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The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties

Catharine Titi

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Think Piece

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Abbreviations

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
BIT	bilateral investment treaty
CEPA	Closer Economic Partnership Arrangement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CETA	Comprehensive Economic and Trade Agreement
CFIA	Cooperation and Facilitation Investment Agreement
FET	fair and equitable treatment
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
IIA	international investment agreement
IPA	investment protection agreement
ISDS	investor-state dispute settlement
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
PACER	Pacific Agreement on Closer Economic Relations
TPP	Trans-Pacific Partnership
US-DR-CAFTA	US-Dominican Republic-Central America Free Trade Agreement
USMCA	US-Canada-Mexico Agreement

Executive Summary

Over the years, the substantive content of international investment agreements (IIAs) has shifted to reflect political change and to respond to lessons learnt in investor-state dispute settlement (ISDS). This think piece explores substantive standards in recent treaty practice and finds that new IIAs converge to an astonishing degree.

The think piece focuses on eight IIAs, selected with a view to geographical representativeness. These are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018); the EU-Singapore Investment Protection Agreement (IPA) (2018); the Pacific Agreement on Closer Economic Relations (PACER) Plus (2017); the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017); the China-Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement (2017); the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2016); the Pacific Alliance Additional Protocol (2014); and the ASEAN-India Investment Agreement (2014).

New IIAs converge on the definition of covered investment. While continuing with the tradition of open definitions, new IIAs require that covered assets have the characteristics of an investment, including commitment of capital or other resources, an expectation of profit, or an assumption of risk. New IIAs further tend to exclude some types of assets from their scope, such as claims to payment resulting solely from the commercial sale of goods and services.

Another element present in recent IIAs is the requirement that the investor have substantial business activities in the territory of either the host state, or the home state or other states. This requirement is included either in the definition of covered investors – typically referring to business activities in the territory of the host state – or in a denial of benefits clause – often referring to business activities in the territory of the home state or other states. But a distinction needs to be drawn between including the requirement in the definition of the term investor or in the denial of benefits clause. The effect of the former will always be to exclude investors without substantial business activities from the treaty's protection. By contrast, the effect of the latter is a lot more uncertain.

New IIAs tend to extend the national treatment and the most favoured nation (MFN) treatment to the pre-establishment phase. Investment protection at the pre-establishment stage is also granted by inserting a provision in relation to the treaty's scope, e.g. providing that a covered investor is a party, a national or an enterprise of a party that "seeks to make, is making, or has made an investment" in the territory of the other party.

A further feature of new IIAs is a tendency to exclude application of the MFN treatment to ISDS clauses. CETA specifies that the MFN standard "does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements" (Art. 8.7 para. 4). But it is also possible to disallow application of the MFN clause to ISDS provisions with a so-called "disappearing Maffezini footnote," suppressed from the treaty text, but which the parties recognise as part of the agreement's negotiating history and expressive of their understanding of the scope of the standard. Some new treaties further render the MFN clause inapplicable, unless the state has taken actual measures to give preferential treatment to other foreign investors.

Fair and equitable treatment (FET) and full protection and security are consistently narrowed in new IIAs, according to two approaches. The first approach is to tie the standards to the customary international law minimum standard of treatment, as has been habitual in North American treaty practice. The second approach is to describe the content of each standard. For FET, this consists in identifying in a quasi-exhaustive manner what situations are covered by the standard, such as if a measure constitutes denial of justice, a fundamental breach of due process, manifestly arbitrary conduct, harassment, coercion, abuse of power or similar conduct in bad faith. For full protection and security, the second approach is to limit the standard to the physical protection of investments, thus leaving outside its scope "legal protection."

The inclusion of interpretative annexes on indirect expropriation has become standard practice in relation to expropriation provisions. The annexes provide guidance on how to determine if there has been an indirect expropriation, and they incorporate (a mitigated form of) the police powers doctrine. This is usually expressed in the following terms: except in rare circumstances, non-discriminatory regulatory measures designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations. Another common provision is an exclusion or exception for the issuance of compulsory licenses granted in relation to intellectual property rights. In addition, all IIAs examined include an exception to their provision on capital transfers for balance of payments difficulties.

Increasingly, new IIAs incorporate public policy concerns and draft exclusions and general exceptions applicable to the entire treaty. All IIAs in the sample include an essential security interests exception. According to the CPTPP, nothing in the agreement shall be construed to "preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests" (Art. 29.2). This is a self-judging exception allowing the host state to be the sole judge of whether the exception is applicable. Most treaties also contain an exception or exclusion relating to subsidies. Three out of the new IIAs examined (CETA, PACER Plus, and the China-Hong Kong CEPA

Investment Agreement) include general exceptions modelled on Article XX of the General Agreement on Tariffs and Trade (GATT).

New IIAs converge to a large extent with respect to their substantive standards. All IIAs examined are new generation IIAs. This reveals that the persistence of the old generation model and its ability to convince are slackening. Old generation IIAs will probably remain dominant for some time: the bulk of existing IIAs are old generation IIAs. But there is a clear trend towards displacing them with the conclusion of new generation IIAs.

1. Introduction and Background

Over the years, the substantive content of international investment agreements (IIAs) has shifted to reflect political change and to respond to lessons learnt in investor-state dispute settlement (ISDS). Old generation IIAs were strongly liberal instruments designed to accommodate imbalanced investment relationships; relationships between, on one hand, an industrialised state and its investors that required protection abroad, and, on the other, a developing state in need of attracting foreign investment. New generation IIAs are in many ways different. While adopting broad definitions of investment and settling on pre-establishment commitments,[1] they are also more balanced instruments than their earlier counterparts that counterpoise liberalism by exceptions for public interest regulation.

Broadly speaking, for about 15 years, the conclusion of old generation IIAs has occurred alongside the conclusion of new generation IIAs. Several treaty elements on which new IIAs converge have existed in North American practice already since the 2004 US and Canadian model bilateral investment treaties (BITs). Such elements include limitations on the otherwise broad scope of covered investment with a view to preventing abuses; a narrowing of the content of fair and equitable treatment and full protection and security; exceptions for public policy space; but also pre-establishment national treatment and pre-establishment most favoured nation (MFN) treatment.

Until lately such elements were generally absent from the majority of newly concluded IIAs, and in particular they were absent from EU member state BITs. This is not insignificant given that EU member states have concluded about half the world's existing BITs (Bungenberg and Titi 2014, 297, 298). Until the late 2000s, when the competence over foreign direct investment passed from the member states to the EU with the Treaty of Lisbon,[2] EU and North American

[1] Another feature of new IIAs is that they include increasingly broad prohibitions on performance requirements. These are not examined in this think piece.

[2] Article 207 of the Treaty on the Functioning of the European Union (TFEU).

Figure 1.

North American treaty practice (1992-2012)

Source: author

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
US Model BIT 2012	■	■	■	■	■			■	■	■	■	■		■		■	■	
US Model BIT 2004	■	■	■	■	■			■	■	■	■	■		■		■	■	
Canadian Model BIT 2004		■	■	■	■			■	■	■	■	■		■	■	■	■	■
NAFTA 1992		■	■	■	■			*	*	■				■		■	■	■

1. Characteristics of investment, e.g. duration, risk
2. Exclusions from covered investment
3. Requirement for substantial business activities
4. Pre-establishment NT
5. Pre-establishment MFN
6. MFN not covering ISDS
7. MFN only for actual measures
8. FET linked to MST or described quasi-exhaustively
9. FPS linked to MST or covering only physical protection
10. Expropriation: exclusion or exception for compulsory licences
11. Guidance on determining an indirect expropriation
12. Police powers doctrine
13. Exception for balance of payment difficulties
14. Public policy concerns outside exceptions
15. General exceptions of the Article XX GATT-type
16. Exception or exclusion relating to subsidies
17. General essential security interests exception
18. Exception or exclusion relating to culture

* Depending on interpretation ** N/A x In schedule

investment IIAs followed their separate trajectories and became known, respectively, as the European and the North American models. Several were the reasons for this cleft between European treaties and their North American counterparts, including the fact that North American treaties were often free trade agreements (FTAs) with investment chapters granting broad market access commitments, while EU member state treaties were post-establishment BITs. In contrast with EU member state BITs, broader liberalisation commitments in FTAs have tended to make them more "intrusive," and these treaties have counterbalanced these commitments with exceptions (Titi 2015, 639, 644). Interestingly, this is also the case (in terms of broad use of exceptions) with the investment chapter-free FTAs concluded by the EU prior to the Treaty of Lisbon. In addition, EU member states had concluded their IIAs with developing partners and had faced few ISDS claims, while North American states had concluded IIAs with developed as well as with developing partners and they had faced a number of investment claims. Their model treaties were amended accordingly.

Newly signed FTAs and standalone BITs resemble North American treaties. All new IIAs examined for the purposes of this think piece turned out to be new generation IIAs. This shows that recent treaties have evolved to become (more) consistently new generation IIAs. Notably, this is also the case for IIAs negotiated by the EU, which marks a formidable break with the past for Europe: the new provisions, more often than not, find no counterpart in old EU member state BITs.

This think piece explores substantive standards in very recent treaty practice. In particular, it focuses on eight trade and investment agreements concluded between 2014 and 2018. These are: 1) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed in 2018 by 11 Pacific states after US withdrawal from the Trans-Pacific Partnership (TPP);[3] 2) the EU-Singapore Investment Protection

[3] These are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The CPTPP incorporates by reference the TPP, with the exception of some provisions.

Figure 2.

A snapshot of world international investment agreements (1999-2000)

Source: author

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Croatia-Thailand BIT 2000				*	*													
Cuba-Peru BIT 2000																		
Egypt-Nigeria BIT 2000										**	**	**						
El Salvador-Israel 2000								**										
Greece-Mexico BIT 2000			*															
India-Sweden 2000																		
Bahrain-United States FTA 1999										*						x		x

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* Depending on interpretation ** N/A x In schedule

Figure 3.

A snapshot of European international investment agreements (2009)

Source: author

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Germany-Pakistan BIT 2009		■						■	■									
Czech Republic-Georgia BIT 2009																	■	
BLEU-Panama BIT 2009									**					■				
Ethiopia-Spain BIT 2009																		
Jordan-Portugal BIT 2009					*	*												
Ethiopia-United Kingdom BIT 2009													■					
Finland-Hong Kong BIT 2009																		
China-Switzerland BIT 2009						*												

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Figure 4.

A snapshot of world (non European) international investment agreements (2008-2009)

Source: author

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
ASEAN Comprehensive IA 2009	■	■	■	■	■	■		*		■	■	■	■		■	■	■	
ASEAN-China IA 2009			■		■	■		*		■			■		■	■	■	
Malaysia-New Zealand FTA 2009			■	■	■	■		■	■	■	■	■	■	■	■	■	■	■
South Africa-Zimbabwe BIT 2009																		
Canada-Jordan BIT 2009		■	■	■	■			■	■	■	■	■		■	■	■	■	■
Burundi-Kenya BIT 2009										■							■	
Rwanda-United States BIT 2008	■	■	■	■	■			■	■	■	■	■		■		■	■	x
Australia-Chile FTA 2008	■	■	■	■	■	■		■	■	■	■	■	■			■	■	

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• Depending on interpretation ** N/A x In schedule

Agreement (IPA) (2018);[4] 3) the Pacific Agreement on Closer Economic Relations (PACER) Plus (2017), concluded by Australia, New Zealand, and eight Pacific island states; 4) the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017); 5) the China-Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement (2017); 6) the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2016); 7) the Pacific Alliance Additional Protocol (2014), concluded by four Latin American countries; and 8) the ASEAN-India Investment Agreement (2014). These IIAs were selected among new investment treaties with a view to geographical representativeness. All eight IIAs are either multiparty agreements (e.g. the CPTPP) or engage large economies (e.g. the EU agreements).

[4] While initially drafted as a chapter in the EU-Singapore FTA, following the Opinion 2/15 of the Court of Justice of the European Union, it appears that the treaty will be signed as a standalone IIA, to allow for the rest of the FTA to be concluded as a pure EU agreement, according to the EU's exclusive competence over the common commercial policy.

The China-Hong Kong CEPA Investment Agreement was chosen in view of its political particularity. The selection was agnostic about the content of the IIAs, in other words IIA content was *not* taken into account in the selection.

The think piece finds that recent trade and investment agreements converge to an astonishing degree. This is particularly true with respect to safeguards introduced to prevent abuses, such as the requirement for substantial business activities, and the widespread use of exceptions introduced in specific investment protection standards or covering the entire treaty, but it is also true with respect to market access commitments. The convergence means that there is coherence and uniformity coming about, but also that investment treaty policy has become more fluid, flexible and fast-paced than in the past. Convergence on a type of standard today may mean convergence on a different standard tomorrow. The think piece canvasses this convergence by selectively considering investment protections in these new IIAs, and notably the treaty's scope of application; pre-establishment

Figure 5.

A snapshot of recent international investment agreements (2014-2018)

Source: author

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
CPTPP 2018	■	■	■	■	■	■		■	■	■	■	■	■	■		■	■	*
EU-Singapore IPA 2018	■	*	■		**	**	**	■	■	■	■	■	■	■		■	■	■
CETA 2016	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
PACER Plus 2017	■	■	■	■	■			■	■	■	■	■	■	■	■	■	■	■
Pacific Alliance Ad. Protocol 2017	■	■	■	■	■	■		■	■	■	■	■	■	■			■	
Intra-MERCOSUR In. Protocol 2017	■	■	■	■	■	■	■	**	**	■			■	■			■	
China-Hong Kong CEPA IA 2017	■	■	■		**	**	**	■	■	■	■	■	■	■	■	■	■	
ASEAN-India IA 2014	■	■	■	■	**	**	**	■	■	■	■	■	■			■	■	

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protections, and in particular with respect to national treatment and the MFN standard; exclusions from the MFN standard; fair and equitable treatment and full protection and security; interpretative annexes to the expropriation standard; capital transfers; public policy concerns (outside exceptions); and exceptions clauses.

2. Scope: Definition of Investment and Investor

This section considers the scope of application of IIAs under the prism of the definition of covered investment and exclusions therefrom; and the requirement for substantial – or, rarely, "real" – business activities.

2.1 Definition of Investment

Recent trade and investment agreements converge for the most part on the definition of covered investment. While continuing with the tradition of open definitions,[5] all new IIAs examined require in quasi-identical language that covered assets have the characteristics of an investment, including commitment of capital or other resources, an expectation of profit or an assumption of risk. According to the CPTPP, "'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (Art. 9.1).

This provision was already present in the US Model BITs of 2004 and 2012, but was absent from the Canadian Model BIT of 2004, the North American Free Trade Agreement (NAFTA),[6] and from EU member state BIT practice, such as Germany's 2009 Model BIT. The provision expressly introduces the *Salini* criteria in the IIA, with the exception of the most controverted *Salini* criterion, i.e. the investment's contribution to the development of the host state.[7] It is unclear whether this is indicative of a will to reject this later criterion or simply a preference not to decide the question. Exceptionally, the criterion of the contribution to the development of the host state is reported to be present in three recent BITs concluded by Turkey (UNCTAD 2018, 5).

The noncommittal language of the above provision further points to the absence of a firm requirement that each of the three characteristics included be satisfied for the assets to qualify as protected investment. However, the characteristics are little more than self-evident: investment will invariably involve a commitment of capital or other resources, the expectation of profit, and the assumption of risk.

All new IIAs explored explicitly exclude some types of assets from their scope. For instance, PACER Plus excludes "claims to payment resulting solely from the commercial sale of goods and services unless it is a loan that has the characteristics of an investment; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing."[8] The CETA excludes from the definition of investment, among other types of assets, "claims to money that arise solely from commercial

[5] Open definitions provide examples of the types of assets covered instead of naming these assets in an exhaustive manner.

[6] The provision has been included in the US-Canada-Mexico Agreement (USMCA), the "new NAFTA" (Article 14.1). The text of the USMCA was released when this think piece was under final revision and it is not examined for its purposes.

[7] The *Salini* criteria are used by a number of tribunals operating under the ICSID Convention in order to determine if an investment is covered under the Convention. Accordingly, the operations at hand must fulfill the following requirements: a contribution of money or assets, a certain duration, an element of risk, and a contribution to the economic development of the host state.

[8] Article 1, Chapter 9, of PACER Plus.

contracts for the sale of goods or services;" and orders, judgments, or arbitral awards related to such contracts.[9] The EU-Singapore IPA specifies that "an order or judgment entered in a judicial or administrative action shall not constitute in itself an investment."[10] The CPTPP and the China-Hong Kong CEPA Investment Agreement state that covered investment does not include "an order or judgment entered in a judicial or administrative action."[11] In addition, both treaties create a negative presumption against the qualification of some types of assets as covered investment. Accordingly, they provide: "Some forms of debt, such as bonds, debentures[,] and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics."[12]

2.2 The Requirement for Substantial Business Activities

Recent trade and investment agreements tend to require, albeit through the use of different clauses, that the investor have substantial business activities either in the territory of the host state, or in the home state or other states. All new IIAs examined include this requirement in some form. Half insert this requirement in the definition of covered investors.[13] The Intra-MERCOSUR Cooperation and Facilitation Investment Protocol provides that a juridical person that qualifies as a covered investor is "any entity constituted in accordance with the national legislation of a State Party *that has its domicile as well as substantial business activities* in the territory of said State Party, and that has made an investment in another State Party" (emphasis added).[14] The other half of the IIAs examined include the requirement for substantial business activities in their denial of benefits clause.[15] Typically, in this case the requirement concerns the investor's substantial business activities in the home state or another state. For instance, PACER Plus provides for a procedure according to which a contracting party may deny the benefits of the investment chapter to the investor when the investment is made "by an enterprise that is owned or controlled by persons of a non-party," or "by an enterprise that is owned or controlled by persons of the denying Party" and "the enterprise has no substantive business operations in the territory of any other Party."[16]

A distinction needs to be made between including the requirement for substantial business activities in the definition of the term investor and in the IIA's denial of benefits clause. The effect of the former will always be to exclude investors without substantial business activities from the treaty's protection. By contrast, the effect of the latter is a lot more uncertain. When the requirement for substantial business activities is inserted in a denial of benefits clause, the claimant does not need substantial business activities to meet the definition of investor, but parties to the treaty *may* deny benefits to such a claimant on a case-by-

[9] Article 8.1 of CETA.

[10] Article 1.2, ft. 3, of the EU-Singapore Investment Protection Agreement.

[11] Article 9.1 of the TPP as incorporated in the CPTPP and Article 2 ft., 4, of the China-Hong Kong CEPA Investment Agreement.

[12] Article 9.1, ft. 2, of the TPP as incorporated in the CPTPP and Article 2 ft., 2, of the China-Hong Kong CEPA Investment Agreement.

[13] These are CETA, the China-Hong Kong CEPA Investment Agreement, the EU-Singapore IPA, and the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol.

[14] Article 3 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, emphasis added. The original text refers to *"toda entidad constituida de conformidad con la legislación nacional de un Estado Parte que tiene su domicilio así como actividades sustanciales de negocios en el territorio de dicho Estado Parte, y que ha realizado una inversión en otro Estado Parte."* Translation of the author.

[15] These are the ASEAN-India Investment Agreement, the CPTPP, PACER Plus, and the Pacific Alliance Additional Protocol.

case basis. Moreover, the modalities of its successful invocation, always depending on the particular wording, are equivocal. Finally, it is certainly not the same to require substantial business activities in the territory of the host state or in the territory of the home state.

3. National Treatment, Most Favoured Nation Treatment, and Coverage of Prospective Investors

National treatment and MFN treatment offered in the pre-establishment phase, in addition to the post-establishment phase, are another point of convergence among new IIAs. While certain treaties, notably FTAs concluded by North American states, have been giving access to pre-establishment national treatment and MFN, this was not the case of, among others, most European BITs. Even prior to the Treaty of Lisbon, the competence over the protection of pre-establishment investment (market access) belonged to the EU and not to EU member states. EU FTAs (without investment chapters) included protections relating to market access. At the same time, member states were in principle not habilitated to protect prospective investment.

Increasingly, trade and investment agreements tend to extend the national treatment and MFN treatment to the pre-establishment phase, and this is also true for the European Union. Although the EU-Singapore IPA does not give pre-establishment national treatment,[17] CETA does.[18] So do all of the other new IIAs examined, with the exception of the China-Hong Kong CEPA Investment Agreement.[19] Not all new treaties examined offer the MFN standard – examples are the EU-Singapore IPA and the China-Hong Kong CEPA Investment Agreement. However, all treaties that do grant the MFN standard also grant it at pre-establishment.

Investment protection at the pre-establishment stage is also granted by IIAs that include a relevant provision in relation to the treaty's scope. Extending the IIA's scope to the pre-establishment phase is not new,[20] but it has gained currency in new IIAs. These include provisions to the effect that a covered investor is a party, a national, or an enterprise of a party that "seeks to make, is making or has made an investment" (Art. 8.1 of CETA) or that "attempts to make, is making, or has made an investment" in the territory of the other party (Art. 9.1 of CPTPP). The ASEAN-India Investment Agreement of 2014 provides simply for a person "that is making" an investment, leaving the agreement's exact scope somehow vague. An exception is the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), which contains a particular arrangement: Article 3(4) provides that a covered investor is someone who has already made an investment and Article 4(3) expressly states that the pre-establishment phase is not covered by the agreement. However, exceptionally, Article 5(5) includes a "for greater certainty" provision, according to which the Protocol will apply to investments that have already been made in the territory of the other party even if they have not begun to operate their business in that territory.

[16] Article 18 of PACER Plus.

[17] See Article 2.3 of the EU-Singapore IPA.

[18] Article 8.6 of CETA.

[19] Article 4 of the China-Hong Kong CEPA Investment Agreement.

[20] E.g. it exists both in the US Model BIT of 2004 and in the US Model BIT of 2012.

4. Most Favoured Nation Treatment – Exclusions

Since the decision in *Maffezini v. Spain*,[21] a number of tribunals have applied the MFN treatment to dispute settlement clauses and have thereby imported into the applicable IIA more favourable elements found in third-party BITs, such as, in order to bypass limited local remedies clauses, requiring investors to resort to local courts for a limited period of time. Treaty practice reacted to this approach and increasingly new investment agreements contain provisions that explicitly exclude application of the MFN standard to ISDS provisions. Most of the new IIAs examined for the purposes of this think piece with MFN provisions follow this approach. For instance, CETA contains a "for greater certainty" provision which specifies that the MFN standard "does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements" (Art. 8.7 para. 4).

However, it is also possible that even a treaty that is not explicit about disallowing application of the MFN clause to dispute settlement provisions actually does so. In the final draft of the US-Dominican Republic-Central America Free Trade Agreement (US-DR-CAFTA) an interpretative footnote explained that the parties understood and intended this clause not to apply to ISDS and that it "therefore could not reasonably lead to a conclusion similar to that of the Maffezini case" (Titi 2014, 138). This footnote was suppressed from the final text, but the parties agreed that it is part of the agreement's negotiating history and expresses their understanding of the scope of that provision. This "disappearing Maffezini footnote" reportedly also forms part of other treaties to which the United States is party.

Some new treaties further circumscribe the MFN clause, rendering it applicable only if the state has taken actual measures to give preferential treatment to other foreign investors. For instance, CETA's MFN provision states that "[s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and this cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations" (Art. 8.7, para. 4). The Intra-MERCOSUR Cooperation and Facilitation Investment Protocol includes a "for greater certainty" provision which states not only that the MFN treatment does not apply to dispute settlement provisions found in other agreements, but also that the provisions of that article will not import substantive provisions not present in the Protocol itself (Art. 5, para. 7).

5. Fair and Equitable Treatment and Full Protection and Security

With the exception of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol which expressly states that it does not grant fair and equitable treatment and full protection and security (Art. 4, para. 3), all other new IIAs examined for the purposes of this think piece narrow fair and equitable treatment and full protection and security according to one of two approaches. The first approach is common to both standards; it is that of tying them to the customary international law minimum standard of treatment, as has been habitual in North American treaty practice. For example, PACER Plus provides fair and equitable treatment and full protection and security in Article 9 entitled "Minimum Standard of Treatment." It explains that this standard:

[21] Emilio Agustín Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 2000, para. 64.

> prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights.

The IIA goes on to identify some elements of fair and equitable treatment and full protection and security. With respect to the latter, the treaty provides that full protection and security "requires each Party to provide the level of police protection required under customary international law."

There is a second approach to circumscribing fair and equitable treatment and full protection and security that focuses on describing the content of each standard. For fair and equitable treatment, this second approach consists in identifying in a quasi-exhaustive manner the situations that are covered by fair and equitable treatment. For instance, the EU-Singapore IPA provides that fair and equitable treatment is breached if a measure constitutes denial of justice, a fundamental breach of due process, manifestly arbitrary conduct, harassment, coercion, abuse of power, or similar conduct in bad faith. When determining whether there has been a violation of the standard, the adjudicators "may" take into account the investor's legitimate expectations (Art. 2.4, paras 2-3). To some extent, some treaties combine the two approaches. The China-Hong Kong CEPA Investment Agreement provides in an article entitled "Minimum Standard of Treatment" that fair and equitable treatment means that a party "shall not deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with due process of law, or implement manifest discriminatory or arbitrary measures" (Art. 4). With respect to full protection and security, the second approach is to limit the standard to the physical protection of investments, thus leaving outside its scope "legal protection." Both the EU-Singapore IPA and CETA follow this second approach (Art. 2.4, para. 5 of the EU-Singapore IPA and Art. 8.10, para. 5 of CETA).

6. Expropriation and Exceptions

The inclusion of interpretative annexes on indirect expropriation, a trend that started with North American IIAs and especially with the Canadian and US Model BITs of 2004, is now standard practice, present in all but one of the new treaties examined. The exception is the intra-EU MERCOSUR Cooperation and Facilitation Investment Protocol, which follows the Brazilian Model "Cooperation and Facilitation Investment Agreement" (CFIA) of 2015 and does not provide protection in the case of indirect expropriation. The interpretive annexes on expropriation in these treaties function in a very similar fashion. They provide guidance on factors that need to be taken into account to determine if there has been an indirect expropriation, and they incorporate (a mitigated form of) the police powers doctrine (Titi 2018, 323-343). For instance, the Pacific Alliance Additional Protocol provides that, to determine the presence of an indirect expropriation, a case-by-case examination is necessary, taking into account among other factors the measure's economic impact (although impact alone does not mean that there has been an indirect expropriation); the extent to which the measure interferes with the investment's unequivocal and reasonable expectations (*expectativas inequívocas y razonables*); and the nature of the state measure. The annex adds that, except in rare circumstances, non-discriminatory regulatory acts designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations (police powers doctrine) (Annex 10.12).

Another provision found in all new treaties examined is an exclusion or exception for the issuance of compulsory licenses granted in relation to intellectual property rights, so long as such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

7. Capital Transfers – Exceptions for Balance of Payments Difficulties

All IIAs examined include an exception to their provision on capital transfers for balance of payments difficulties. The provision has been present in North American treaties for some years, but it had not spread beyond that region until recently. The CPTPP offers an example of this exception. It provides:[22]

> Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers for current account transactions in the event of serious balance of payments and external financial difficulties or threats thereof.
>
> Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers relating to the movements of capital:
>
> (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or
>
> (b) if, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management.

[22] Article 29.3(1)-(2) of the CPTPP.

8. Public Policy Concerns – Outside Exceptions

Increasingly, new IIAs incorporate public policy concerns. This section focuses on public policy concerns outside exceptions. All treaties examined with the exception of the ASEAN-India Investment Agreement (the oldest among them) contain some reference to public policy concerns. Free trade agreements often have chapters dedicated to environmental and labour measures. This is for instance the case of the CPTPP (Chapters 19 and 20). Some IIAs introduce provisions on the non-lowering of environmental and/or labour standards. For instance, the China-Hong Kong CEPA Investment Agreement provides that it is inappropriate for parties to encourage investments by weakening domestic environmental standards (Art. 25). In CETA, "the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity" (Art. 8.9). It is possible that this clause could also function as an exception. The preamble to PACER Plus makes several references to environmental and labour standards, including through the parties' commitment to their "multilateral environmental, labour and sustainable development agreements;" "a common aspiration to promote high standards of environmental and labour protection and, to uphold these in the context of sustainable development;" and the parties' "right to regulate and their resolve to preserve [the flexibility] to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals."

9. General Exceptions and Exclusions

New IIAs tend to draft general exceptions applicable to the entire treaty and exclusions. All new IIAs examined include exceptions and exclusions. All IIAs in the sample include an essential security interests exception. An example is offered by the CPTPP. The treaty provides that nothing in the agreement shall be construed to "preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests" (Art. 29.2). This is a self-judging exception, as indicated by the words "that it considers," allowing the host state to be the sole judge of whether the exception is applicable.[23] Most treaties also contain an exception or an exclusion relating to subsidies. For example, CETA includes a "for greater certainty" provision according to which nothing in the investment protection section shall be construed to prevent a party from "discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor (*sic*)" (Art. 8.9). The ASEAN-India Investment Agreement excludes subsidies from its scope (Art. 1). A number of IIAs make some reference to the protection of cultural diversity or the audio-visual sector. For instance, this is the case of the EU-Singapore IPA (Art. 2.2). Finally, three out of the new IIAs examined (CETA, PACER Plus, and the China-Hong Kong CEPA Investment Agreement) include general[24] exceptions modelled on Article XX of the General Agreement on Tariffs and Trade (GATT). This type of exception, already present in the 2004 Canadian Model BIT, had been resisted and critiqued by states and scholars alike, which makes its incorporation in these new IIAs particularly noteworthy.

10. Conclusions

New IIAs converge to a large extent with respect to their substantive standards. This convergence is evident in numerous provisions, such as the granting of pre-establishment national treatment, the narrowing of some elements of investment protection, introduction of a mitigated form of the police powers doctrine in the expropriation standard, and the drafting of public policy exceptions. While some clauses are very similar between them, others of course differ. Changes in wording, such as whether an IIA introduces an exception for cultural diversity or whether it entirely carves out the audio-visual sector from the treaty's protections, can have important consequences for concerned investors and produce different outcomes. More particularly, all IIAs examined are uniformly new generation IIAs. This reveals that the persistence of the old generation model and its ability to convince are slackening. Old generation IIAs will probably remain dominant for some time: the bulk of existing IIAs are old generation IIAs. But there is a clear trend towards displacing them with the conclusion of new generation IIAs.

[23] Although a tribunal would still be able to conduct a good faith review, self-judging exceptions grant the state maximal flexibility.

[24] As opposed to standard-specific exceptions, e.g. Article 9.10(3)(d) of the CPTPP.

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