilding the democratic state and the rule of law in countries such as Italy and Germany, with which the US concluded FCN treaties and where treaty law presented the best assurance of continued protection to US investments. For the same reason, decolonisation and the development of North-South trade and investment heralded a proliferation of BITs since the 1970s.

The development of foreign-investment laws in international treaties, and in particular the development of investor-state dispute settlement (ISDS) provisions in bilateral investment treaties, contributed, along with human rights law, to the rise of individuals as actors in international public law. ISDS gave foreign investors protection and directly enforceable[25] rights under international public law. The development of investment rules with ISDS clauses, in treaties concluded among developed countries, first found in the US-Canada FTA, could also be explained by the development of individual rights in international public law. Moreover, regardless of the status quo of domestic law in the partner country, international public law remains a ***safeguard*** against any future changes in the balance of state versus foreign investors' rights within domestic law. International public law ensures that a minimum standard of protection (or depending on the treaty formulation, stronger protection), will always be granted to the investors of each party to the agreement. Inserting foreign investors' rights in treaties means the balance between the state's and the foreign investor's rights can only be changed by amending the treaty through negotiation between the two states. If, however, the balance between the state's and the foreign investor's rights is enshrined in domestic constitutional law, it can be unilaterally changed by each state, as it depends on implementation of those rights in domestic law, or on the interpretation of the rights by domestic courts.[26]

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24 Article IX of the Friendship, Commerce and Consular Rights Treaty between Austria and the United States (1929): *Limited liability, and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.*

The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfil their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State or Provincial laws.

25 Whether these rights are directly enforceable may depend on the domestic framework and how it incorporates international obligations.

26 There may be some international human rights rules that still impose constraints on countries regarding the balance between, for example, states' right of expropriation and the rights of property owners in general, including investors. EU Member States are bound by the rules applied by the European Court of Human Rights. Refer to: Monica Carss-Frisk, A guide to the implementation of article 1 of protocol No. 1 to the European Convention on Human Rights, in Council of Europe, Human Rights Handbooks no. 4: The right to property, 2001, reprinted 2003; A. Grgič, Z. Mataga, M. Longar and A. Vilfan, The right to property under the European Convention on Human Rights, in Council of Europe, Human Rights Handbooks no. 10, 2007; H. Lambert, The position of aliens in relation to the European Convention on Human Rights, in Council of Europe, Human Rights files no. 8, 2007.

It is in this light that an investment chapter was introduced in the Australia-US FTA (AUSFTA). In AUSFTA, the preferred route for claiming a breach of property rights is through domestic courts applying domestic law, as investors cannot issue direct claims under AUSFTA. However, because of the inclusion of an investor chapter in the Treaty, the US (or Australia), can always introduce a case under the state-to-state dispute settlement process whenever domestic law diverges from the Treaty protection standards. The investor can also indirectly seek protection under AUSFTA, using diplomatic protection to start a state-to-state dispute under the investment protection chapter. The AUSFTA further includes a clause allowing exceptional direct claims under the Treaty before an arbitral tribunal, in case changes in circumstances affect the domestic resolution of the dispute.[27]

Therefore, regardless of the type of resolution mechanism which is included, a chapter on investment protection will most probably be included in TTIP.

2.2.2 From BITs to investment protection clauses in FTAs

It is interesting to explore the reasons for inserting investment-protection mechanisms within trade treaties, rather than conclusion of bilateral investment treaties, covering only investment provisions.

Taking the US point of view, the main reason for the inclusion of investment protection mechanisms within trade treaties, could simply be the change in policy approach towards global trade policy. The US shift to bilateral investment treaties in the 1970s was followed in the early 1990s[28] with the development of FTAs including investment provisions. US FTA negotiations again peaked at the end of the 1990s.[29] The 1970s shift to the bilateral investment treaties format was due simply to the rise of GATT as the main forum for international trade negotiations; in that period the US only needed to negotiate investment provisions at bilateral level, relying on GATT rounds to liberalise trade. Difficulties in reaching agreements on reforms within the WTO arose at the end of the 1990s, and the US started negotiating improvements to market access bilaterally or regionally via FTA negotiations, incorporating chapters on investments in the trade agreements.

In the EU, the main reason for the initial development of investment provisions in international agreements in separate BITs derives from a question of distribution of competences between the EU and its Member States. While the EU is competent to negotiate trade agreements, up until the Lisbon Treaty, investment treaties were in the purview of EU Member States' foreign policy. Today, the Treaty of Lisbon gives exclusive competence to the EU in dealing with foreign direct investment.[30] Thanks to

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[27] Further analysis of the AUSFTA approach and its related limits, as well as a discussion of why such an approach is not feasible in TTIP, can be found in: Laura Puccio, Investor-State dispute settlement – issues, reform proposals and alternatives, EPRS, forthcoming; Laura Puccio, EU-US negotiations on TTIP - a survey of current issues, EPRS, June 2015; L. E. Trackman, Choosing domestic courts over investor-state arbitration: Australia's repudiation of the status quo, UNSW Law Journal vol. 35(3), 2012; W. S. Dodge, Investor-State dispute settlement between developed countries: reflections on the Australia-United States Free Trade Agreement, Vanderbilt Journal of Transnational Law vol. 39(1), 2006.

[28] This change of policy started in particular with the US-Canada FTA of 1989 and NAFTA in 1994.

[29] Further development of investment rules in US FTAs started with the US-Chile agreement of 1998 and the subsequent development of trade agreements both in Latin America and in the Asian-Pacific area.

[30] See: Articles 3, 206 and 207 TFEU.

Regulation 1219/2012,[31] Member States' bilateral investment treaties with third countries remain in force until the EU has concluded an agreement with those third countries.[32] The EU is therefore now starting to include investment agreements in negotiations on FTAs.[33]

Finally, the inclusion of investment chapters within FTAs can create synergies between investment provisions and other chapters, such as the services chapter (including the financial services chapter) or provisions on environmental and labour concerns.[34]

2.2.3 Investment promotion

Protection of investments can be seen as the legal rationale for investment rules in treaties, however, economic reasons may also exist. The fact that states are bound by international rules on the protection of investments can have a positive impact in attracting FDI. The rationale behind this assumption is that investment treaties lessen the political risk of expropriation or discriminatory treatment and should therefore promote a more stable institutional framework conducive to the development of FDIs. For that reason, the US concluded agreements with investment protection clauses with 21 Member States of the EU at various points in time.[35, 36]

However, econometric results have been inconsistent in proving a causal link between investment protection rules and FDIs: some find that investment rules may increase FDI for developing countries, others challenge these findings.[37] Some studies indicate positive econometric results for developing countries, as political risk is higher and can constitute a potentially prohibitive cost for investments. Therefore, a developing country's commitment to respect investment treaty rules and to have them enforced by a neutral authority through investor-state arbitration is considered to reduce the costs of such political risk, and allow FDI growth. Positive impact is also seen when investment protection is included in preferential trade agreements. Econometric studies finding no, or little, impact of BITs on FDI could be justified by the 'preference' erosion which may result from developing countries being placed on an equal institutional footing due to a proliferation of BITs. Increased FDI will then depend mainly on other market factors. This consideration reminds us that BITs and institutional factors are only one element for attracting FDI (the others being linked to market and labour characteristics). An absence of investment treaties may be a greater factor hindering states' ability to attract FDI than investment protection rules in place actually positively promoting them.

[31] Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries, (2012) OJ L 351/40.

[32] See: Article 3 of Regulation 1219/2012.

[33] The only exception here is the negotiation of an investment agreement with China.

[34] See also analysis in section 3.3.1.

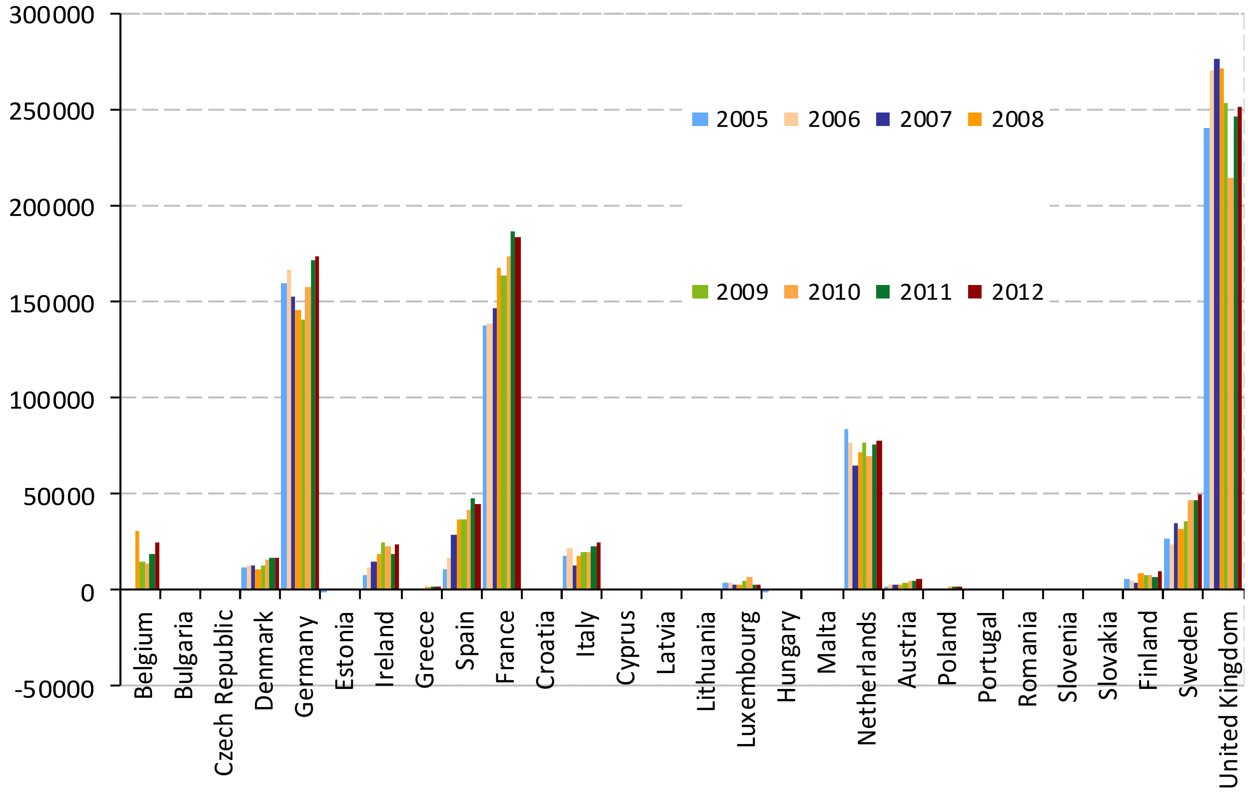
[35] See annex 5.

[36] The level of protection and the resolution mechanism depends largely on the type of agreement and the date at which it was concluded as the older agreements were never updated to follow the developments in international investment law.

[37] Review of the outstanding economic literature can be found in: UNCTAD, The impact of international investment agreements on foreign direct investment: an overview of empirical studies 1998-2014, September 2014; On methodological issues that arise in the framework of econometric studies of FDI, refer to the book review by Poulsen: K. P. Sauvant and L.E. Sachs, The effects of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties and investment flows, in European Journal of International Law vol. 20(3), 2009.

In the TTIP context, however, the economies involved are advanced. Most EU outward FDI to the US comes from the UK, Germany, France, or the Netherlands (see figure 2), countries with which the US does not have BITs (although the US has an FCN treaty with Germany and a Convention on Establishment with France).[38] Regarding US investment in the EU (see figure 3), the UK attracts most US FDI, yet is one of the few countries with which the US does not have any kind of international provisions on investments (not even those contained in the earlier FCN treaties mentioned earlier). It should be noted that the UK has a ***long-standing tradition as a country open to foreign investment***;[39] UK courts are known by the US to ***apply customary international law to foreign investment cases***;[40] and the ***characteristics*** of the UK ***market*** are attractive for FDI. The main sectors covered by US FDI in Europe (see figure 4), are predominantly in the service and financial sectors. That the UK is home to one of the biggest European centres for the latter sector makes it an obvious choice as a location for US bank affiliates.

Figure 2: EU Member States outward FDI to the US (Direct investment stocks – million euros)



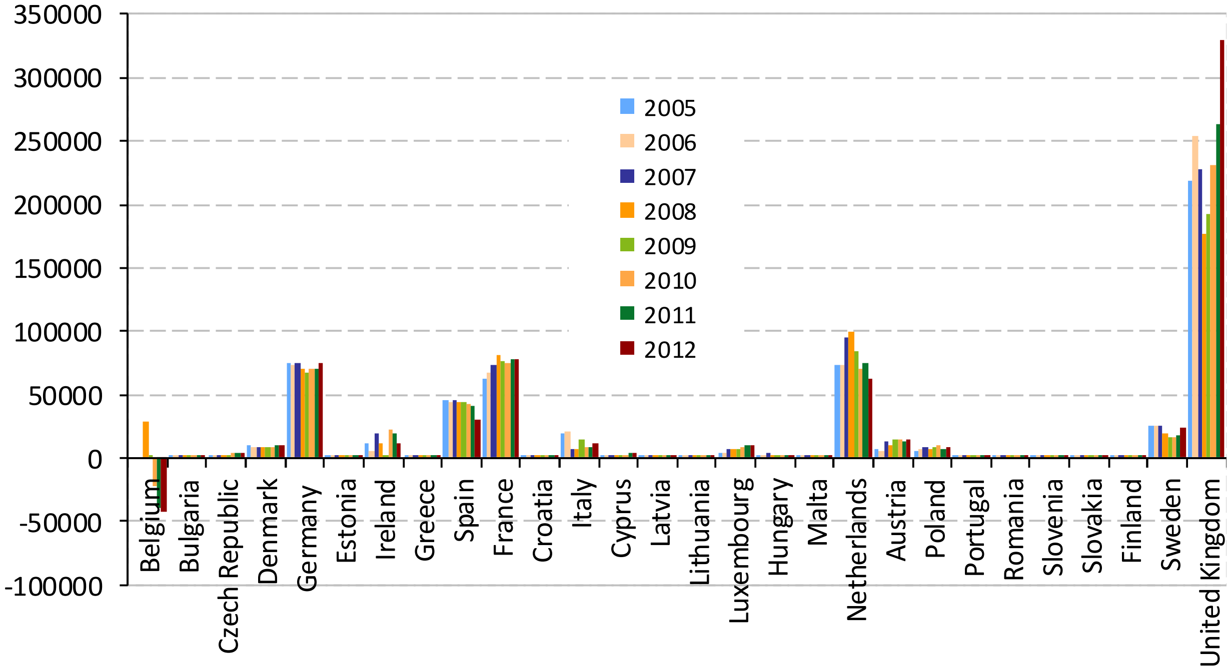
Source: Eurostat (2015).

[38] See annex 5.

[39] US State Department, 2014 Investment Climate Statement – United Kingdom; US State Department, 2015 Investment Climate Statement – United Kingdom, 2015.

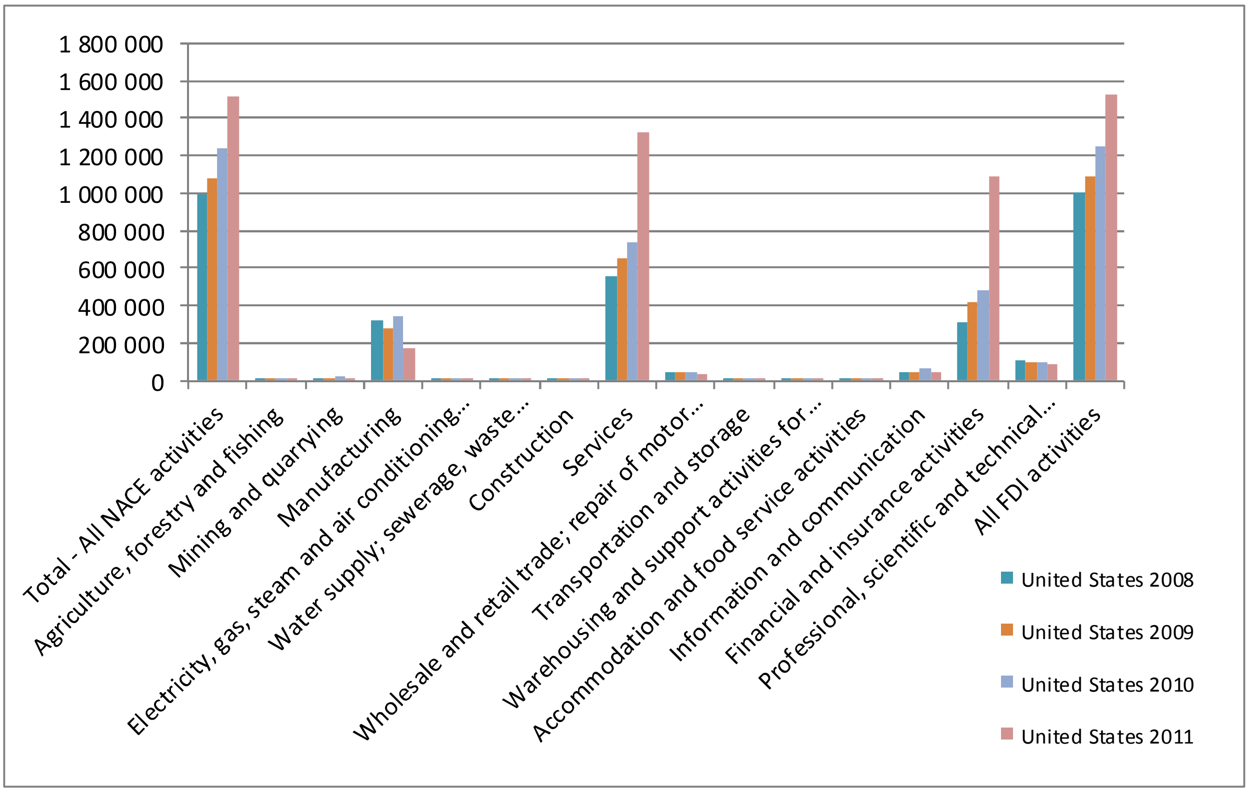
[40] Idem.

Figure 3: EU Member States inward FDI from the US (Direct investment stocks – million euros)



Source: Eurostat.

Figure 4: EU inward FDI from the US by sector (Direct investment stocks – million euros)



Source: Eurostat (2015).

Another important centre in the EU for US FDI is the Netherlands (see figure 3), although US direct investment has decreased over time. Although further research is needed, it may be that the Netherlands is used by US firms as a base *to* ***access the EU internal market and at the same time obtain protection under the intra-EU BITs concluded by the Netherlands***. This hypothesis is supported by two further considerations: Firstly, according to a 2014 study, headquarters locations seem to make up a large part of US FDIs in the Netherlands;[41] Secondly, Dutch BITs merely require a firm to have a registered seat in the Netherlands in order to be covered by Dutch BIT protection,[42] and the Netherlands is renowned for offering the greatest protection to foreign investors in its BITs – setting a 'Gold Standard' in international investment law.[43] To conclude, we may add that the business environments in the Netherlands and the UK are known to be investment-friendly.[44]

3 Analysis of selected provisions relevant in the TTIP debate

3.1 Development of the rules on expropriation

3.1.1 The rule and its interpretation issues

One of the key provisions in international investment law is the rule on expropriation of alien property. The protection of alien property rights from unjust seizure by the host state is at the core of international investment law.

Customary law makes a distinction between legal and illegal expropriations. Indeed it is a state right to expropriate a property and therefore there expropriation can be legal. This legal right of states to expropriate is, however, subject to conditions aimed at achieving a balance between the right of property of private individuals and the state's right to expropriate.

Under customary law, legal expropriation must comply with the following conditions:

- the expropriation must be undertaken in the public interest;
- the expropriation must be carried out in compliance with due process rules;
- the expropriation must not be discriminatory;
- the investor must receive compensation.

Some of the above conditions are also to be found in domestic law.[45] These conditions are reinserted in Bilateral Investment Treaties and International Investment Agreements (see box 1).

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41 C. Tietje and F. Baetens, The impact of Investor-State-Dispute Settlement in the Transatlantic Trade and Investment Partnership, 2014.

42 R. van Os and R. Knotterus, Dutch bilateral investment treaties - a gateway to 'treaty shopping' for investment protection by multinational companies, SOMO, October 2011.

43 F. Fontanelli and G. Bianco, Converging toward NAFTA: an analysis of FTA investment chapters in the European Union and the United States, Stanford Journal of International Law vol. 50, 2014.

44 Financial Times, UK attracts record number of foreign investment projects, 20 July 2014; US State Department, 2013 Investment Climate Statement: Netherlands, 2013; US State Department, 2015 Investment Climate Statement- United Kingdom, 2015.

45 Domestic law will not explicitly mention non-discrimination as a requirement, however International Human Rights law or constitutional law could, in principle, include non-discrimination within domestic cases. The burden to prove discrimination can, however, be onerous (see, in particular *Sporrong and Lönnroth* v. *Sweden* before the European Court of Human Rights). Similar consideration could be given to the due process requirement, a requirement to follow fair procedural laws, which are at the basis of the rule of law system. The ECHR has also imposed a duty of proportionality of the expropriation, which requires not only that expropriation is legitimate but also that it is the least restrictive means for a government to achieve that particular public purpose. See: ECHR, 23 September 1982, *Sporrong and Lönnroth* v. *Suède*, appl. n° 7151/75 and n° 7152/75; ECHR, 12 February 2007, *Maupas et al.* v. *France*, appl. n° 13844/02.

Box 1: Example of basic provisions on expropriation in BITs

Article 6: Expropriation from the Dutch Model BIT (2004)[46]

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

a) the measures are taken in the public interest and under due process of law;

b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;

c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

The definition and interpretation of these various conditions is important in defining the scope of the protection granted.

In general, the interpretation of public interest has been extremely broad, giving much discretion to states. Expropriation was considered not to be in the public interest only when it was carried out to avoid state contractual obligations or when the only purpose was monetary. Expropriation has been found to be in the public interest even in cases where the main reason was monetary but concerned the development of the country, as was the case in some oil nationalisation disputes.[47]

The due process requirement is one of procedural fairness requiring transparent administrative proceedings. There may be differences in the way this concept is interpreted – it may simply mean that expropriation must follow legal and procedural requirements as set in national law, or it may also require the institution of a system for judicial review of the expropriation decision. The latter interpretation would normally include reasonable advance notice, a fair hearing and an impartial adjudicator to assess disputes (i.e. imposing a good-governance standard).[48]

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[46] Dutch BIT Model 2004.

[47] *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Arward (July 14, 1987), 27 ILM 1314 (1988): *... as a result of the modern acceptance of the right to nationalise, this term [public purpose] is broadly interpreted, and that States, in practice, are granted extensive discretion. An expropriation, the only purpose of which would have been to avoid contractual obligations of the state or entity controlled by it, could not, nevertheless, be considered as lawful under international law. [...] It is also generally accepted that a State has no right to expropriate only for a financial purpose. [...] in recent practice and mostly in the oil industry, States have admitted expressly, in a certain number of cases, that they were nationalising foreign properties primarily in order to obtain a greater share, or even the totality, of the revenues drawn from the exploitation of a national natural resource, which, according to them, should accrue to the development of the country. Such a purpose has not generally been denounced as unlawful and illegitimate.* See for this quotation: K. Nadakavukaren Schefer (2013), International Investment Law - Text, Cases and Materials, Edward Elgar Publishing.

[48] See: *ADC Affiliate Limited and ADC&ADMC Management Limited* v. *Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

It is not surprising to find the requirement of non-discrimination in international investment law, as non-discrimination is one of the cardinal principles of international economic law. International economic law was partly developed to ensure equal treatment across economic agents of different nationalities. The scope of the non-discrimination requirement depends on how the expropriated and the non-expropriated are compared. For example in the *Amoco* case, the claimant suggested that another petrochemical consortium (the Iran-Japan Petrochemical Company, IJPC) was not expropriated. As the two companies were in the same sector, the claimant considered the expropriation discriminatory. The tribunal ruled against the discrimination claim because operations of the IJPC had started after the nationalisation programme, and its areas of operation were not closely related to the field of oil exploitation covered by the nationalisation.[49]

The last element in legal expropriation is the duty to compensate. Compensation for legal expropriation normally requires an adequate level of compensation, corresponding often to the market value of the expropriated good at the time before expropriation. The Commission draft proposal issued on 16 September clarifies that the 'fair market value' should be assessed before 'the expropriation or the impending expropriation became known' (emphasis added),[50] as expropriation can cause market values to drop suddenly.[51] Treaties may make more detailed specification of fair compensation and how it should be calculated.[52] Some BIT models also include the requirement of prompt, adequate and effective payment, also known as Hull's formula.[53] This formula is that adopted by most BITs and it is also suggested in the Commission's proposal.[54] The notion of prompt payment considers that liquidity today is generally worth more than money tomorrow; lengthy delays in compensation payments may render the requirement to offer fair compensation meaningless. The proposed draft from the Commission for TTIP suggests that the fair value should also include interest at a normal commercial rate from the date of expropriation until the date of payment. The US BIT model also suggests the same approach to ensure delays in compensation do not become unreasonable.[55]The requirement for effective payment will often require payment in convertible currencies, so as to ensure that the compensation is sufficiently liquid to be reused without delay by the investor.

Fair compensation in the framework of legal expropriation is part of any legal system (both domestically and internationally), the greatest difficulty is compensation levels when expropriation of a foreign investor's goods is considered illegal. In this case, compensation is normally more than the market value of the goods. Case law does not

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49 *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, footnote 47.

50 See draft article 5(3) of the Commission proposal to TTIP.

51 Similarly the US model BIT specifies that the fair market value should 'not reflect any change in value occurring because the intended expropriation had become known earlier'; article 6(2)(c).

52 For example, the Italian 2003 BIT model which even clarifies the ways in which compensation must be calculated taking into account the different type of investment (see article V).

53 More discussion on the Hull's Formula can be found in: K. Nadakavukaren Schefer (2013), International Investment Law - Text, Cases and Materials, Edward Elgar Publishing.

54 See article 5(1) of the Commission proposal for TTIP.

55 See article 6(3) of the US BIT model.

give coherent guidance, and treaties are obviously mute on the amount of compensation in illegal expropriation cases.[56]

3.1.2 Regulatory freedom and indirect expropriation

Beyond the distinction between legal and illegal expropriation, international investment laws make a distinction between direct and indirect expropriation. Indeed the expropriation provision in IIAs also concerns measures 'having effects similar to' or 'tantamount to' expropriations. In some cases this refers to a series of regulatory measures, challenged as having a cumulative effect leading to expropriation (this type of effect is known as 'creeping expropriation').[57]

In general, international economic law always protects the rights it stipulates from disguised measures which have a similar effect, and which can annul such rights via other state actions (including regulatory measures).[58] Without prohibition of such measures having equivalent effects, the rights protected in international economic law could easily be circumvented.

Interpretations by tribunals are varied.[59] On the one hand, some tribunals define illegitimate indirect expropriations only on the basis of a sole-effect doctrine; on the other, different tribunals have engaged in a balancing analysis between state interest and consequential impact on investor rights.

- When applying the sole-effect doctrine, only the degree of the effect on the investor's rights is taken into account, focusing on the extent to which the state's action deprived the investor of its property or of the effective control over such property, as well as looking at the duration and permanent nature of this deprivation of the right to property.[60] Generally, an arbitral tribunal will require a 'substantial deprivation' to take place,[61] which is understood as deprivation of property rights and does not include diminished profits.[62]
- As opposed to the sole-effect approach, when tribunals choose a balancing approach, they take three further elements into account: (1) the public purpose of the measure, (2) the bona fide nature of the measure (which will be analysed in terms of transparency, non-discrimination and non-arbitrariness of the measure), and also (3) the proportionality of the measure. Taking account of

56 K. Nadakavukaren Schefer (2013), International Investment Law - Text, Cases and Materials, Edward Elgar Publishing.

57 Two examples of cases with 'creeping expropriation' claims are: *Feldman* v. *Mexico* and *RosInvest* v. *Russia*.

58 See the application of article III of GATT in the WTO system.

59 This is due to the interpretation approach taken, but also because BITs have very different formulations: Hindelang, Study on Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law, in Kuijper et al., Investor-State dispute settlement (ISDS) provisions in the EU's international investment agreements, European Parliament - Policy Department on External Policies of the Union, 2014.

60 See Tecmed case.

61 AES v. Hungary: '*For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived in whole or significant part of its value*' *AES Summit Generation Limited and AES-Tisza Erömü Kft* v. *Republic of Hungary*, ICSID case No ARB/07/22, ECT Arbitration Award, 23 September 2010.

62 In the *LG&E* v. *Argentina* case, the value of the investors' licences was reduced by 90%. However, the tribunal did not find indirect expropriation, as they still enjoyed property rights and some profits, albeit reduced. *LG&E Energy Corporation, LG&E Capital Corporation, LG&E International INC v. Argentine Republic*, ICSID Case No ARB/02/1.

proportionality means that a measure following a legitimate purpose can still be considered as indirect expropriation if it is found to impose a disproportionate burden on the foreign investor. The balancing approach is not without interpretation issues, in particular as there is no clear guidance as to whether and when the effect on investor rights must prevail over the state's right to regulate, and vice versa.

Finally, tribunals have started to consider the investors' 'legitimate expectations'.[63] Originally, this consideration could have been born out of an acknowledgement that states might promise to maintain a certain regulatory environment, in order to attract investment. However, the concept becomes problematic as soon as it is interpreted as an expectation born from the simple status quo of the regulatory environment at the time the investment was made, i.e. an expectation by the investor without any state promises or actions that the regulatory environment will not change. Such a broad consideration of investors' legitimate expectations would mean that the political risk of changing the regulatory environment is not borne by the investor, but by the regulatory state.

Box 2: Extracts from NAFTA case law on indirect expropriation

Extract from the *Tecmed* case:

... In determining whether a taking constitutes an 'indirect expropriation', it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under outright expropriation, the investor could in all likelihood be covered under most BIT provisions.

... it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that '...any form of exploitation thereof...' has disappeared; i.e. economic value of the use, enjoyment or disposition of the assets. ... The government intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation of the measure is less important than its actual effects.

... The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable. ...

Although the analysis starts at the due deference owing to the State when defining the issues that affect public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal [...] to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realised by any expropriatory measure.

Extract of the *Methanex* case, on legitimate expectations:

... a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

[63] K. Nadakavukaren Schefer (2013), International Investment Law - Text, Cases and Materials, Edward Elgar Publishing.

Because of uncertainty in interpreting the rules, and considering the rising number of challenges in the field, the prohibition of indirect expropriation has attracted much political debate, due to fears that a state would become liable (and therefore obliged to compensate), every time a regulation had an impact on a foreign investment. The main concern is whether prohibition of indirect expropriation could lead to a regulatory chilling effect, i.e. a situation in which the state would fail to enact or apply regulatory measures because of the perceived or actual threat of investment arbitration.[64] It is difficult to assess whether regulatory chill really exists, as it can only be verified through case-by-case analysis of specific occurrences, rather than an established trend.[65] However, if regulatory chill exists, its causes lie in the difficulty in distinguishing measures that should be considered as disguised expropriations and those measures that are genuine and legitimate regulation.

To face these challenges, states (and particularly the US), have guided the interpretation of the clauses or added clauses on the right to regulate in order to direct interpretation in tribunals.

After the first years of its experience in NAFTA, the US added interpretation guidance in its subsequent agreements, as demonstrated by the US-Chile FTA.[66] The US-Chile FTA model annex was re-used in other agreements:[67]

- The annex tries to limit tribunals' discretion by making reference to customary obligations in international law regarding expropriation, i.e. the tribunal must analyse and interpret the rules on expropriation in line with customary law.
- The annex simply codifies some of the case law, singling out the various elements that must be considered to assess an indirect expropriation.
- It also clarifies that legitimate expectation must be taken into account only if they are 'distinct' and 'reasonable', thus attempting to ensure that tribunals do not expand investors' legitimate expectations to include hopes for a stable, unchangeable, regulatory environment.

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64 On regulatory chilling, see: C. Tietje and F. Baetens, The impact of Investor-State-Dispute Settlement in the Transatlantic Trade and Investment Partnership; 2014.

65 Idem.

66 D. A. Gantz, The evolution of FTA Investment Provisions: from NAFTA to the United States-Chile Free Trade Agreement, American University International law Review vol. 19(4), 2003.

67 For example, a similar approach is found in the US-Korea FTA.

Box 3: Annex 10-D of the US-Chile FTA on expropriation

The Parties confirm their shared understanding that:

1. Article 10.9(1) is intended to reflect ***customary international law concerning the obligation of States with respect to expropriation****.*

...

4. The second situation addressed by Article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by- case, fact-based inquiry that ***considers, among other factors:***

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safeties, and the environment, do not constitute indirect expropriations.

However, the US-Chile FTA approach fails to clarify how to assess all the elements (such as economic impact on the investor or legitimate expectation). The leaked draft Trans-Pacific Partnership Agreement (TPPA) from 2012,[68] may indicate how to further detail the interpretation guidance on indirect expropriation. **However, the leaked text cannot be relied upon and it is impossible to know whether the US ever supported the text**, particularly as the current US BIT model only contains wording similar to annex 10-D of the US-Chile Agreement. Notwithstanding, the draft suggested some interesting modifications to the approach used in the US-Chile FTA. In the proposal, annex 12C is practically a copy of annex 10-D to the US-Chile FTA, and, according to a further leaked TPPA text from 2015, is the only annex which remains in the current draft.[69] However, the 2012 proposal suggested the addition of annex 12-D, which would have given an extra layer of guidance (see box 4 below).

- The leaked 2012TPPA proposal clarified that indirect expropriation can only take place when there is a substantial deprivation of the use of property rights (therefore ruling out economic impact on profits).
- Moreover, the substantial deprivation must have been either severe or imposed for an indefinite period.

[68] 2012 leaked TPPA proposal, refer to the text on wordpress.

[69] 2015 leaked TPPA draft text circulated on wikileaks.

- Finally the measure had to be disproportionate to the public purpose. Disproportionality of the measure must have been established in order to win a claim for indirect expropriation; in other words a measure found to be proportional to the public purpose would not have resulted in indirect expropriation, even if it substantially deprived the investor of their property rights.
- Paragraph 4 of proposed annex 12-D includes two situations that would likely be considered indirect expropriation: (a) the case of discriminatory measures and (b) the breach of a state’s prior ***written commitments***. It is important to point out that these situations are considered to be ***likely*** to result in indirect expropriation, but are not always considered indirect expropriation, and are certainly not a *conditio sine qua non* for finding indirect expropriation, i.e. other situations might also result in indirect expropriation, even if there is no breach of written commitment or the measure is non-discriminatory.
- The last paragraph of the annex reinforced the protection of state regulatory power already introduced in annex 10-D of the US-Chile FTA. Indeed, paragraph 5 established that non-discriminatory and proportional ('*reasonably justified*') regulations to achieve a legitimate public objective do not constitute indirect expropriation.

The leaked 2012 text also illustrates the difficulty in further clarifying the text. In particular, the phrasing of paragraph 4 of annex 12-D is instructive on the limits of listing situations in which indirect expropriation could be found. Indeed the two situations mentioned (a discriminatory measure or a measure in breach of a state's written commitment) are only ***likely to*** constitute indirect expropriation as there might be cases in which such state measures can, and should, be justified, and thus the formulation allows states to issue measures that could be discriminatory or in breach of a written commitment. At the same time, the inclusion of such a paragraph could have legal consequences, in particular with respect to the burden of proof. While it is for the claimant to prove that indirect expropriation took place, the attribution of the burden of proof under paragraph 4 of annex 12-D could be interpreted slightly differently, depending on whether the word 'likely' is interpreted as creating a presumption that under these particular circumstances (i.e. existence of discrimination or breach of a host state written commitment), indirect expropriation took place. If 'likely' were to be interpreted as creating a presumption of indirect expropriation, the claimant could be required only to prove the existence of the specific circumstances foreseen under the paragraph (i.e. existence of discrimination or breach of a host state's written commitment), while it would impinge on the host state to prove that indirect expropriation did not take place or that the action was otherwise justified.

At the same time, paragraph 3 of the leaked 2012 text gives a clear indication of the interpretation method to use in order to assess indirect expropriation, choosing the balancing approach.

Box 4: Annex 12-D of a leaked TPPA draft proposal from 2012

1. An action or a series of actions by a Party [cannot] [shall not] constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Expropriation may be either direct or indirect:
(a) direct expropriation occurs when a state takes an investor's property outright, including by nationalization, compulsion of law or seizure;
*(b) indirect expropriation occurs when a state takes an investor's property in a manner equivalent to direct expropriation, in that **it deprives the investor in substance of the use of the investor's property**, although the means used fall short of those specified in subparagraph (a) above.*
3. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be:
*(a) either **severe** or for an **indefinite peri**od; and*
*(b) **disproportionate** to the public purpose.*
4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:
*(a) **discriminatory in its effect**, either as against the particular investor or against a class of which the investor*
forms part; or
*(b) in **breach of the state's prior binding written commitment** to the investor, whether by contract, license or other legal document.*
5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute and indirect expropriation.] [5. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.]

The US-Chile FTA approach has certainly inspired the European Commission. Annex X.11 of the draft CETA agreement (see box 5)[70] adds only small variations from the wording of the US-Chile FTA annex 10-D. In particular:

- it adds the requirement to consider the duration of the measure(s);
- it also clarifies that the character of government action must be established via analysis of object, context and intent of the measure(s);
- when stating that non-discriminatory regulations to achieve a legitimate purpose are not to be considered indirect expropriations except in rare circumstances, it clarifies that those rare circumstances are exclusively to be understood as situations in which the measure is ***manifestly*** excessive (i.e. disproportionate).

[70] CETA draft text of 26 September 2014.

Box 5: Annex X.11 of CETA draft text on expropriation

The Parties confirm their shared understanding that:
1. Expropriation may be either direct or indirect:
direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

the duration of the measure or series of measures by a Party;

the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and the character of the measure or series of measures, notably their object, context and intent.

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

The Commission's September 2015 draft proposal for the TTIP negotiations follows a similar approach to that used in CETA.[71] There are two main differences. The first concerns the third factor (i.e. character of the measure) to determine indirect expropriation. The latter is not defined in terms of *object, context and intent* but in terms of *object and content*.[72] The characterisation via object and content seems to suggest an analysis centred on the more restrictive 'plain meaning' interpretation approach instead of the purposive interpretation suggested in CETA. The second difference with CETA is the longer list of legitimate public welfare objectives mentioned.[73] Both in CETA and in the Commission's draft proposal, these lists are open-ended, as they are introduced by the term '*such as*'.

3.2 The General Standards of Treatment: concerns and developments

3.2.1 Non-discrimination rules

Non-discrimination rules are the backbone of international economic law. Two different types of non-discrimination rules are normally introduced:

71 See Annex I to the Commission proposal for TTIP.

72 Article 2(c) of Annex I of the Commission proposal for TTIP.

73 Article 3 of Annex I of the Commission proposal for TTIP.

- The National Treatment rule, requiring that foreign investors are not treated less favourably than domestic investors.
- Most-favoured Nation Treatment, which requires treatment of the trade partner investor to be equally favourable to that granted to the most-favoured foreign investor.

Several interpretation issues are relevant to non-discrimination rules.

- Non-discrimination rules are relative standards, i.e. a comparison must be established between the treatment of an investor (the BIT partner investor) and the treatment reserved for another group of investors in the host country (domestic or other foreign investors). However, defining the groups to compare is an issue. A narrow comparison would only include investors operating in the same sub-sector; another would include investors in competing industries, or an even broader comparison would include any investor in the country. In the *Occidental* v. *Ecuador* case,[74] the interpretation was understood to be broad: the same treatment had to be granted to investors across different industries. So Ecuador could not give a VAT refund to investors in flower exports, mining or seafood without also giving it to oil producers. This broad interpretation was based on the fact that the obligation of 'no less favourable treatment' was given to *like circumstances / like situations* and not to the narrower definition of *like products,* as in WTO law. In other cases, a more restrictive definition was applied, even where drafting could have been more broadly interpreted, as there was no reference to like situations or like products (as is the case in most EU Member States' BITs).[75]
- Normally, non-discrimination obligations are interpreted to cover both *de jure* and *de facto* discrimination. In one case, this was apparently pushed to hypothetical discrimination, i.e. the fact that a treatment was not, in practice, applied to any other investor, may lead to a conclusion on discriminatory treatment.[76]
- Another question concerns whether states may derogate from compliance with non-discrimination rules for public purposes. Normally, BITs and IIAs do not include justifications similar to article XX of GATT, even though similar clauses were recently introduced in some agreements.[77] However, justification for discriminatory treatment can actually stem from other international public law justifications for non-compliance (including, for example, necessity or *force majeure*...). Moreover, within FTAs, justifications for deviation from the non-discrimination principle might be inferred from the other chapters of the treaty. For example, in the *SD Meyers* case, the tribunal decided to incorporate the environmental concerns stipulated in other NAFTA chapters in the analysis of the NAFTA investment chapter, and stated that appraisal of non-discrimination rules had to take circumstances where the measures were justified by public

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74 *Occidental Exploration and Production Company* v. *The Republic of Ecuador*, LCIA Case No. UN 3467 (UNCITRAL), Final Award, 1 July 2014.

75 K. Nadakavukaren Schefer, International Investment Law - Text, Cases and Materials, Edward Elgar Publishing, 2013.

76 *Bogdanov* v. *Republic of Moldova*, SCC Arbitration No V (114/2009), Final Arbitral Award (30 March 2010)

77 See discussion in section 3.3 of this study.

interest considerations into account.[78] In the US-Chile FTA, environmental concerns are directly mentioned within the chapter on investment.[79]

- A further issue concerns the application of Most-favoured Nation clauses. Investors issued claims expanding the MFN clause beyond treatment granted by the host to investors under domestic regulations, to include treaty provisions granted to other countries in other BITs or IIAs. In other words, the investors claimed that the MFN clause would entitle them to obtain rights given by the host country to other trade partners under other BITs or IIAs concluded, which afforded better treatment than that afforded to the claimant under the IIA concluded with claimant's origin country. For example, in the *CME Czech Republic BV* case,[80] the claimant (a Dutch company in the Czech Republic) argued that 'just compensation' within the meaning of the BIT between the Czech Republic and the Netherlands had to be interpreted as entitling the investor to compensation at the fair market value before the expropriation occurred, even if the BIT in question did not refer to fair market value but only to the 'genuine value' of the investment. The claimant considered that the MFN clause gave it the right to compensation at the fair market value, as this was the compensation value provided for under the BIT between the Czech Republic and the United States. The tribunal agreed with this interpretation of the MFN clause. Other cases used the MFN clause to import more convenient procedural clauses; an example of this is the *Maffezzini* case,[81] whereby the claimant waived the requirement to first exhaust domestic remedies included within the Argentinian and Spanish BIT by invoking, via the MFN clause, the Chile-Spain BIT, where no such condition was included.

In CETA, the Commission took the derivation of the scope of application of the MFN clause into account, and clarified that such a clause is **not applicable to substantive obligations or to dispute settlement procedures within other investment treaties or trade agreements.** The MFN can therefore only be invoked with reference to treatment as it differs from acts or activities of governmental authorities. The leaked 2012 TPPA draft proposal suggested the inclusion of a paragraph in the MFN clause clarifying that the MFN was not applicable to dispute-settlement procedures within other investment treaties or trade agreements.[82] This limited approach is, however, not present in the leaked 2015 TPPA draft text, nor does it appear in previous US FTAs,[83] or in the 2012 US BIT model.[84] This could therefore present some difficulties for the US to deviate from

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[78] *SD Meyers, Inc.* v. *Government of Canada* UNCITRAL (NAFTA), First Partial Award (Nov. 13, 2000): *The Tribunal considers that the interpretation of the phrase "like circumstances" in Article1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.*

[79] See article 10.12 in the US-Chile FTA.

[80] *CME Czech Republic BV (The Netherlands)* v. *The Czech Republic* (UNCITRAL), final award (Mar. 14, 2003).

[81] *Maffezzini* v. *The Kingdom of Spain*, ICSID case No ARB/97/7, Decision of the tribunal on objections of jurisdiction.

[82] See, the 2012 leaked TPPA proposal.

[83] According to the texts of US FTAs: US-Chile, US-Korea, US-Singapore only.

[84] 2012 US BIT model.

past formulations of the MFN clause. Differences in formulation could imply that a different interpretation must be applied to the MFN clauses in previous agreements, unless the US can issue interpretation notes under the previous FTAs in order to achieve uniform interpretation in line with a reformed MFN clause.

Box 6: CETA draft articles on non-discriminatory treatment for investments

Section 3: Non-Discriminatory Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a European Member State, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors.

Article X.7: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords ***in like situations, to investors and to their investments*** *of any third country with respect to the establishment, acquisition, expansion, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.*

2. ...

3. ...

4. ***For greater certainty, the 'treatment' referred to in Paragraph 1 and 2 does not include investor – to – state dispute settlement procedures provided for in other international investment treaties and other trade agreements.***

Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.

In the Commission proposal for the TTIP negotiations, the MFN and NT clauses are contained within the General Provisions to the Title on Trade in Services, Investment and e-commerce (see article 2-3 and 2-4).[85] The approach taken is identical to CETA.

3.2.2 Fair and Equitable Treatment Rule

While the National Treatment and Most-favoured Nation Treatment rules are contingent rules which ensure non-discrimination relative to the treatment received by other investors, the Fair and Equitable Treatment (FET) establishes a minimum standard of protection without the need to reference treatment given to other groups.[86] The content of the FET remains vague; covering both basic substantive and procedural rights such as rights to due process; including access to justice (and claims against denial of justice); protection against arbitrariness and discrimination; and

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[85] European Commission draft proposal for TTIP for the Title on Trade in Services, Investment and e-commerce.

[86] *Alex Genin, Eastern Credit Limited, Inc. and As Baltoil (US)* v. *Republic of Estonia*, ICSID Case No ARB/99/2 (Award) (25 June 2001): *... the BIT requires the signatory governments to treat foreign investment in a 'fair and equitable' way. Under international law, this requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law.' While the exact content of this standard is not clear ..., the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law ...*

requirement of transparency; as well as other concepts of good governance (such as a stable and predictable legal framework).

The main fears concerning the FET are due to its vague definition and all-encompassing nature. Originally limited to consideration of actions in bad faith by a state,[87] FET interpretation was expanded in subsequent NAFTA arbitral tribunal cases. In particular, the *Mondev* case rejected the validity of the *Neer* threshold; bad faith was not necessary to find 'unfair and inequitable treatment'.[88] Other cases have required 'a transparent and predictable framework'[89] of states, thus going well beyond the *Neer* test of bad faith. In the *SD Myers* case, violation of non-discrimination treatment also resulted in the violation of the FET.[90] Finally in the *Pope & Talbot* case, the FET was considered as an additional element of 'fairness', going beyond the minimum standard.[91] These arbitral decisions prompted the NAFTA states to issue a note on the interpretation of the FET rule (see box 7). In a clear response to the *Pope & Talbot* case, the note clarifies interpretation of the FET concept following the minimum standard of fair and equitable treatment according to international customary law, i.e. that the concept of fairness is not to be considered as additional to the minimum standard. Finally, the third paragraph of the NAFTA Trade Commission note is clearly a response to the *SD Myers* case,[92] where a finding in favour of a violation of non-discrimination was sufficient to also find in favour of a violation of the FET.

[87] *'Without attempting to announce a precise formula, it is in the opinion of the Commission ... to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.'* L.F.H. Neer and Pauline Neer (USA) v. United Mexican States, 4 R.I.A.A. 60, (Oct.15, 1926), for the citation of this case refer to: K. Nadakavukaren Schefer, International Investment Law - Text, Cases and Materials, Edward Elgar Publishing, 2013.

[88] '*Neer and like arbitral awards were awarded in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. ... In light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – ... – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.'* *Mondev International Ltd* v. *United States of America*, ICSID Case No. ARB(AF)/99/2, NAFTA, Award (11 October 2002).

[89] See: *Metalclad Corp.* v. *United Mexican States*, 40 I.L.M. 36, 50 (2001) ICSID (30 August 2000).

[90] SD Meyers, Inc. v. Government of Canada UNCITRAL (NAFTA), First Partial Award (13 November 2000).

[91] '*Investors under the NAFTA are entitled to the international law minimum, plus the fairness elements*' Pope & Talbot, award on merits phase 2 (NAFTA Arb. Trib.) (10 April 2001).

[92] SD Meyers, Inc. v. Government of Canada UNCITRAL (NAFTA), First Partial Award (13 November 2000).

Box 7: NAFTA interpretation of the FET[93]

The NAFTA Trade Commission note on the interpretation of certain Chapter 11 provisions (extracts).

Minimum Standard of Treatment in Accordance with International Law

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of 'fair and equitable treatment' and 'full protection and security'do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Notwithstanding the note on interpretation, the content of the FET is naturally subject to developments in customary law, as state practices may change over time.[94] Definition of the content of FET therefore remains unclear. The leaked TPPA document adds an open definition of the FET principle:

> *'The Fair and Equitable Treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.*[95]

The approach adopted by the EU in CETA (see box 8), as well as in the EU-Singapore Agreement, aims to clearly define the content of the FET. Reference to the changing concept of international customary law is dropped, and the article provides a list of actions that violate the FET. This list is clearly meant to be exhaustive. Indeed, paragraph 3 of article 9.4 in the draft EU-Singapore Agreement[96] provides a clear procedure for including other breaches to the violation list covered by FET protection. Similarly, the CETA draft article requires the list to be reviewed regularly by the Parties. Had the list of violations reported in these draft articles been open-ended, no revision would have been required, as new additional violations not explicitly included in the list could be added directly by tribunal award, without any need for further revision by the Parties. The Commission proposal for TTIP follows the same approach as CETA and EU-Singapore.[97]

Currently, the EU approach only provides clarification of the content of the FET clause, but does not provide guidance on the 'quality' of protection the FET clause provides. The US instead began their refinement of the FET clause by clarifying that the latter is a minimum standard. The two approaches, although different, could be complementary.[98]

93 The NAFTA Trade Commission Note on the Interpretation of Certain Chapter 11 provisions.

94 See: Glamis Gold Ltd v. United States of America, UNCITRAL (NAFTA), Award (8 June 2009).

95 TPPA 2012 leaked document, article 12.6; this seems to be confirmed in the 2015 leaked draft, article II.6.

96 EU-Singapore chapter 9 on Investment.

97 See article 3 of the Commission proposal for TTIP.

98 The main opposition could come from EU Member States applying stronger protection standards.

Box 8: CETA draft text on FET

Article X.9: Treatment of Investors and of Covered Investments

Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.

A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

Denial of justice in criminal, civil or administrative proceedings;

Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.

Manifest arbitrariness;

Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

Abusive treatment of investors, such as coercion, duress and harassment; or

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

The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.

When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.

For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

3.3 Other selected issues

3.3.1 Clauses protecting regulatory authority

In investment chapters, some governmental actions can be excluded from the scope of application of all or some rules protecting investors.

- The best known is the exclusion of prudential regulation measures in the framework of financial market regulation.[99] This exception is included in both the US FTAs, and in the current investment chapters proposed by the EU in CETA, and the EU-Singapore FTA.[100]
- Other exceptions or reservations only impact on the application of some of the substantive rights (such as non-discrimination rules). The US normally includes an article in its IIAs allowing the maintenance of some measures which do not

[99] The prudential carve-out and the exclusion of prudential regulation from ISDS are discussed in the in-depth analysis on TTIP and financial markets. See: Laura Puccio (2015), TTIP and Financial Markets - Safeguarding regulatory autonomy and the challenges of regulatory fragmentation, EPRS.

[100] See Laura Puccio (2015), TTIP and Financial Markets - Safeguarding regulatory autonomy and the challenges of regulatory fragmentation, EPRS.

conform to national treatment, MFN or the prohibition of performance and managerial nationality requirements.[101] The measures in question fall into two different annexes: the first containing the existing non-conformity measures that can be maintained, the second contains the sectors where future non-conforming measures can be enacted. A similar approach was included in the CETA draft (article X.14).

- Procurement rules, subsidies and grants are also often excluded from application of National Treatment, MFN and prohibition of imposing managerial nationality requirements.

The full or partial exclusion of sectors and measures from the application of investment protection rules can effectively be used only when the area of regulatory power to safeguard is clearly defined. When the regulatory concern in question has a more horizontal nature and can involve a large number of different governmental actions, the horizontal concern will have to somehow be incorporated into the investment chapters to ensure that arbitrators take the concern into account. In recent IIAs this was achieved with three different approaches:

- The inclusion of the concern in the preamble (e.g., environmental concerns in CETA): normally preambles are used to establish the intent of parties when concluding a treaty, in order to interpret the treaty provisions. However, many critics fear a 'race to the bottom' in regulation because this option is considered as too soft and therefore inefficient for a proper integration of environmental or other concerns within the investment chapter.
- The US BIT approach introduces a specific provision in the investment chapter, reaffirming environmental concerns as a legitimate regulatory purpose that should not be undermined by the application of foreign investment protection. Limited firstly to environmental concerns (see the US-Chile FTA article 10.12), a second clause was inserted on labour concerns within the 2012 US BIT model.[102] In box 9, we reproduce the two clauses of the 2012 US BIT model dealing with environmental and labour concerns. The environmental clause recognises the right of states to regulate in order to attain these legitimate objectives, when the exercise of such action is 'reasonable'. In other words, the exercise of this discretion must be proportional. In both the environmental and the labour clause, parties commit not to derogate from their environmental laws in order to attract foreign investors.
- The third method is to include legitimate policy concerns via a general exception rule, similar to that present in article XX GATT.[103] As in the previous case, non-conforming measures would have to be both legitimate and proportional.

[101] For example see article 10.7 of the US-Chile FTA.

[102] The 2012 US BIT model can be viewed as the model investment chapter that the US wants to achieve in its trade negotiations.

[103] This approach is used by Canada in its BIT model (see: article 10 of the Canada 2004 BIT model); it is also the approach suggested by Prof. Dr. Markus Krajewski to the German Ministry for the Economy and Energy (Bundesministerium fur Wirtschaft und Energie): Prof. Dr. Markus Krajewski, 'Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren fur Industriestaaten under Berucksichtigung der USA', Bundesministerium fur Wirtschaft und Energie.

Box 9: Environment and labour standards in US BIT[104]

Article 12: Investment and Environment in the 2012 US BIT model (extract)

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources. (...)

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 13: Investment and Labor (extract)

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

The Commission proposal for TTIP follows a similar approach to the US as it clarifies that investment provisions cannot affect a country's ability to regulate in order to achieve legitimate policy objectives, nor should they be interpreted as a commitment not to change the legal and regulatory framework.[105] However the EU approach inserts the regulatory protection into a wider context. Indeed the regulatory exception is not limited to environment or labour. The proposal makes reference to an ***open-ended list*** of legitimate objectives such as '***protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity***'.[106] Moreover the same article specifies that nothing in the investment can

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[104] See the [2012 US BIT model](#).

[105] Article 2(1) and 2(2) of the Commission proposal for TTIP.

[106] Article 2(1) of the Commission proposal for TTIP.

limit the ability of the state not to issue or renew subsidies in the absence of any other specific commitment under law or contract.[107]

Box 10: Regulatory Measures in the September 2015 EU Commission Proposal on Investment for the TTIP negotiations[108]

Article 2

1. The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.

2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,

shall not constitute a breach of the provisions of this Section.

4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy2 and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III

3.3.2 Clauses tackling forum-shopping issues

In some BITs, the creation of letterbox companies is sufficient to claim protection under BIT provisions. Figure 5 illustrates a fictional situation where an Asian investor (individual number 1) has launched a plant in Spain (individual number 3), in order to obtain investment protection under TTIP, whereas it operates through an affiliate in the US (individual number 2).[109]

[107] Article 2(3) and 2(4) of the Commission proposal for TTIP.

[108] See the Commission proposal for TTIP.

[109] For concrete examples of forum shopping, refer to: Mariel Dimsey, The resolution of international investment disputes: challenges and solutions, Eleven Publishing Edition, 2008.

Figure 5: Forum-shopping issue and intra-EU FTA

Source: Author.

Two different approaches (see box 11) can be used to deal with this issue. The first approach clarifies from the outset that the definition of investor covered by BIT protection only refers to entities owned and controlled directly or indirectly by a **natural person of a Party**, or that an enterprise constituted under a Party's laws operates a **substantial business activity** in the Party's territory. This approach, used by the Commission in CETA, directly redefines the scope of application of the treaty.

The US BIT Model instead defines a right of the Parties to deny benefit to foreign-controlled enterprises in two distinct situations: first when the foreign-controlled enterprise is owned by a non-Party that does not have diplomatic relations with the Party or when the foreign enterprise maintains with a third countries transactions that are prohibited by the Party. Second, the US BIT model allows a Party to deny benefits under the investment chapter to foreign controlled firms which do not perform a substantial business activity.

The Commission draft proposal for TTIP appears to take the US approach on board.[110] However, it allows Parties to deny benefit in the context of foreign-controlled firms engaging in prohibited transactions related to the maintenance of peace and security. No reference is made at this stage of the draft to foreign-controlled firms which do not perform a substantial business activity (see box 11). However, it is possible that the Commission will add reference to a 'substantial business activity' within the definitions at the beginning of the chapter, as was done in CETA, therefore narrowing the scope of application of the investment protection chapter only to 'substantial business activities' of the Parties.

While the issue of forum shopping with respect to non-Party investors could easily be solved by the above provisions, the issue of forum shopping between extra-EU trade agreements and intra-EU BIT would most probably remain. Returning to figure 5, and

[110] Article 9 of the Commission proposal for TTIP.

assuming a fictional US investor (individual number 4) is planning a plant in Romania (individual number 6). Consider that the latter investor does not like some of the clarifications and limitations that could be introduced in the investment chapter in TTIP. Individual No. 4 then decides to operate their European business via another EU country, such as the Netherlands (individual number 5). Intra-EU BITs do not always limit access to investment-protection rules to firms with substantial business activities. In the example mentioned, the Netherlands-Romania BIT only requires the firm to be incorporated under the laws of one of the Parties, therefore a US-controlled firm incorporated in the Netherlands could probably bring a claim under the intra-EU BIT, instead of using TTIP provisions.

This fictional example illustrates that any innovation introduced in TTIP or CETA could easily be bypassed by the intra-EU BITs that remain in force.[111]

Box 11: Two approaches to tackle forum shopping

Extract from article X.3 of CETA: Definitions

investor *means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party.*

For the purposes of this definition an 'enterprise of a Party' is:

an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or

an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under a).

locally established enterprise *means a juridical person which has the nationality of the respondent and which is owned or controlled, directly or indirectly, by an investor of the other Party.*

Extract from Article 17 of the 2012 US BIT Model: Denial of Benefit:

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

[111] Presently, the issue of whether intra-EU BIT clash with the Commission's competence to conclude extra-EU BIT has not been approached by courts or arbitral tribunals. Intra-EU BITs have simply been found to be still in force after accession to the EU, as long as they are compatible with EU rules, see the partial award in the *Eastern Sugar v. Czech Republic* (27 March 2007) or the German case *Eureko v. Slovakia* (case no. 26 SchH 11/10). For the moment, provisions in EU FTAs have provisions with respect to BITs or IIAs concluded between Member States and the other Party to the EU FTA but there are no references to what happens to intra-EU BITS. See as an example the rule under article 9.10 of the EU-Singapore FTA draft agreement and annex 9D.

Extract from the September 2015 Commission draft proposal for TTIP: Article 9 on Denial of Benefit

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

(a) the investor of a non-Party owns or controls the enterprise; and

(b) the denying Party adopts or maintains measures with respect to the non-Party that:

(i) are related to the maintenance of international peace and security; and

(j) prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

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5 Annex: List of Treaties concluded by EU Member States with the US having investment protection provisions

Treaty name		Date (signed)	Date (in force)
1)	Navigation and Commerce Treaty between the US and France	1822 (Convention on Establishment 1959)	1823 (Convention on Establishment 1960)
2)	Friendship and General Relations Treaty between the US and Spain	1902	1903
3)	Friendship, Commerce and consular Rights between the US and Austria	1928	1931
4)	Friendship, Commerce and consular Rights between the US and Finland	1934	1934
5)	Treaty of Friendship, Commerce and Navigation between the US and Italy	1948	1949
6)	Treaty of Friendship, Commerce and Navigation between the US and Ireland	1950	1950
7)	Treaty of Friendship, Commerce and Navigation between the US and Denmark	1951	1961
8)	Treaty of Friendship, Commerce and Navigation between the US and Greece	1951	1954
9)	Treaty of Friendship, Commerce and Navigation between the US and Germany	1954	1956
10)	Treaty of Friendship, Commerce and Navigation between the US and Netherlands	1956	1957
11)	Treaty of Friendship, Commerce and Navigation between the US and Belgium	1959	1960
12)	Treaty of Friendship, Commerce and Navigation between the US and Luxembourg	1962	1963
13)	Bilateral Investment Treaty between the US and Poland	1990	1994
14)	Bilateral Investment Treaty between the US and Czech Republic	1991	1992
15)	Bilateral Investment Treaty between the US and Bulgaria	1992	1994
16)	Bilateral Investment Treaty between the US and Romania	1992	1994
17)	Bilateral Investment Treaty between the US and Slovakia	1992	1992
18)	Bilateral Investment Treaty between the US and Estonia	1994	1997
19)	Bilateral Investment Treaty between the US and Latvia	1995	1996
20)	Bilateral Investment Treaty between the US and Croatia	1996	2001
21)	Bilateral Investment Treaty between the US and Lithuania	1998	2001

QA-02-15-517-EN-N

The foreign direct investment (FDI) stocks of EU entities in the US and of US entities in the EU both amount to over €1.6 trillion. Investment access and protection is therefore critical to EU-US economic relations. On both sides of the Atlantic, criticism has been growing regarding the interpretation of certain investment protection rules found in either free trade agreements or in bilateral investment treaties, and of their potential constraints on the regulatory capacity of the states party to them. The US and the EU alike are revising these rules to ensure states maintain the freedom to regulate for legitimate public purposes. Often, the US and EU approach to reform investment chapters is similar and could be complementary. The need for a solution that works for both has become an essential component of the negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

This is a publication of the
Members' Research Service

Directorate-General for Parliamentary Research Services, European Parliament

PE 568.333
ISBN 978-92-823-7552-5
doi:10.2861/75779