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APPROACHES TO INTERNATIONAL INVESTMENT PROTECTION: DIVERGENT APPROACHES BETWEEN THE TPPA AND DEVELOPING COUNTRIES' MODEL INVESTMENT TREATIES

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INTRODUCTION

The international investment treaty regime is at historical crossroads. There is a growing international community of policy makers and analysts that recognizes that major reforms in the investment treaty regime are needed. But at the same time, countries continue to negotiate and sign international investment agreements, which peaked to more than 3,280 treaties during the first period of 2016[2].

Overall, the majority of international investment agreements (IIAs) currently in force remain based on a model that has proved highly disadvantageous particularly to developing countries, especially in relation to their policy space and the achievement of their development objectives. The basic problem of the investment protection regime is rooted in the imbalance of provisions under investment treaties, which focus on protecting investors' rights while limiting or neglecting investors' responsibilities. Many treaties often do not explicitly recognize the need to safeguard the host states' regulatory authority.

Several countries, both developed and developing, are seeking to reform their investment treaty models. According to UNCTAD[3], since 2012, at least 110 countries have reviewed their national and/or international investment policies and at least sixty countries have developed or are developing new model IIAs. UNCTAD points out that "today, the question is not whether or not to reform, but about the what, how and the extent of such reform"[4]. While the reform process of the international investment protection regime is evolving, it is still at a nascent stage.

Within this context, some of the most significant developments that took place during the year 2015 included the agreement among twelve countries, to which the United States is a party, of an investment chapter under the Trans-Pacific Partnership (TPP) Agreement. In addition, India released its new investment model. South Africa adopted a new national investment law that entered into force at the end of 2015. Brazil developed its 'Investment Facilitation and Cooperation' model treaty and undertook negotiations with several countries, including Malawi, Chile, Colombia, Angola, Mexico and Mozambique.

A closer look at the model treaties and agreements adopted last year reveals that approaches to proclaimed reforms differ substantively among countries involved. For example, some countries are withdrawing from investment treaties, and seeking to find alternatives either through national laws or through designing new model investment treaties attentive to the sovereign right to regulate[5] (for example, South Africa, Indonesia, and Bolivia have withdrawn from all or a significant number of their existing investment treaties). Others propose changes that could prove cosmetic or of limited systemic implications. These, for example, include proposing minor clarification annexes or 'right to regulate' provisions and exceptions without directly addressing the problematic provisions that have proved highly intrusive on domestic regulatory space, such as the 'fair and equitable treatment' provisions.

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[2] UNCTAD Investment Policy Monitor No.15, March 2016 and http://investmentpolicyhub.unctad.org/IIA .
[3] UNCTAD's IIA Issues Note "Taking Stock of IIA Reform" (March 2016).
[4] Ibid.
[5] See South Centre (2015), *Investment Treaties: Views and Experiences from Developing Countries*.

The first section of this paper presents an overview of the investment treaty practice by the United States (US), including the US model bilateral investment treaties (BITs) and their basic provisions, and the evolution of the United States' BIT program up until the conclusion of the TPP[6]. This section sets the background for discussing the approach adopted under the TPP investment chapter. Section II of the paper compares the approach adopted under the TPP investment chapter to that adopted under the new Indian and Brazilian[7] model treaties. This section discusses selected elements of these agreements, including definitions and scope, national treatment, most-favored nation treatment, direct and indirect expropriation, fair and equitable treatment, obligations of investors, performance requirements, the right to regulate and general exceptions, as well as the approach to investor-state dispute settlement (ISDS). It reveals that the substantive content and approach towards dispute settlement rules significantly vary among these treaties.

[6] Available at: https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf .

[7] The analysis of the Indian Investment Model Treaty is based on the version released by the Indian Government in January 2016. The analysis of the Brazilian approach is based on an unofficial translation of the agreement signed between Brazil and Malawi. It is important to note that there are several differences among the agreements concluded by Brazil thus far, including those with Mozambique, Angola, Mexico and Malawi. For a more detailed discussion, please see Nathalie Bernasconi and Martin Dietrich Brauch (September 2015), "Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements with Mozambique, Angola, Mexico, and Malawi".

SECTION I: HISTORY OF THE UNITED STATES' INTERNATIONAL ECONOMIC AGREEMENTS PROGRAM

The US has had a long tradition in promoting Treaties of Friendship, Commerce and Navigation (FCN), which were the earliest form of economic agreements signed by the US. The FCN treaties set out the basis for the United States' trade and investment relations with foreign countries.[8] The 21 United States' FCN treaties signed between 1946 and 1966[9] incorporated benefits to individual and corporate investors, including local subsidiaries of US corporations conducting activities abroad[10]. Based on the FCN, the US subsequently developed its model BITs with the aim of broadening investors' protections and coverage under the treaties, particularly with respect to the protection against expropriation, including payment of full compensation[11].

Since the beginning of the US Bilateral Investment Treaty Program in 1981, as part of its international economic agreements program (IEAP), the adopted model had the purpose of securing stable international legal standards for the protection of US investments already in place in the developing countries[12]. According to the drafters of the first model BIT, the objective of these BITs was the protection of the "stock of investment already in place"[13], and *not necessarily* the promotion of foreign direct investment (FDI) flows. The US also utilized these treaties to improve its relationships with politically important countries[14]. Recently, the US focused its treaties on limiting performance requirements in the establishment (entry) phase and throughout the investments' life cycle in the territory of the host State[15].

The development of the US IEAP started as a response to the rise in the number of BITs signed between European countries and developing countries[16]. The first BITs by the United States were signed during the 1980s[17], long after the first European BITs, which were signed in the early 1960s[18]. Currently, the United States has 46 BITs, forty of which are in force, in addition to 67 other forms of IIAs, 49 of which are in force[19]. In addition, the US reached an

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[8] Congressional Research Service, Library of Congress, 'Treaties and Other International Agreements: The Role of the United States Senate' (Prepared for the Committee on Foreign Relations of the United States Senate), 2001, p. 265.
[9] Kenneth J. Vandevelde, 'The Bilateral Investment Treaty Program of the United States,' *Cornell International Law Journal* 21 (2), 1988, p. 208.
[10] K. Scott Gudgeon, 'United States Bilateral Investment Treaties: Comments on Their Origin, Purpose, and General Treatment Standards,' *Berkeley Journal of International Law* 4 (1), 1986, p. 108.
[11] Martin A. Weiss, 'The U.S. Bilateral Investment Treaty Program: An Overview' (Congressional Research Service 2007).
[12] Gudgeon, op. cit, p. 110.
[13] Ibid, p. 111.
[14] Adam Chilton, 'The Politics of the United States' Bilateral Investment Treaty Program,' Working Paper No. 722, Coase-Sandor Institute for Law and Economics, 2015, p. 11.
[15] US Department of State Bureau of Economic and Business Affairs, 'Bilateral Investment Treaties and Related Agreements,' 2016. Available from, http://www.state.gov/e/eb/ifd/bit/ (accessed 21 March 2016).
[16] Weiss, op. cit.
[17] The United States negotiated its first BITs in the first half of the 1980s. In 1982, the United States signed its first BIT with Panama on the basis of the 1981 US model BIT. The same model was emulated for the negotiations and signing of the BITs with Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada. See: Gudgeon, op. cit., p. 105.
[18] Weiss, op. cit., p. 2.
[19] UNCTAD Investment Policy Hub, 'United States of America: Bilateral Investment Treaties.' Available from http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu (accessed 18 March 2016). See also

agreement on the TPP investment chapter in 2015 (not yet in force at the time of writing this paper) with 11 other countries (See Annex 1 for the timeframe of BITs' signature by the United States and other selected OECD countries).

Studies have shown that US investors bring the most investor-state dispute settlement (ISDS) cases, amounting to about 130 out of the 608 known claims[20]. According to UNCTAD, the US has been a respondent party to ISDS procedures 15 times, while US investors have submitted claims under US BITs or investment chapters in US FTAs 138 times. From those 138 cases, 80 were initiated against developing countries (see Annex 2 for a summary of cases by US investors against developing countries). Out of these cases, 64 have already been decided, whereby 24 were decided in favour of the investor, 13 were settled, 21 decided in favour of the State, and 6 discontinued. It is worth noting that settlements are usually not public and entail compensation to the investor. Moreover, even in cases decided in favour of the State, high legal costs are usually incurred by the State throughout the proceedings period. The type of State policy measures challenged under these claims ranged from resource management policies to environmental protection and public order[21].

Some of these claims involve US oil companies challenging local government's guidelines that required the payment of fees to support research and development after discovering that oil fields in the investment region were larger than projected[22]. A tribunal in one case[23] considered that such guidelines imposed new obligations barred under the North American Free Trade Agreement (NAFTA) investment chapter as performance requirements, ordering the State to pay more than $13 million, plus interest, to the oil corporations. Likewise, under another NAFTA claim, a US corporation initiated proceedings against environmental requirements imposed in relation to an extractive project located in a key area of endangered maritime species. Such requirements included rigorous environmental impact assessments that were considered by the investor to be arbitrary, discriminatory and unfair[24]. In March 2015, the tribunal majority ruled in favour of the investor[25], deciding that "the environmental assessment was "arbitrary" and frustrated the expectations of the investors, thus violating the "minimum standard of treatment" obligation"[26].

UNCTAD International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#footnote . According to UNCTAD, the stated number of BITs/Other IIAs appearing on the navigator does not include treaties that have been denounced, terminated by mutual consent or renegotiated.

[20] See: UNCTAD IIA Issues Note No. 1, February 2015, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (accessed April 2016). Reference is made to 'known' claims because many ISDS cases are not revealed to the public, often if they are handled through ad hoc tribunals. Likewise, US investors have a 98% chance of a broad interpretation of their procedural rights. See: Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration,' *Osgoode Hall Law Journal* (50)1, 2012 at http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj (The results regarding interpretation of substantive rights will be forthcoming by the same Canadian legal academic).

[21] See: IIAPP, 'Cases and Regulatory Impacts' at http://www.iiapp.org/cases-regulatory-impacts/ (accessed 8 April 2016).

[22] See: Public Citizen, 'Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. "Trade" Deals', June 2015, http://www.citizen.org/documents/investor-state-chart.pdf (accessed 8 April 2016), p. 16.

[23] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4.

[24] See: Public Citizen, op. cit., p. 17.

[25] *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04.

[26] See: Public Citizen, op. cit.

Some other cases challenged measures taken by the State to guarantee the provision of basic services, like water and sewage[27]. In 2001, a US water corporation, holding a concession to privatized provision of water and sewage treatment in a developing country, challenged government measures aimed at preventing rate increases and guaranteeing the quality of the services. The challenged measures were adopted by the State after claims were raised by consumers, particularly because of the odour coming from the water, and after algae contamination of the water reservoir was identified as causing the problem. The investor claimed that the State breached its "fair and equitable treatment" obligations, by not allowing the increase of rates or by not providing public funds for the water infrastructure[28]. In 2006, an arbitral tribunal concluded in this case that even a legitimate public measure serving a public purpose could give rise to a compensation claim[29] and ordered the respondent State to pay $165 million, plus interest, for breaching the right of the investor to 'fair and equitable treatment'.

The United States' model BITs and their basic provisions

Between the conclusion of its first BIT with Panama in 1982, and until the conclusion of the TPP, the US reviewed its model treaty three times (1994, 2004 and 2012)[30].

However, the different versions of the US Model BITs do not differ greatly. They mainly provide for six basic elements of protection to covered investments and investors:

> **(i) Treatment of the investment:** national treatment and most-favored-nation treatment throughout the entire cycle of investment, including at the stages of entry/establishment, acquisition, expansion and development, management, conduct, operation, and disposition of investments.
>
> **(ii) Right to property (direct expropriation, indirect expropriation and compensation):** Establishing clear limits to expropriation and recognizing the formula of 'prompt, adequate and effective' compensation (known also as the 'Hull Formula'). Older US model BITs do not contain an elaborated concept of expropriation; they are "broad and flexible", which allow considering as expropriation "any measure" that deprives an investor of the management, control or economic value of an investment[31].
>
> **(iii) Transfers:** Establishing a right for investors to make all transfers related to a covered investment in a free and prompt manner and at a market rate of exchange.

[27] *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12.
[28] See: Public Citizen 'Case Studies: Investor-State Attacks on Public Interest Policies' at http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf (accessed 8 April 2016).
[29] *Azurix Corp. v. The Argentine Republic,* Award (July 14, 2006).
[30] See: the US Bilateral Investment Treaty Program, established in 1977, and that is jointly administered by the Department of State and the United States Trade Representative.
[31] Presidency of the United States, Letter of Transmittal of the Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment to the United States Congress (1986), available at: http://www.state.gov/documents/organization/43480.pdf (accessed 14.4.2016). The letter provides that: "The BIT's definition of "expropriation" is broad and flexible; essentially "any measure" regardless of form, which has the effect of depriving an investor of his management, control or economic value in a project may constitute an expropriation requiring compensation equal to the "fair market value."

(iv) Performance requirements: Imposing restrictions on performance requirements, such as local content, export quotas, technology transfer, among others.

(v) Dispute settlement: Establishing the right for a covered investor to submit to international arbitration a claim against the host State with respect to an investment dispute.

(vi) Senior management and board of directors: Restricting State Parties from requiring an enterprise, which is a covered investment, to appoint to senior management positions natural persons of a particular nationality. This establishes a right for covered investors to hire top managerial personnel of their choice regardless of nationality[32], on a negative list basis. The most recent US model BITs have recognized such restriction as an autonomous provision[33], while earlier agreements have included it as a restriction under the 'performance requirement' provision.

According to the Office of the United States Trade Representative (USTR), the core objectives of the BITs signed by the US are as follows[34]:

(i) to protect investments of its nationals abroad;
(ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory manner; and
(iii) to support the development of international law standards consistent with these objectives.

The preambles of the BITs signed by the United States generally provide for the following purposes as basis for its signature:

(i) to promote economic cooperation and economic development among the Parties, and
(ii) the reciprocal protection of the investment of nationals of the other Party[35].

The BITs signed after 2004 also included as a purpose the recognition of effective means of asserting claims or enforcing rights with respect to such investments[36]. One of the last BITs signed by the US in 2012 also referred to the 'desire' to achieve these objectives while promoting the protection of health, safety, and the environment, and the protection of labor rights[37]. Such language in preambular sections of treaties is hortatory, which indicates the objectives of the treaty and reflects the intentions of the Contracting Parties, but does not necessarily help State Parties safeguard regulatory space if the substantive provisions of the

[32] US Department of State Bureau of Economic and Business Affairs, op. cit.
[33] See for example: United States – Uruguay BIT (2005) and United States – Rwanda BIT (2008).
[34] Office of the United States Trade Representative, 'Bilateral Investment Treaties'. Available from https://ustr.gov/trade-agreements/bilateral-investment-treaties (accessed 18 March 2016)
[35] See for example: United States – Bangladesh BIT (1986), United States – Argentina BIT (1991), United States – Bahrain BIT (1999), among others.
[36] See for example: United States – Uruguay BIT (2005) and United States – Rwanda BIT (2008)
[37] The United States – Rwanda BIT (2012) provides the following language in the preamble: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights."

treaty are intrusive. Indeed, the preamble does not set out binding obligations, but could play a role in the interpretation of the substantive provisions of the treaty[38].

Some commentators have observed that the primary objective of the US in signing BITs is "to improve relationships with politically important developing countries"[39] (see Box 1).

Box 1. BITs as a Foreign Policy Tool

"The Politics of the United States' Bilateral Investment Treaty" (Adam S. Chilton)[40]

The US' BITs' program considers political objectives at the time of negotiation and signature of BITs, particularly the provision of military aid for US operations, and/or other political outcomes of such signature, including if the BIT partner is a *former communist* state, or it expected support from the BIT partner for initiatives in international forums, such as the United Nations General Assembly[41].

At the same time, empirical evidence demonstrates that the traditional economic elements used to explain the objectives behind signing BITs (i.e. promoting the development of international investment law and protecting national investors abroad) fall short on explaining the US's approach, especially given the following points:

1. Evidence that the US' negotiators do not usually expect a large increase of foreign direct investment (FDI) flows as a consequence of the agreements, and alert prospective BIT partners not to expect any increase of such flows[42].
2. Recent studies demonstrating that even if BITs do have a positive effect on overall FDI flows[43], bilateral FDI flows among the US and its BIT partners have little statistical impact[44] and do not reflect a direct correlation between the existence of a BIT and FDI inflows from the US (see Annex 3).
3. The US has limited willingness to negotiate, sign and ratify BITs with 'any' country, but it has increasing interest in signing BITs with countries that share the political views of the US.
4. BITs do not impact the investment decisions taken by the United States' corporations. A survey carried out in 2010 found that general counsels from these corporations do not consider that the presence of a BIT impacted their companies' decision to make an investment[45].

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[38] UNCTAD IPFSD page 48.
[39] Chilton op. cit., p., 11.
[40] Ibid.
[41] Ibid, p. 4.
[42] Kenneth J. Vandevelde, 'Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties', *Columbia Journal of Transnational Law* 36, 1998 , p. 524; and, Jose E. Alvarez, 'The Once and Future Foreign Investment Regime,' in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman,* M.H. Arsanjani et al. (eds.), Martinus Nijhoff Publishers, 2010, p. 621. In Chilton, op. cit., p. 9.
[43] Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship,' American Journal of International Law, vol. 106(1), 2012. In Chilton, op. cit., p. 11.
[44] Clint Peinhardt and Todd Allee, 'Failure to Deliver: The Investment Effects of US Preferential Economic Agreements,' *The World Economy* 35 (6), 2012. In Chilton, op. cit., p. 11.
[45] Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence,' *Virginia Journal of International Law* 51 (397), 2010. In Chilton, op. cit., p. 11.

An overview of the US model BITs (see Box 2)

The first US model BIT was concluded during the 1980s and it served as a basis to negotiate the first BITs with Panama and Egypt. This model departed from the traditional FCN signed by the US as it protected indirectly owned investments, meaning that various forms and varieties of investments enjoyed the benefits of the BIT, including foreign incorporated entities and foreign-owned subsidiaries incorporated under the laws of the host State[46]. Such approach aimed at extending the benefits of the BIT to all investments, including those "accomplished through any local corporate form"[47].

The second wave of US model BITs was developed during the 1990s. The development of the new model BIT was instigated by the proliferation of BITs signed around the world[48]. The BITs signed since 1994 were based on the North American Free Trade Agreement (NAFTA) Chapter on investment[49].

The dispute cases brought against the United States under NAFTA, particularly against environmental measures taken by US state-level authorities[50], raised concerns about the broad benefits given to foreign investors, particularly with respect to the possibility available to foreign investors to receive a more favorable treatment using investor-state dispute procedures than that available to US investors in the United States[51].

In 2012, the US Model BIT was again reviewed with the objective of safeguarding the space to legislate in the national interest by narrowing the scope of investment protection[52]. However, changes in the 2012 Model BIT were modest in comparison to its 2004 predecessor, and upheld the substantive protection of investors[53].

The language used in the 2012 US Model BIT formed the basis for Chapter 9 on investment under the TPP[54]. Although some provisions have been clarified, and others added, there are persistent concerns about the actual balance between the benefits recognized for investors and the States' policy space to regulate in the public interest. The inclusion of provisions on environment, public health and safety in the 2012 Model BIT have not addressed many concerns regarding safeguarding regulatory space and addressing obligations for investors to prevent and redress detrimental impacts on the public welfare in the host State.

Indeed, the provisions in the investment chapters of recently signed US FTAs, such as the US-Colombia FTA (2014) and the TPP, reflect little further evolution with respect to their

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[46] Gudgeon, op. cit., p. 114.
[47] Ibid, p. 115.
[48] Shayerah Ilias Akhtar and Martin A Weiss, 'U.S. International Investment Agreements: Issues for Congress' (Congressional Research Service 2013), p. 4.
[49] Weiss, op. cit., p., 12.
[50] Such cases include: *Methanex Corp. v. United States of America, Glamis Gold Ltd. v. United States of America, Terminal Forest Products Ltd. v. United States of America*, among others. See more details and cases in U.S. Department of State, 'Cases Filed Against the United States of America', http://www.state.gov/s/l/c3741.htm , accessed 29 March 2016.
[51] Akhtar and Weiss, op. cit., p. 10.
[52] Ibid, p. 11.
[53] See: Public Citizen, annotated copy of the 2012 BIT showing changes in comparison to the 2004 BIT, available at http://www.citizen.org/documents/2012-model-bit-changes.pdf (accessed 13 April 2016).
[54] Akhtar and Weiss, op. cit., p. 10.

predecessor models. In case of the definition of investment, almost no changes were introduced, with the exception of introducing in the main body of the treaty the limitation to recognize as an investment an order or judgement entered in a judicial or administrative action (in the 2012 US Model BIT and the Colombia FTA, the limitation was included as a footnote).

In the case of the provisions on national treatment (NT), most-favored nation treatment (MFN) and expropriation, the TPP uses the same language introduced in the 2012 US Model BIT. No changes were introduced under the TPP except for the exclusion of international dispute resolution mechanisms from MFN in the TPP. In the case of fair and equitable treatment 'FET', the new FTAs reintroduce the language of the 2012 US Model BIT, but separate the minimum standard of treatment and FET from the treatment owed to the investors in case of armed conflict or civil strife, which is included as an autonomous provision.

The TPP also introduces provisions with the intent of clarifying that "the mere fact that a Party takes or fails to take action that may be inconsistent with an investor's expectations does not constitute a breach …even if there is loss or damage to the covered investment as a result" (Article 9.6 (4) TPP). The TPP also provides that "the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced…does not constitute a breach…" of the provision on minimum standard of treatment (Article 9.6 (5) TPP). Such language retains the spirit of "past US pacts that grant foreign investors 'rights' to not have expectations frustrated by a change in government policy"[55]. The vagueness of the language used in such provisions grant enormous discretion to ISDS tribunals to keep using minimum standard of treatment and FET as grounds to compensate investors merely in cases where public measures affect their expectations, which in turn limits the States' right to regulate[56]. With respect to performance requirements, the TPP extends the restrictions on performance requirements, maintaining similar language to the 2012 US Model BIT.

Box 2. Evolution of the US Model BITs

The US Model BITs
The First US model BIT (1981) The first model BIT included provisions on the treatment of investment, particularly in regard to national and most favored nation treatment, prohibition of performance requirements, and provisions on nationalization and expropriation. One particular issue addressed under the first US model BIT was the ability of companies legally constituted in the territory of the host State to hire managerial personnel of their choice, and the professional and technical personnel for the particular purpose of planning and operating their investment. It is important to emphasize that US BITs during this period silently departed from addressing the inclusion of technology transfer and cooperation between the

[55] Public Citizen, 'Secret TPP Investment Chapter Unveiled: It's Worse than We Thought, Analysis of Specific TPP Investment Provisions and Their Threats to the Public Interest: Scope of ISDS Challenges Expanded, Promised Procedural Reforms Absent.' Available from http://www.citizen.org/documents/analysis-tpp-investment-chapter-november-2015.pdf (accessed 8 April 2016).
[56] Ibid.

parties of the treaty in regard to increasing productivity and improving living standards in the territory of home and host States, which were addressed in the first ever BIT between Germany and Pakistan (1959).

The Second US model BIT (1992 – 1998)

Basically, the 1994 US model BIT includes the same provisions as its predecessor. In the case of expropriation, it specified that compensation should be equivalent to the fair market value of the investment at the date of expropriation or when the intent of expropriation became known and had to include interest at a commercial rate from the date of expropriation and in a freely transferable currency. The growing number of dispute cases against the US and Canada on the basis of NAFTA raised concerns in regard to the extent of investor coverage under BITs, particularly in cases of indirect expropriation and government regulations, which led to the adoption of the 2004 model BIT.

The Third US model BIT (2004)

The drafting of the 2004 Model BIT brought certain changes with respect to former BITs and FTAs, particularly by introducing the language on minimum standard of treatment (MST), including fair and equal treatment and full security of the investment, which were previously included in general terms under Article II of the 1994 model BIT (Treatment of Investment). Such approach gave autonomy to the provision. The 2004 model BIT linked MST to principles of customary law with respect to treatment of aliens (See: Annex A 2004 US Model BIT). This provision was preserved, without any changes, in the 2012 US Model BIT.

On the issue of dispute resolution, the 2004 US model BIT had a more detailed approach to ISDS procedures. First, the ISDS is incorporated as a separate section under the treaty. It provides for the need to establish causation between the loss or damage incurred by the investor with respect to a protected investment and the breach of a provision in the BIT (Article 24). The Model also introduces transparency provisions for the arbitral proceedings, including public availability of documents, but allows the parties to determine which information should not be disclosed (Article 29.3).

The Fourth US model BIT (2012)

The 2012 US Model BIT is the result of the review of former model BITs with the objective of ensuring that it is "consistent with the public interest and the Administration's overall economic agenda". It included new elements on:

> **(a) Performance requirements:** It expands restrictions on performance requirements to include requirements to purchase, use or accord a preference to certain technology, and limitations on the purchase or use of certain technology, "so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party" (Article 28.1(h)).
>
> **(b) Transparency:** It introduces obligations on the Parties to "provide interested persons and the other Party a reasonable opportunity to comment on … proposed measures", including by addressing "significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed

regulations in its official journal or in a prominent location on a government Internet site" (Article 11.3(d)), and to allow the investors from the other party to participate in the development of standards by national standardization bodies (Article 11.8(b)).

(c) Dispute Settlement Procedures: It provides language for a future appellate mechanism on ISDS to review awards rendered by a Tribunal under the BIT. The Model requires "that the Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the provisions established in Article 29" (Article 28.10). Article 29 of the 2012 US Model BIT provides for arbitral procedures to be conducted publicly, which includes the conduct of open hearings and publication of related legal documents (notice of intent, notice of arbitration, pleadings, memorials, briefs, orders, awards and decisions, among others). It requires the Tribunal to take appropriate measures to guarantee the non-disclosure of information designated as protected on basis of essential security interests of a Party to the Treaty (Article 18), or to protect public interest or legitimate commercial interests of particular enterprises, public or private (Article 19).

Nevertheless, substantive rights given to investors were not narrowed as expected by public stakeholders[57]. The definition of investment did not change, although a key demand of consumer and environmental groups was to narrow the definition of investment. Similarly, provisions on minimum standard of treatment, NT, MFN, FET and direct and indirect expropriation remained unchanged from the previous model[58].

What is new in the TPP Investment Chapter?

Proponents of the TPP Investment Chapter have characterized it as a new instrument addressing the principal concerns of the current international investment legal framework[59], particularly those pertaining to the investor-State dispute settlement mechanism. It is also presented as a model for safeguarding the regulatory space of States, including through the inclusion of provisions on health, safety, financial stability, and environmental concerns[60]. Nonetheless, the TPP Investment Chapter has received strong criticisms on the grounds that its provisions replicate, to a large extent, the US model BIT and existing treaties. It has also been criticized as falling short from other State efforts that seek to promote environmentally and socially conscious investments and approaches that more effectively protect the States' policy and regulatory space[61] (See Box 3 for views on the TPP from scholars and experts).

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[57] See: Public Citizen, annotated copy of the 2012 BIT showing changes in comparison to the 2004 BIT, available at http://www.citizen.org/documents/2012-model-bit-changes.pdf (accessed 08 April 2016).
[58] Ibid.
[59] U.S. Trade Representative, op. cit.
[60] Ibid.
[61] Nathalie Bernasconi-Osterwalder, 'How the Investment Chapter of the Trans-Pacific Partnership Falls Short.' Available from http://www.iisd.org/blog/how-investment-chapter-trans-pacific-partnership-falls-short (accessed 18 March 2016).

Several emerging and developing economies have designed alternatives to traditional BITs, which reflect a more balanced approach to international investment agreements[62] (See Section II for more discussion of India's model treaty and Brazil's treaty with Malawi). Some countries, like South Africa, promoted the idea of setting investor protection standards in domestic legislation (see Box 4).

Box 3. Views on TPP from scholars and experts

- "*Entrenching, rather than reforming, a flawed system*" (Columbia Centre on Sustainable Development, Columbia University Law School).

- "*Shows that the U.S. has been successful at imposing its own investment treaty model upon its negotiating partners, with only a few changes made in response to new case developments*" (Nathalie Bernasconi, November 06, 2015, International Institute for Sustainable Development).

- "*Contrary to administration claims that the TPP's investment chapter would somehow limit the uses and abuses of the controversial investor-state dispute settlement regime, much of the text replicates, often word-for-word, the most provocative terms found in past ISDS-enforced agreements*" (Public Citizen).

Box 4. Example of Domestic Investment Legislation

South Africa's 'Promotion and Protection of Investment' Law[63]

The preamble of the 'Promotion and Protection of Investment' Law in South Africa recognizes the need to promote and protect the rights enshrined in the Constitution. It emphasizes the need to secure a balance between rights and obligations of investors. It also recognizes the need to promote, protect and encourage investment in accordance with the law, reaffirming the State's right to regulate in the public interest.

On definitions, the Law establishes a level-playing-field, subject to some exceptions, for national and foreign investors by defining an investor as an "enterprise making an investment in the Republic regardless of nationality". It takes an enterprise approach to define investment, requiring three elements to be fulfilled:

i) Commitment of economic resources;
ii) Over a period of time, and;
iii) Anticipation of profit.

Concerning the interpretation of the Law, it provides strict rules of interpretation, particularly considering the purposes of the Law and the Constitution, including the South African Bill of Rights, customary law, and relevant international treaties ratified by the State (See: Section 3 of the law).

Under section 6, the Law provides for fair administrative treatment, meaning that all administrative, legislative and judicial processes should not be arbitrary or deny

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[62] Ibid.
[63] This section is prepared based on the version released in the Government Gazette N. 39514 of 15 December 2015. The law was passed in January 2016. See: https://www.thedti.gov.za/gazzettes/39514.pdf (Accessed 5 April 2016).

administrative and procedural justice to investors in respect of their investments, as provided for in the Constitution and applicable legislation. This includes the right to be given written reasons and review of administrative decisions affecting their investments as provided by Article 33 of the Constitution.

Section 8 of the Law affords foreign investors treatment no less favorable than national investors in 'like circumstances'. The term 'in like circumstances' is constructed broadly and requires considering the merits and requirement of each case including, but not limited to, the effect of foreign investment on third persons, local communities and the environment (Section 8.1 and 8.2). The section also provides that 'national treatment' should not extend to foreign investors, and their investments, the benefits of any treatment, preference or privilege resulting from taxation provisions in any international agreement or arrangement or any law of the Republic, government procurement processes, subsidies or grants, any measure to promote and preserve cultural heritage, or advance the protection of persons historically discriminated, among others (Section 8.4).

Section 9 provides for physical security of investment, under which the State must accord to foreign investors and investments the same level of security generally provided to domestic investors in accordance with minimum standards of customary international law, and subject to available resources and capacity.

With regard to property and expropriation (Section 10), the Law recognizes the same level of legal protection of property[64] as provided in the Constitution. Article 25 of the Constitution guarantees the right to property by prohibiting its deprivation (Art. 25.1), except in cases of expropriation for public purpose or in the public interest[65] and subject to just and equitable compensation[66] (Art. 25.2)

The Law does not provide a specific clause on performance requirements. Nevertheless, it requires the imposition of taxation on transfer of funds in respect to an investment (Section 11). The Law contains provisions guaranteeing the right of the State to regulate and take measures needed for the fulfilment of its obligations in regard to the maintenance of international peace and security, the protection of security interests, including financial stability (Section 12)[67] .

In the case of dispute settlement procedures, the Law allows for the State to give consent for international arbitration subject to the exhaustion of local remedies. Such arbitration, if it takes place would be State-to-State and would involve South Africa and the home-State of the foreign investor (Section 13.5). The exhaustion of local remedies requires as well demonstration of attempt to resolve the dispute through mediation between the affected investor and the competent authority (Section 13.1). Nonetheless, the investor is not precluded from initiating proceedings in a competent domestic court or domestic tribunal or statutory body (Section 13.4).

[64] For South Africa, property is not limited to land ownership (Art. 25.4(b) Constitution).
[65] Public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.
[66] The amount of compensation shall consider the public interest and the interests of those affected, including the current use of the property; its acquisition and use; its market value and the purpose of the expropriation.
[67] The Act provides for a non-exhaustive list of areas in which the State might adopt legislative or other policy measures, including: redressing historical, social and economic inequalities, upholding the rights recognized in the Constitution, promoting and preserving cultural heritage and ancestral knowledge, protecting the environment, among others.

SECTION II: APPROACHES TO INVESTMENT TREATY CONTENT: REVIEW OF INDIA'S, BRAZIL'S AND TPP APPROACHES

This section presents a comparative overview between the approaches to investment protection rules adopted under the Indian model BIT and Brazil's agreement concluded with Malawi on one hand, and those adopted under the TPP investment chapter[68] on the other hand. The review covers selected elements under the respective treaties, including: definitions of protected investment and investors, national treatment, most favored nation treatment, direct and indirect expropriation, fair and equitable treatment, obligations of investors, investor-state dispute settlement, performance requirements, and the use of the 'right to regulate' and 'general exception' provisions (See Box 5 for a summary of the comparative overview).

Box 5: Snapshot comparison between India's, Brazil's, and the TPP approaches

	Indian Model BIT	**Brazil's Treaty**	**TPP Chapter 9**
Definitions	Limited 'enterprise-based' definition, requiring compliance by the investor with the law of the Party, cumulative set of characteristics required, with exclusions.	'Enterprise-based' definition, with exclusions.	Broad 'asset-based' definitions, non-cumulative set of characteristics.
National Treatment	NT limited to 'post-establishment' and subject to guidance in approaching 'likeness'.	NT subject to exceptions established by law and applicable legal requirements.	NT extending to 'establishment' phase, and approach to 'likeness' allowing high discretion to tribunals.
MFN	Does not include MFN provision.	MFN extends to establishment phase, with limitations.	MFN extending to 'establishment' phase, excludes dispute resolution procedures and mechanisms.
Direct and indirect expropriation	Covers expropriation either "directly or through measures having an effect equivalent to expropriation", except when it is taken for reasons of public purpose, in accordance with due process of law and on	Only covers direct expropriation.	Covers direct and indirect expropriation.

[68] Available at: https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership .

	payment of adequate compensation.		
Fair and equitable treatment	Does not include FET.	Does not include FET.	Old model provision that could allow tribunals to apply expansive interpretation that includes an obligation to honour the investor's expectations.
Obligations of investors	A section on investor obligations, provisions pertaining to corruption, taxation, and disclosure of information.	Best endeavor provision pertaining to contribution to sustainable development, stimulating the economic, social and environmental progress…	No reference.
ISDS	Exhaustion of local remedies, time limitations for bringing cases, criteria in regard to conduct of arbitrators, transparency of arbitral proceedings, guidance in award decisions.	No ISDS. Only State-to-State mechanism, in addition to 'dispute prevention' process.	No requirement of exhaustion of local remedies, unlimited monetary awards with possibility of compound interest, extension of ISDS to certain investment contracts, no new safeguards against expansive interpretations by arbitral tribunals, does not address arbitrators' conduct.
Performance requirements	Does not include prohibitions on performance requirements.	Does not include prohibitions on performance requirements.	Includes an extensive list of prohibitions that extends beyond traditional investment treaty prohibitions.

- **Definitions of protected investment and investors**

Traditional investment protection treaties provide for a broad 'definition' of the investment that is offered protection under the treaty. Such definition usually extends beyond covering foreign direct investment, to cover "every kind of asset" or "any kind of asset", thus extending protection to intangibles, including for example mortgages, intellectual property rights, shares, stocks and similar forms of participation in companies, as well as expectations of future gains and profits. This approach risks extending treaty protections to assets that may not have economic benefit to the host economy (See Box 6).

Box 6: Examples of arbitral tribunals' approaches

Eli Lilly case (ICSID case No. UNCT/14/2): The broad definition of 'investment' was the starting point for the complaint brought by the US pharmaceutical company Eli Lilly against Canada. The case was brought on the basis of the investment chapter under NAFTA and UNCITRAL rules (September 2013). It addressed the invalidation of a patent. The Federal Canadian court in 2010 had taken a decision to invalidate a patent that Eli Lilly held, 5 years before the patent's expiry. In accordance with generally accepted principles of international law, the courts of the country granting a patent have the exclusive jurisdiction to address issues of invalidation[69]. Yet, Eli Lilly sought a decision from an arbitral tribunal operating outside the Canadian jurisdiction, and whose decision would not be appealable before Canadian courts, to award it compensation for alleged losses due to the invalidation of the patent. It is worth noting that the TRIPS agreement left wide room for Member countries to revoke a patent, including invalidating patents. The TRIPS agreement establishes that 'an opportunity for judicial review of any decision to revoke or forfeit a patent shall be available' (See Article 32 of TRIPS).

Tobacco plain packaging case: The claim was initiated by Philip Morris against the Republic of Uruguay (ICSID case No. ARB/10/7) on the basis of the BIT signed between Switzerland and Uruguay. The claimant alleged that a public health policy adopted by Uruguay (Ordinance 514 dated 18 August 2008), with the objective of warning about the health effects of smoking, deprives it of the use of its intellectual property rights and generates a decrease in Philip Morris' sales. The policy in question included instituting "single presentation" and prohibiting different packaging for different kinds of cigarettes. Uruguay argued that the economic activities of the claimant do not constitute an investment as they do not contribute to the development of the country. The Tribunal discarded in its jurisdictional considerations the criteria of what constitutes an 'investment' under the 'Salini Test' (this test defines an investment as having four elements: (1) a contribution of money or assets (2) a certain duration (3) an element of risk and (4) a contribution to the economic development of the host state). For the Tribunal, the relevance of the 'Salini test' on the interpretation of the notion of 'investment' was considered "very doubtful" because it has not been accepted as *jurisprudence constante.* Particularly, the element of contribution to the economic development of the host State was not considered as a constitutive element of the notion of 'investment', and as such the definition of investment was interpreted broadly[70].

Approaches adopted by India and Brazil

Developing countries' reform approaches to international investment agreements (IIAs) tend to limit the definition of investment covered by the treaties. **India** adopts an 'enterprise-based' definition and requires compliance of the investor with the law of the host country. It also requires the fulfillment of a set of characteristics including "commitment of capital or

[69] See: Carlos Correa (May 2013), "Investment Agreements: A New Threat to the TRIPs Flexibilities", appearing in the South Centre Bulletin.
[70] ICSID case No. ARB/10/7, para. 201 -208.

other resources, certain duration, the expectation of gain or profit, the assumption of risk and significance for the development of the Party in whose territory the investment is made" (See Article 1.4 of the India BIT Model). The scope of the Indian Model excludes portfolio investments, debt securities issued by a government or government-owned or controlled enterprise and loans to such entities, any pre-operational expenditure relating to admission, establishment, acquisition or expansion, goodwill, brand value, market share or similar intangible rights, claims to money arising solely from commercial contracts for the sale of goods and services, among other elements.

Brazil, in its 'Investment Cooperation and Facilitation Agreement' also adopts an 'enterprise-based' definition[71], covering "any type of property or right owned or controlled directly or indirectly by an investor from one of the Parties in the territory of the other Party *for the purpose* of establishing an enterprise with long lasting economic relations with a view to producing goods and services…" (Emphasis added). The model also excludes from the coverage of the treaty government debt securities or loans to government, portfolio investment, and claims to money arising solely out of commercial contracts.

Approach under the TPP investment chapter

The TPP maintains the broad 'asset-based' definition for protected investments, which covers "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". This is a non-cumulative list of characteristics, unlike the approach adopted in the Indian model for example, where the definition includes a cumulative list of characteristics that have to be fulfilled for an investment to be covered under the Treaty protections. The definition of 'investment' under the TPP excludes 'a loan by one Party to another Party' (see footnote 3 of TPP chapter 9) and 'an order or judgment entered in a judicial or administrative action'.

The TPP investment chapter considers that the category of investors covered by the protections of the Treaty include an investor that 'attempts to make" an investment, which is understood to mean an investor that "has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for a permit of license" (see footnote 12 of the TPP chapter 9). This low standard to qualify as an investor covered by the protections of the Treaty could potentially permit compensation claims even over failed attempts to make an investment[72]. Such kind of expansive approach significantly increases the exposure of governments to potential claims from investors, especially given the far reaching ISDS mechanisms offer to investors under these treaties.

It is worth noting that the scope of coverage of the TPP extends broadly to measures adopted or maintained by central, regional, or local government or authorities of the Parties. Developing countries reforming their approach tend to limit the scope through excluding measures by local government including local bodies, enterprises owned or controlled by the

[71] It is worth noting that there is a difference between the design of the 'enterprise-based' definition of protected investment as adopted under the India and the Brazil models. The inclusion of the words "for the purpose of establishing an enterprise" as used in the Brazilian model might allow for a broader interpretation of the scope of coverage, in comparison to the wording under the Indian Model.

[72] See: Public Citizen (2015), 'Secret TPP Investment Chapter Unveiled: It's Worse than We Thought'.

local body or municipal corporations (See as example: the Indian Model Treaty, Articles 1.7 and 2).

- **National treatment (NT)**

The national treatment standard stipulates that parties to the treaty shall accord investments by investors from the other party treatment that is no less favourable than that accorded to investments by its own nationals. The standard precludes the contracting State from imposing more onerous requirements on the foreign investors than that accorded to the investments of their own nationals.

Where the NT provision refers to investors and investments 'in like circumstances', and in order to determine if a measure is discriminatory, the tribunals should identify the subjects of local comparison, the level of treatment available to each subject in 'like circumstances', and the existence of any relevant factor to justify different treatment.

This question of 'likeness' of the investments is central to addressing the issue of national treatment, and is often controversial. Some tribunals have taken an expansive approach to this question, thus finding investors that are involved in completely different sectors as investors in 'like circumstances'. Such an approach limits the ability of governments to differentiate between investors based on factors related to their activities and not their nationalities. Thus, it restricts the ability of states to encourage certain investments in line with their industrialization and development objectives, and based on the overall costs and benefits associated with the investment, including for example its impacts on the balance of payments and on the environmental conditions, as well as its contribution to the domestic job generation or technology development and transfer (See Box 7).

Box 7: Examples of arbitral tribunals' approaches

In the case of **Occidental Exploration v. Ecuador** (London Court of International Arbitration, Case No. UN 3467, award of July 1, 2004), the claimant argued that Ecuador had breached its obligation because a number of other companies involved in the export of other goods, including flowers, mining, and seafood products, had received VAT refunds (See para. 168 of the award)[73]. The tribunal found that Ecuador had breached its obligation under the national treatment provision. The tribunal was of the opinion that " 'in like situations' cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken" (See para. 173 of the award).

In the **Bilcon v. Canada** ISDS case (Permanent Court of Arbitration, Case No. 2009-04, based on NAFTA rules) a controversial mining project was found in 'like circumstances' as other projects despite the differences in scope, location, and environmental implications of the projects (More details on this case provided under this section).

[73] See also: Christoph H. Schreuer, 'Protection against Arbitrary or Discriminatory Measures', page 195. Available at: http://www.univie.ac.at/intlaw/wordpress/pdf/93.pdf .

Approaches adopted by India and Brazil

Developing countries' reform approaches have attempted to clarify the approach to 'likeness' and limited national treatment to 'post-establishment' phases. For example, the **Indian** model BIT limits national treatment to the phases of "management, conduct, operation, sale or other disposition of investments in its territory" (See Article 4.1 of the Indian Model BIT). It also provides guidance in regard to the approach to deciding 'likeness', pointing to "the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives" including "the goods or services consumed or produced by the investment; the actual and potential impact of the investment on third persons, the local community, or the environment; whether the investment is public, private, or state-owned or controlled; and the practical challenges of regulating investment" (See footnote 2 of the Indian Model BIT).

Brazil offers national treatment for 'investors of the other Party to invest and conduct business…" subject to "*the exceptions established by law and to applicable legal requirements*" (See Article 10.2)[74].

Approach under the TPP investment chapter

The TPP rules regarding national treatment extend to the 'establishment' phase, covering "establishment and acquisition" in addition to "expansion, management, conduct, operation, sale or other disposition of investments in its territory" (See Article 9.4 of the TPP investment chapter).

Establishment rights refer to the right of entry of investments and investors of a Party into the territory of another Party. The TPP provides foreign investors with the right to establishment in conditions no less favorable than those of national investors 'in like circumstances'. In effect, these conditions liberalize the environment for investment and lower the degree of discretion in regulating entry matters. They effectively lock countries into longstanding commitments to open their borders and allow foreign investors to enter[75], except for where exceptions are undertaken.

TPP includes a footnote that attempts to give guidance in addressing the issues of 'likeness', providing that 'likeness' depends on "the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives" (See footnote 14 of the TPP investment chapter). Experts point out that such clauses still give the arbitral tribunals wide discretion in deciding what is 'legitimate' or not[76]. Whereas a stronger approach could require the investor to establish that it faced nationality-based discrimination[77].

[74] The Brazilian model also provides for "the right of the administrative review of decisions…[commensurate] with the level of development and available resources at the disposal of Parties" (Art. 10.4).
[75] See: IISD, 'Investment Treaties and Why they Matter to Sustainable Development,' p. 22, and UNCTAD IPFSD.
[76] Public Citizen (2015), 'Secret TPP Investment Chapter Unveiled: It's Worse than We Thought.' It is worth noting that if WTO's interpretation of the term 'legitimate' is followed, it can be taken to mean widely recognized state practice that is carried out by many governments. This would make it difficult for laws and regulations that are undertaken to respond to particular circumstances of the host state to pass the test established

The approach adopted by the TPP has been assessed as allowing an investor to challenge measures as discriminatory even when they do not differentiate between investors on a nationality basis, thus when there is no intent to harm foreign investors[78]. Public Citizen notes that such claims could be raised if the foreign investor's business model resulted in the firm experiencing a slightly higher burden in complying with the non-discriminatory law[79].

Tribunals could apply this standard in a manner whereby they question regulatory interventions by governments and attempts to strengthen environmental regulation, even when the government is not discriminating on a nationality basis. The decision in Bilcon v. Canada ISDS case (Permanent Court of Arbitration Case No. 2009-04, based on NAFTA rules) demonstrates how the national treatment standard could be applied expansively beyond the original aims of protecting against nationality-based discrimination, thus in a way that challenges any disparate government treatment[80]. In this case, the investor successfully argued that Canada violated the national treatment obligation because officials denied an environmental permit for the controversial mining project while other mining projects were allowed. This despite the differences in scope, location, and environmental implications of the projects[81]. Canada argued that given those differences, the Bilcon project was not in 'like circumstances' with other mining projects. The tribunal disagreed with Canada and found that it had violated the national treatment obligation under NAFTA.

The tribunal considered that the treatment accorded to Bilcon investment was an "adverse treatment" as compared to other "similar" extractive industry projects and was inconsistent with the "investment liberalizing objectives of NAFTA"[82]. The Tribunal did not conclude however that Canada's decision in regard to Bilcon's project intended to discriminate based on the nationality of the investor.

- **Most-favoured nation treatment (MFN)**

The MFN provision allows investors to claim equally favourable treatment as the host country offers under other BITs to investors of any other country. Consequently, the 'more protective' standard agreed upon by the host state in any BIT may be invoked by a foreign investor even if the BIT with their home country entitles them to different levels of protections[83].

by this language. (See: Canada — Pharmaceutical Patents, Panel Report dated 17 March 2000, p. 162. More details available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm .)

77 See: Lise Johnson, Lisa Sachs (November 2015) 'The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system', Columbia Center on Sustainable Development. page 10.

78 Lise Johnson, Lisa Sachs (November 2015), 'The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system', and Public Citizen (2015), 'Secret TPP Investment Chapter Unveiled: It's Worse than We Thought.'

79 Ibid, Public Citizen (2015), page 12.

80 See: Lise Johnson, Lisa Sachs (November 2015) "The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system", Columbia Center on Sustainable Development.

81 Ibid.

82 See: decision in Bilcon v. Canada, para. 724, referenced in Lise Johnson, Lisa Sachs (November 2015).

83 See: UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), page 46, available at: http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx .

It is important to note that if States reform or renegotiate some of their treaties (where other parties are willing to renegotiate) and leave others with problematic provisions, commitments made in the latter may filter through to newer/renegotiated IIAs through the MFN clause, depending on its formulation[84]. Accordingly, if a State seeks to reform its approach to investment treaties and limit its liability, it is important to avoid inclusion of an MFN clause in its new reformed treaties, or else it could result in the unintended incorporation of older 'more protective' standards from older model treaties that might still be in force at the time the new reformed treaties are put in place.

The MFN provision was used by Philip Morris in order to try and avoid a requirement under the Uruguay-Switzerland BIT (Article 10.2) based on which Philip Morris brought a claim against Uruguay. Article 10.2 of the Uruguay-Switzerland BIT requires a complainant to submit the dispute to the competent courts of the Contracting party where the investment is made, and only if a judgement has not been made within 18 months after the proceedings have been instituted would the investor be able to submit a claim to an arbitral tribunal.[85]

Approaches adopted by India and Brazil

India avoids granting MFN in its model. Brazil provides an MFN clause that extends to the establishment phase and explicitly excludes treatment offered under a free trade zone, tariff union or common market, and privilege arising out of double taxation agreement (Article 10.5 and 10.6 of the Brazil - Malawi agreement). Brazil's model also provides that the Agreement shall not be "interpreted in a way that prevents the adoption or execution of any measure aimed at ensuring the equitable or effective imposition or collection of taxes as provided in the Party legislation" (Article 10.7 of the Brazil - Malawi agreement).

The TPP investment chapter

The TPP includes a broad MFN clause that extends to the establishment phase, and provides that investors and covered investments shall be accorded treatment no less favourable than that it accords, in like circumstances, to investments and investors of any other Party or of any non-Party with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition (Article 9.5 of TPP investment chapter).

- **Direct and indirect expropriation**

Investment treaties allow direct expropriation but under strict conditions including compensation, requiring expropriation to be for public purpose, non-discriminatory thus not targeted at a specific company or nationality, and in accordance with due process of law. [86]

Moreover, investment agreements have expanded the coverage of the rules to include direct and indirect expropriation, or what is referred to as 'expropriation and measures tantamount to

[84] See: UNCTAD 2010, "Most-Favoured Nation Treatment: A Sequel".
[85] See: "Trade and Investment Agreements - Barriers to national public health and tobacco control measures" by Carlos Correa, Nirmalya Syam, and German Velasquez, South Centre policy brief, November 2012.
[86] See: IISD, "Investment Treaties and Why they Matter to Sustainable Development", p. 15.

expropriation'. Indirect expropriation is generally defined as a State measure which causes serious injury to an investment without legal title to the investment being affected.[87]

The way tribunals has approached such takings varied based on a case by case evaluation. The most expansive interpretation only considers the extent of the measures' impact on the investor (what is referred to as the 'sole-effect' doctrine), which was applied in the Metalclad v. Mexico case (ICSID ARB(AF)/97/1, award August 2000) (See Box 8).

Box 8: Example of an arbitral tribunal's approach

The **Metalclad v. Mexico** ISDS case was brought under the rules of NAFTA. The tribunal addressed a set of events that cumulatively denied the company a permit to operate a hazardous waste disposal. The Tribunal stated in this regard that "expropriation under NAFTA includes not only open, deliberate, and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state" (para. 103 of award). The tribunal also addressed a state-level act that converted the area of operation of the investor to an ecological reserve. In this regard, the tribunal stated that the "tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree". Thus, the tribunal explicitly decided that the purpose of the measure was not important. Other tribunals used a 'proportionality test' to evaluate the balance between the public purpose of the measure and its impact on the investor[88]. Under such an expansive approach to interpreting 'indirect expropriation', any regulatory measure - such as ones dealing with production processes, or technology transfer, or ban on harmful products - could potentially be judged as indirect expropriation.

Approaches adopted by India and Brazil

In **Brazil's** treaty approach, only direct expropriation is covered, whereby the treaty stipulates that "subject to its laws and regulations, a Party shall not directly nationalize or expropriate covered investments by this Agreement, except: a) in the public purpose; b) in a non-discriminatory manner; c) on payment of effective compensation…; and d) in accordance with due process of law" (See Article 8 of Brazil - Malawi agreement, Risk Mitigation and Disputes Prevention).

The **Indian** Model BIT covers expropriation either "directly or through measures having an effect equivalent to expropriation" except when it is taken for reasons of public purpose, in accordance with due process of law and on payment of adequate compensation (See Article 5). The Indian model treaty sets a list of elements that are to be considered in the process of determining whether a measure or a series of measures have an effect equivalent to expropriation, including the economic impact of the measures, duration of the measure,

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[87] Suzy H. Nikièma, "Compensation for Expropriation," March 2013. Available from http://www.iisd.org/pdf/2013/best_practice_compensation_expropriation_en.pdf. Nikièma points out that "In theory, every state regulation could, thus, be classified as indirect expropriation, depending on the definition in the BIT or the criteria used by the tribunals, which are often varied and sometimes contradictory".
[88] See: IISD, "Investment Treaties and Why they Matter to Sustainable Development", p. 15.

character of the measure notably its object, context and intent, and whether a measure breaches prior binding written commitment to the investor through contract, license or other legal document (See Article 5.3b). As explained in the paragraph that follows, TPP includes investor's expectations in this list, through referring to "distinct, reasonable investment-backed expectations" as one of the elements that should be considered when assessing whether the action constitutes indirect expropriation (See Annex 9-B of the TPP investment chapter). The model excludes "non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment…" (See Article 5.5).

Approach under the TPP investment chapter

The TPP investment chapter provides that "no party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except: for public purpose, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation …, in accordance with due process of law". The TPP also provides that the article pertaining to 'expropriation and compensation' (Article 9.8) shall be interpreted in accordance with Annex 9-B. This annex provides the basis for determining whether an action constitutes an indirect expropriation, which requires a case by case, fact-based inquiry that considers, among other factors, the economic impact of the government action, the extent to which the government action interferes with "distinct, reasonable investment-backed expectations", and the character of the government action. (Annex 9-B para. 3 of the TPP Chapter 9). Regarding legitimate expectations, panels are required to consider "factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector" (Footnote 36, Annex 9-B of the TPP Chapter 9).

While the language of Annex 9-B attempts to carve-out "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment" from being considered indirect expropriation, a loophole is inserted through the addition of the phrase "except in rare circumstances"[89] to the provision (Annex 9-B para. 3(b)). Para. 3(b) does not define the 'rare circumstances' and leaves it up to arbitral tribunals thus granting them a lot of discretion to establish precedents. In the end, it remains up to the arbitral tribunals to weigh these factors and decide whether a measure or set of measures amount to indirect expropriation. Thus, the TPP does not establish a final answer, and therefore the discussion of whether a measure is an indirect expropriation or a non-compensable measure will still be discussed in arbitral proceedings. Arbitrators will have to make their decisions on a case-by-case basis[90].

It is worth noting that this language is not new, and has been used in previous US agreements (including the 2004 and 2012 US Model BITs, FTAs with Australia, Chile, Colombia, DR-

[89] The reference to "rare circumstances" has been part of 2004 and 2012 US model bilateral investment treaty.
[90] Nahila Cortes, "Indirect Expropriation under the TPP: A New Frontier for the Right of States to Regulate?", December 20, 2015, American University Washington College of Law. Available from http://kluwerarbitrationblog.com/2015/12/20/indirect-expropriation-under-the-tpp-a-new-frontier-for-the-right-of-states-to-regulate/ .

CAFTA, Korea, Morocco, Oman, Panama, Peru, Singapore, and bilateral investment treaties with Rwanda and Uruguay)[91].

- **Fair and equitable treatment (FET)**

Violation of this standard has been the most frequent claim in ISDS cases along with direct and indirect expropriation claims[92], and has been successfully used to challenge conduct by all branches and levels of government[93].

This provision has become a "catch all" clause, especially given the indeterminacy of the threshold of liability under the FET standard. It is increasingly interpreted to cover not only cases of denial of justice but also legitimate expectations and loss of future expected profits, or claims in regard to failure of a State to act in a transparent manner in administrative decision making[94]. Accordingly, these provisions have been construed broadly by investment tribunals to include a right to a "stable and predictable" business and regulatory environment, allowing investors to seek compensation for changes in tax and regulatory standards (See Box 9). Such an approach leads to situations where, in effect, a legislative standstill is expected.

In developing countries, where regulatory frameworks are still in the process of evolving as the government's capacity to regulate increases and its economy and society change, such broad interpretations put strong constraints on the right of the State to regulate. Overall, this approach contradicts the nature of regulations, which are supposed to evolve with the changing local, national, and global contexts.

Box 9: Examples of an arbitral tribunal's approach; interpreting FET as standstill on regulatory context

In the **Tecmed v. Mexico case** (ICSID case No. ARB(AF)/00/2), the tribunal found that the obligation of the State under the FET standard requires that it acts in a manner that "does not affect the basic expectations that were taken into account by the foreign investor to make the investment, and in a way free from ambiguity and totally transparent so that the investor may know all the rules and regulations and their respective goals before investing"[95].

The **Tecmed case** concerns replacement of an open license for operation of a landfill site by a license of limited duration. The investor claimed that this change in legal and business environment amounts to breach of FET under the Spain-Mexico BIT. The tribunal upheld the

[91] Ibid.
[92] See: IISD, Review of recent investment arbitration decisions 2012-2013.
[93] Lise Johnson, Lisa Sachs (November 2015), page 4. For example, out of 23 known (published) "wins" by investors under U.S. trade and investment agreements, nearly 75 percent (17) have found violations of 'fair and equitable treatment' or 'minimum standard of treatment'. Source: Public Citizen, Memo on ""Fair and Equitable Treatment" and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed", Sept. 2012, http://www.citizen.org/documents/MST-Memo.pdf .
[94] See: IISD, "Investment Treaties and Why they Matter to Sustainable Development" p. 12 & IISD, Review of recent investment arbitration decisions 2012-2013, p. 17.
[95] Note that other tribunals have interpreted this standard with a more restricted approach, as a requirement on the state not to behave in a manner that is "egregious and shocking".

claim on the grounds that the way the Mexican authorities acted infringed the legitimate expectations of the investor[96].

Approaches adopted by India and Brazil

Developing countries reforming their approach have been avoiding inclusion of the FET standard of protection in their treaties. For example, there is no reference to 'fair and equitable treatment' in the new Indian model treaty and Brazil's agreement concluded with Malawi.

The **Indian** Model Treaty provides that no Party shall "subject investments….to measures which constitute a violation of customary international law through: denial of justice in any judicial or administrative proceedings; or fundamental breach of due process; or targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or manifestly abusive treatment, such as coercion, duress and harassment" (See Article 3.1). This approach attempts to maintain an approach in line with practice under customary international law[97], limiting the potential for an expansive interpretation of the State Parties' obligations in regard to the standard of treatment of the investment[98].

Approach under the TPP investment chapter

To the contrary of the approaches mentioned above, the TPP investment chapter replicates to a large extent the language pertaining to FET used in existing investment agreements and in the 2012 US Model BIT. The TPP provision on 'Minimum Standard of Treatment' provides that the investor shall be accorded "treatment in accordance with applicable international law principles, including fair and equitable treatment and full protection and security" (See Article 9.6 of TPP Chapter 9). 'Fair and equitable treatment' is clarified through a non-exhaustive list of measures including "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...". This approach leaves leeway for the arbitral tribunals to expand on this non-exhaustive list.

Moreover, the TPP chapter includes a clarification noting that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the Article [on minimum standard of protection] …" (Article 9.6.4). Experts noted that this language provides that a breach of an investor's 'expectations' does not alone constitute basis to bring a claim of breach of minimum standard of protection. Yet,

[96] See: UNCTAD, 'Fair and Equitable Treatment,' UNCTAD Series on Issues in International Investment Agreements II, p. 65.
[97] The Indian Model recalls through a footnote that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation (See footnote 1 in the Indian Model BIT).
[98] It is worth noting that the approaches to 'denial of justice' have sometimes adopted an all-encompassing definition equating denial of justice with the general notion of an international wrong, and sometimes adopted a restrictive definition limiting denial of justice to incidences of refusal of access to courts. In the recent practice of investment arbitration, denial of justice was construed to go beyond a refusal of access to courts to include manifestly unjust decisions, as well as governmental interference with the administration of justice through acts of legislature or the executive (See: Mavluda Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct', *International and Comparative Law Quarterly* 61(1), 2012.

implicitly, this approach provides that breach of an investor's 'expectations' may be relevant in establishing a violation of FET and minimum standard of protection[99].

The TPP refers to customary international law for interpretation of the provision on minimum standard of protection (See footnote 15 and Annex 9-A of TPP chapter 9), providing that the relevant standard would "result from a general and consistent practice of States that they follow from a sense of legal obligation". Similar language was included in an annex under that DR-CAFTA (Dominican Republic-Central America Free Trade Agreement, Annex 10-B). Tribunals had ignored this annex in previous cases, relying on expansive interpretation that included an obligation to honour the investor's 'expectations'[100].

- **Obligations of investors**

Approaches adopted by India and Brazil

One of the main objectives of reforming the investment protection regime is rebalancing the rights and obligations of investors under IIAs. The **Indian** Model Treaty includes a section on investor obligations (See Chapter III, Article 11 and 12), which establishes obligations to comply with "all laws, regulations, administrative guidelines and policies" of the host state at the "establishment, acquisition, management, operation and disposition" stages of the investment. It also includes provisions pertaining to corruption, taxation, and disclosure of information. Article 12 of the Indian Model BIT provides a best endeavor provision pertaining to "voluntarily incorporating internationally recognized standards of corporate social responsibility in their practices and internal policies…" (See Article 12).

The **Brazilian** Investment Treaty Model includes a detailed best endeavor provision pertaining to "contribution to sustainable development of the Host Party and local community", "stimulat(ing) the economic, social and environmental progress..", "respect(ing) the human rights of those involved in the companies' activities…", "encourage(ing) the strengthening of local capacities", "encourag(ing) the development of human capital, especially by creating employment opportunities…", among other elements.

Approach under the TPP investment chapter

The TPP, to the contrary, does not include any direct reference to mandatory nor best-endeavor requirements from investors. The TPP investment chapter includes a provision on corporate social responsibility (See Article 9.17), which addresses the importance of "each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party". This provision is not mandatory on the Parties but merely affirms the importance of encouraging enterprises, without requiring specific obligation or action.

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[99] See: Lise Johnson, Lisa Sachs (November 2015), page 4.
[100] See: Railroad Development Corporation v. Guatemala and TECO Guatemala Holdings v. Guatemala referenced in Public Citizen (2015) "Secret TPP Investment Chapter Unveiled: It's Worse than We Thought", page 11.

- **Investor-state dispute settlement (ISDS)**

Approaches adopted by India and Brazil

Many developing countries have been highly critical of the ISDS system. In its agreement with Malawi, **Brazil** does not give the option of investor-state dispute settlement mechanism. It only provides for State-State arbitration (See Article 13.3 of the Brazil-Malawi Agreement) as one element of broader 'dispute prevention' provision, which includes a 'joint committee for administration of the Agreement', composed of government representatives of both Parties designated by their respective Governments (See Article 3). The agreement establishes 'focal points or ombudsmen' (See Article 4), which have as main responsibility the support for investors from the other Party.

For example, in the agreement negotiated between Brazil and Malawi, the Brazilian Chamber of Foreign Trade, part of the Government Council of the Presidency of Brazil, operates as the focal point, while the national focal point in Malawi is the Investment and Trade Centre, which is a government agency responsible for investment and trade promotion. Furthermore, before initiating a dispute, the Parties are required to go through consultations and negotiations facilitated by a Joint Committee composed of government representatives of both Parties. Resorting to State-State arbitration could be agreed upon by the Joint Committee, after undertaking a process of consultations and negotiations between the Parties (See Article 13), "whenever the Parties find it appropriate" (See Article 13.6).

The **Indian** Model Treaty requires exhaustion of local remedies (See Article 15.1) before pursuit of arbitration. The model provides time limitations for the window in which the investor can bring a claim (not more than six years since the date on which the disputing investor first acquired or should have first acquired knowledge of the measure in question) (See Article 15.5.i). It is important to note that the Indian Model requires exhausting "all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question (Article 15.2). Accordingly, an investor will have a window of one year to bring an arbitration claim after exhaustion of local remedies.

The Indian Model Treaty requires, as one of the conditions before an investor may submit a claim to arbitration, that they waive "their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach…"(Article 15.5.iii and 15.5.iv). It also includes a section on 'prevention of conflict of interest of arbitrators' (See Article 19) providing grounds based on which a party may challenge an arbitrator appointed under the Treaty, detailed criteria pertaining to assessing the 'independence, impartiality and freedom from conflict of interest' of the arbitrators (See Article 19.10), and a section on transparency in arbitral proceedings (See Article 22).

In regard to calculating the awards, the Indian Treaty Model requires from arbitrators that "monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party…and any restitution of property or repeal or modification of the measure, or other mitigating factors"[101] (Article 26.3). It also includes a *rendez-vous* clause pertaining to an appeals facility.

It is worth noting that the Indian Model does not cover measures by local government, any measure regarding taxation, issuance of compulsory licenses or revocation/ limitation/ creation of intellectual property rights consistent with the WTO TRIPs Agreement, government procurement, subsidies or grants by a Party, and services supplied in the exercise of governmental authority (Article 2.4). Non-discriminatory measures of general application taken by a central bank or monetary authority of a Party in pursuit of monetary and related credit policies or exchange rate policies are also carved out from the scope of Treaty application (See Article 32.2 of the Indian Treaty Model).

Approach under the TPP investment chapter

The TPP investment chapter does not require exhaustion of local remedies. It permits investors to make claims for compensation over failed attempts to make an investment, setting as a threshold "concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for a permit or license" (See Article 9.1 and footnote 12). The TPP investment chapter also allows for ISDS cases in the area of sovereign debt restructuring (ISDS is limited to claims of NT and MFN breaches in the case of negotiated restructuring that involves the consent of at least 75% of debt holders. See Article 9.1 for definitions and Annex 9-G para. 2).

Furthermore, the TPP allows an investor of a Party to bring a claim in relation to certain contracts with the central authority of the government pertaining to " (a) natural resources that a national authority controls such as oil, natural gas, rare earth minerals, timber….including for their exploration, extraction, refining, transportation, distribution or sale; (b) supply(ing) services on behalf of the Party for consumption by the general public for power generation or distribution, water treatment or distribution, telecommunications…; (c) undertak(ing) infrastructure projects…" (See definition of investment agreement under Article 9.1 and Article 9.19 in regard to 'submission of a claim to arbitration'). Annex 9-L allows an investor to bring an arbitration claim in regard to such contracts even if they have submitted a written waiver under the investment agreement (thus even where the contract requires litigation of disputes in domestic courts). The TPP chapter also expands the window within which an investor can bring a claim to three and half years after the knowledge of breach (See Article 9.21.1. This is compared to 3 years in the US 2012 model BIT).

The TPP investment chapter lacks additional safeguards, compared to existing agreements, which could limit ISDS tribunal's discretion to issue expansive interpretations of government's obligations under the agreement. While the USTR claims that the TPP model provides for improved grounds for expedited review and dismissal of frivolous claims (See Article 9.23.4), such provisions have been already part of older agreements such as DR-CAFTA (Article 10.20.4) and US-Peru FTA (Article 10.20.4) and proved not so effective in limiting frivolous claims[102].

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[101] See also footnote 4 of the model explaining that mitigating factors could include "current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor".

[102] Public Citizen (2015) "Secret TPP Investment Chapter Unveiled: It's Worse than We Thought".

The TPP investment chapter currently does not address issues pertaining to arbitrators' ethics, but provides for a 'rendez-vous' clause (Article 9.22.6) stating that "parties, shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings…to arbitrators...provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration…". It is not clear the extent to which the approach to be adopted by the Parties will be of added value in this area.

In regard to transparency elements and public participation, experts have noted that the TPP "presents a step backward as compared to other recent US trade agreements"[103]. They point that the TPP adds language not contained in other US trade agreements stating that governments "should endeavor to apply [its law on freedom of information] in a manner sensitive to protecting from disclosure information that has been designated as protected information" in ISDS proceeding. Such language could potentially be used to prevent information submitted or issued in the ISDS proceedings from being disclosed to the public[104]. Moreover, participation through submission of amicus curia reports (Article 9.23.3) remains at the discretion of the arbitral tribunals to allow it or not.

The TPP investment chapter gives tribunals the discretion to offer unlimited monetary awards and the possibility of compound interest at commercial interest rates (compounded monthly from the date of the government action), in addition to discretion in allocation of costs of the arbitration[105] (Article 9.23.6). This in effect raises the economic incentives that fuel the interests of both investors and law firms under the current ISDS system.

- **Performance requirements**

The historical record of industrialized economies indicates that foreign investment flows are not inherently a positive influence for industrial development, and that performance requirements are indispensable to obtaining benefits from foreign investment. Host countries will not automatically gain from foreign investment unless their own policies induce investors to make these contributions as part of their operations. The kinds of policy interventions that would be required to ensure positive benefits from foreign investment are those that have been historically applied by successful countries as part of their industrial policy[106] but today are restricted under investment treaties.

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[103] Lise Johnson, Lisa Sachs (November 2015), Page 12
[104] Ibid.
[105] On average, a case costs around 8 million USD in fees for administering the tribunal, arbitrators' and lawyers' fees.
[106] Manuel Montes and Kinda Mohamadieh, "Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements", in *Investment Treaties: Views and Experiences from Developing Countries* (Geneva, South Centre, 2015).

Approaches adopted by India and Brazil

The models by Brazil and India do not include such prohibitions. On the other hand, under Article 9.10, the TPP investment chapter restricts, on a negative list basis[107], the imposition of a long list of performance requirements in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, or as a condition for the receipt or continued receipt of an advantage[108]. The list of restrictions is much broader than those which countries agreed to under the WTO Trade-related Investment Measures (TRIMs) Agreement.

Approach under the TPP investment chapter

The TPP expands the restrictions of the TRIMs to services and makes it enforceable through ISDS. Beyond TRIMs, the TPP restricts technology transfer requirements, use of local technology requirements[109], adoption of a given rate or amount of royalty such as caps on royalty payments to parent companies[110]. As noted before, the TPP provision on performance requirements applies to investments from any country, even those who are not party to the TPP.

- **The right to regulate provisions and general exceptions: their effects and limitations[111]**

Incorporating general exceptions and right-to-regulate clauses or clarifications in investment treaties has been one of the options widely cited in discussions of reforming the investment treaty regime[112]. The 2014 World Investment Report[113] provides that 15 out of the 18 IIAs

[107] TPP Parties adopt a "negative-list" basis, meaning that their markets are fully open to foreign investors, except where they have taken an exception (non-conforming measure) in one of two country-specific annexes: (1) current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and (2) measures and policies on which a Party retains full discretion in the future. Source: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership.

[108] Similarly, CETA extends a broad set of negative list restrictions on performance requirements (Article 8.5 on performance requirements). In addition, CETA restricts the conditioning of market access on joint venture requirement, maximum foreign equity participation, and limitations on value of transactions or assets, limitations on number of employees, among other conditions (Article 8.4 on market access). It is worth noting that CETA excludes the provision prohibiting performance requirements from the application of investor-state dispute settlement (See Article 8.18 of the CETA Chapter 8). Thus, only the other State Party could bring a challenge pertaining to performance requirements, in accordance with the provisions of Chapter 29 of CETA dealing with dispute settlement. Under TPP, a claim pertaining to performance requirements would be covered under the section pertaining to investor-state dispute settlement.

[109] Restrictions pertaining to technology transfer and use were part of the 2012 US Model BIT.

[110] Developing country experiences show that without a cap on royalties, the payouts or outflows of royalty to parent companies tend to increase significantly, to the detriment of the dividends to national shareholders. (See: "Investor returns take a hit as arms of foreign MNCs hike royalty payment", by Suresh P Iyengar, available at http://www.thehindubusinessline.com/markets/stock-markets/investor-returns-take-a-hit-as-arms-of-foreign-mncs-hike-royalty-payment/article5815560.ece (accessed 8.4.2016)).

[111] This section presents a comment on the effect of 'general exceptions' and provisions referring to the 'right to regulate'. It does not present a comprehensive comment on the overall scope of reservations and exceptions included in any of the tackled agreements.

[112] Reference can be made to the discussions and statements made at UNCTAD session on IIA reforms during the WIF 2014. See also agenda of the OECD meeting on "Investment Treaties: The Quest for Balance" held on

concluded in 2013 have exceptions. Yet, the majority of States do not have exceptions in their existing treaties. Moreover, States' drafting of the general exception clauses in their IIAs have often been inconsistent[114].

Reliance on exception clauses could prove of limited effect. Much rests on the way the provision is designed or articulated and its interface with other provisions under the treaty. This in turn will determine the potential approach by arbitral tribunals to interpreting the clause and consequently the degree of flexibility available to States. It is worth noting that arbitral tribunals have often emphasized the promotion and protection function of the IIAs, which has been the primary focus of traditional IIAs as reflected in their drafting, leading them to construe exceptions narrowly[115].

For example, a "necessity" threshold is much harder to fulfill in comparison to more lenient nexus requirements such as "relating to" or "designed and applied for" a certain objective, which offer more leeway to host States[116]. Furthermore, it is important to consider the interface of the exception clause with other provisions under the treaty. For example, the exceptions may not apply to provisions that a government is trying to shield itself from, such as 'fair and equitable treatment'. Thus, exceptions might prove of limited value in case they are inserted in a treaty where standards of protection remain far-reaching.

Often, States choose to refer to WTO Article XX[117] of the GATT (General exceptions)[118] and Article XIV GATS (General Exceptions) as exceptions that apply under IIAs[119]. The experience under the WTO dispute settlement system showed that fulfilling the high threshold under GATT XX and XIV is difficult. For example, since the establishment of the WTO, out

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March 14, 2016, available at: http://www.oecd.org/daf/inv/investment-policy/OECD-treaties-investment-2016-agenda.pdf.

[113] The United Nations Conference on Trade and Development (UNCTAD). Referenced in "The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice", by Levent Sabanogullari – May 21, 2015.

[114] Andrew Newcombe, "General Exceptions in International Investment Agreements" (2008), draft discussion paper prepared for BIICL Eighth Annual WTO Conference.

[115] Ibid. Reference is made to Canfor Corporation v. USA and Terminal Forest Products v. USA where the tribunal subscribed to the view expressed in GATT panel opinions in Canada –Import Restrictions on Ice Cream and Yoghurt, noting that exceptions are to be interpreted narrowly and argued against flexible interpretation.

[116] See: "The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice,"
By Levent Sabanogullari – May 21, 2015, available at : https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.

[117] Article XX GATT : "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (*a*) necessary to protect public morals; (*b*) necessary to protect human, animal or plant life or health; …(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;…"

[118] See: "The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice,"
By Levent Sabanogullari – May 21, 2015, available at : https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.

[119] Examples include: e.g. COMESA Investment Agreement, art 22; ACIA, art 17; Benin-Canada BIT 2013, art 20. Canada usually includes Article XX GATT like general exception in its BITs.

of 40 attempts to invoke these exceptions, only one succeeded[120]. Moreover, it is argued that GATT Article XX is not appropriate for investment dispute settlement; it is applied under WTO case law to traded goods and not investment flows, and the understanding of ‘necessity’ as used under the article refers to ‘least-trade restrictive’[121].

According to Nathalie Bernasconi and Howard Mann, “far from providing any measure of guarantee for a State’s right to regulate, this type of general exceptions clause provides an untested transfer of trade law concepts to investment law, a vastly different domain of regulatory interaction between government-investment as compared to government-product regulatory interaction at a border… its scope and means of application is manifestly unclear, and there is no way to review a wrong application of the provision as there is in trade law through the WTO Appellate Body. Thus, this provision cannot be called a guarantor in any form of the right to regulate” [122]. Mann and Bernasconi adds that “it is by no means clear in its present form that the general exception proposed would actually mean that the government would not be subject to any monetary award”[123]. For example, a government might still be challenged under ISDS for taking measures that would fall under this exception, on the basis of violating FET or another provision of the agreement and subsequently the government might be forced to pay compensation to the investor.

Moreover, many IIAs also include a security exception which provides that the treaty does not preclude Parties from applying measures necessary for the maintenance of public order, maintenance or restoration of international peace or security or protection of essential security interests (See for example Article XI of the Argentina-US 1991 IIA)[124]. Tribunals held that justifying measures as necessary for essential security interests require fulfilling the same elements as those required for invoking the plea of necessity in customary international law (See CMS Gas Transmission Company versus Argentina, ICSID Case No. ARB/01/8; LG&E versus Argentina, ICSID Case No ARB/02/1; Sempra Energy International versus Argentina, ICSID Case No. ARB/02/16).

The TPP does not apply the exception clauses styled after the WTO exceptions to the investment chapter. The TPP includes a general security exception (Article 29.2) and temporary safeguard measures in the event of “serious balance of payments and external financial difficulties” (Article 29.3).

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[120] See: Public Citizen “Only 40 attempts to use the GATT Article XX / GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct will not Provide for an Effective TPP General Exception”.

[121] Aaron Cosby, “Inside CETA: Unpacking the EU-Canada free trade deal” (3 November 2014), available at : http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal.

[122] Nathalie Bernasconi and Howard Mann, “A Response to the European Commission’s December 2013 Document ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA)’”, available at: http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf.

[123] Ibid.

[124] Article XI of Argentina-US BIT provides that “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests”. In the case of Brazil, the Brazil-Mexico Cooperation and Investment Facilitation Agreement includes an article on prudential measures and a security exception, and removes the measures undertaken under these exceptions from the scope of the dispute settlement mechanism.

In the case of the EU-Canada Free Trade Agreement (CETA), Article XX of the GATT is incorporated under through the Chapter on Exceptions (Article 28.3 on General Exceptions), although its application is limited to Sections B and C of the investment chapter (Establishment of Investment and non-discriminatory treatment, respectively)[125]. Similarly, an exception clause styled after XIV GATS is included under the Chapter on Exceptions (Article 28.3.2), whose application is also limited to Sections B and C of the investment chapter. This keeps the provisions regarding fair and equitable treatment and expropriation, among other standards of protection, outside the ambit of these exception provisions.

The Indian Model Treaty includes a General Exception (Article 32) and Security Exception (Article 33). Article 32 provides that nothing in the treaty shall be construed to prevent the adoption or enforcement of non-discriminatory measures of general applicability that are necessary to protect public morals and public order, protect human, animal and plant health and life, among other objectives. As noted above, such language might not necessarily shield the host State from being sued for monetary awards, because it does not remove the addressed measures from the scope of ISDS. Thus, possibly, the State could be required to pay compensation for adopting or enforcing such measures[126]. Article 32 of the Indian Model also provides that "*nothing in this treaty shall apply to non-discriminatory measures* of general application taken by a central bank or monetary authority of a Party in pursuit of monetary and related credit policies or exchange policies…without prejudice to a Party's rights and obligations under Article 6 (Transfers)". Such language while providing a stronger carve out of these measures from the Treaty including ISDS, goes back to limit the flexibility available to the State through the circular language referring back to the obligations under the Article pertaining to transfers of capital (i.e. article 6). In the case of the Indian Model, Article 6 on 'Transfers' includes several safeguards subjecting the provision to domestic laws.

States have also attempted to insert reference to the 'right to regulate', through provisions focusing on the objective of safeguarding policy and regulatory space, such as environment protection and prudential measures for the financial sector. States have tended to insert references to the 'right to regulate' both in preamble and substantive sections of the treaties. Similar to the issues raised in regard to 'exception clauses', the level of flexibility resulting from these provisions depends on the way they are worded and their interface with other treaty provisions.

For example, Article 9.16 of the TPP investment chapter, entitled "Investment and environmental, health and other regulatory objectives", provides that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives" (emphasis added).

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[125] This is unlike the practice under Canada's 2012 model Foreign Investment Promotion and Protection Agreement (FIPA).

[126] Bernasconi and Mann proposes that the exceptions clauses might be more suitable if they begin with: "Nothing in this Agreement shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied to . . . " Source: Nathalie Bernasconi and Howard Mann, "A Response to the European Commission's December 2013 Document 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)'", available at: http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf.

This is an example of circular language that does not provide effective policy space for the government because in effect it requires that any measure taken for the purposes of environmental, health or other regulatory objectives be consistent with the other provisions of the Chapter. Thus, the government can still be questioned on whether the measures are in line with its obligations under the FET clause, besides other standards of protection included in the chapter.

In the context of the CETA, Article 8.9.1 provides that "For the purpose of this Chapter, 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". This provision does not go beyond reaffirming the well-established sovereign right to regulate[127] without clarifying how this provision relates to the other substantive provisions of the agreement. Thus, it is not clear the extent to which such provision would provide flexibility to a State Party claiming the measures it undertook in good faith aim at one of the objectives stated under Article 8.9.1 of CETA.

[127] As a matter of customary international law, tribunals have recognized that the States have an inherent right to regulate and not all State's measures interfering with property are expropriation [*Pope & Talbot v. Canada*, *Tecmed v. Mexico*, *S.D. Myers v. Canada*].

CONCLUDING NOTES

While the international investment treaty regime is at a conjuncture, States face the challenge of designing reforms that would result in systemic solutions, and not merely cosmetic changes, to the challenges emerging out of the existing regime and the ISDS mechanism it embodies.

While many countries are reviewing and introducing changes to their treaty practice, which is often proclaimed as 'reforms', countries are taking significantly different steps and approaches in this area. As discussed in Section II of this paper, the vision for the future of the investment protection rules presented by India and Brazil under their new model treaties is substantively and significantly different from those presented under the TPP investment chapter. The latter has been assessed as a model that "entrenches rather than reforms" the existing flawed system.

The United States' treaty practice reveals limited changes to the substantive content of the treaty models that the US adopts in its negotiations. As shown under Section I of this paper, the treaty content reflected in the NAFTA investment chapter, the 2012 US model BIT, and lately the TPP investment chapter does not significantly differ. Furthermore, no clear correlation could be established between the existence of a BIT with FDI inflows from the US to partner countries party to the BITs. Often, political elements drive the objectives behind negotiation and signature of BITs by the United States**.** At the same time, empirical evidence demonstrates that the traditional economic elements used to explain the objectives behind signing BITs fall short on explaining the US's approach.

The rules established under US investment treaties and investment chapters in US FTAs, such as the TPP, remain highly intrusive on the right to regulate, giving extensive rights to a broad set of investors, including the right to sue the State while by-passing the domestic judicial systems. Based on US BITs, American investors have been the most active among foreign investors in challenging a milieu of governmental actions and regulatory interventions, including challenging developing countries around 80 times.

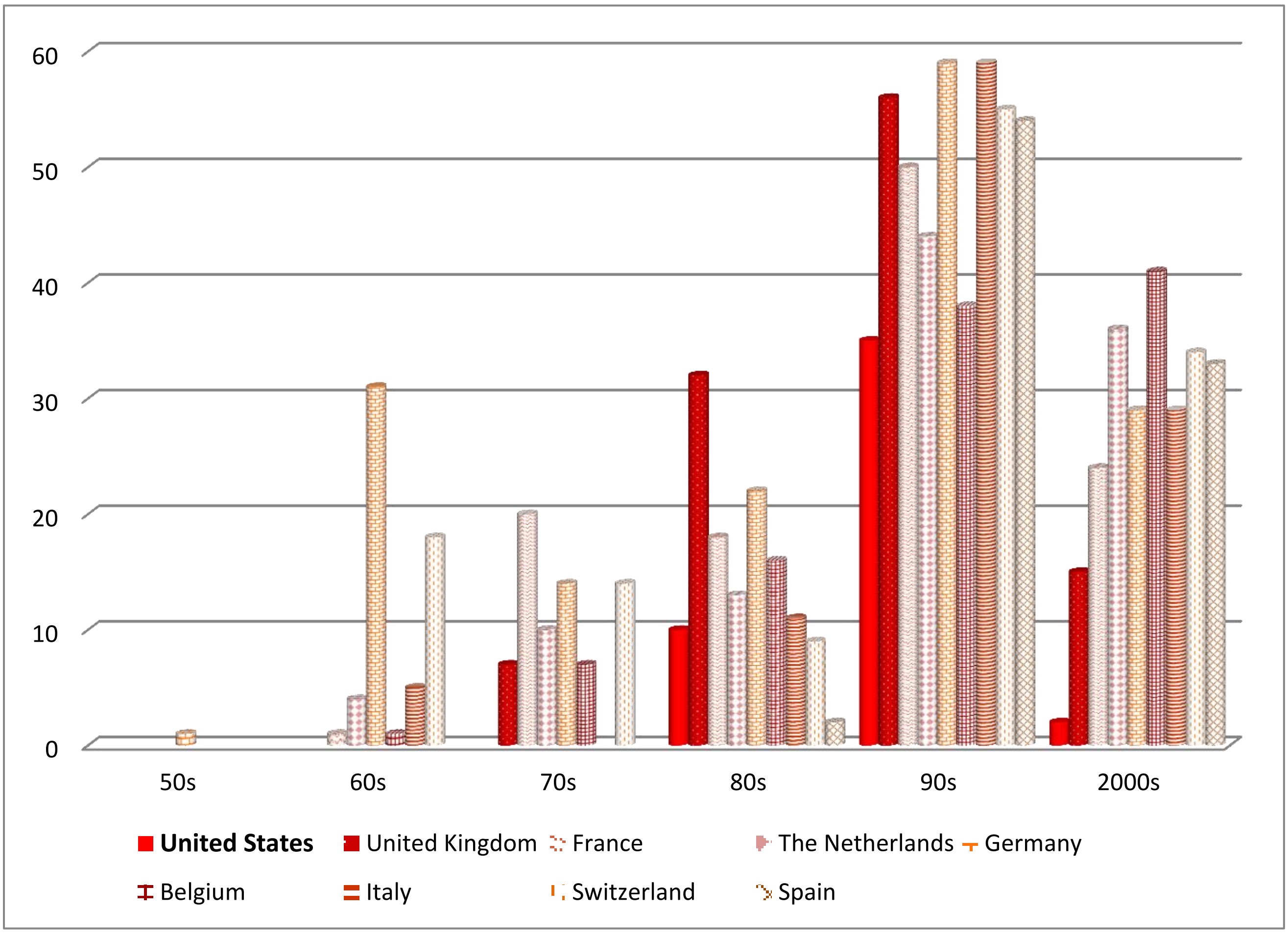
For countries considering negotiations with the United States, the TPP investment chapter would potentially be used as the template. Given the analysis above, it is clear that this model does not address the fundamental problems emerging out of the existing investment protection regime.

For developing countries, it is important to focus on identifying the kinds of reforms that will bring systemic changes to the investment protection regime and address the challenges to regulatory space resulting from the ISDS mechanism. This includes limiting potential challenges to States' legitimate regulatory action in the public interest, as well as balancing the rights and obligations of investors under the treaties. This entails addressing whether the challenges resulting from the regime could be resolved without withdrawal from, or through renegotiating the content of the existing treaties. It also entails revisiting the role of ISDS, and whether it is needed, and if so whether it should be the norm or the exception, whereby only specific types of investment disputes would fall under the purview of international courts and tribunals while others would only be dealt with between the home state and the host state, or through national courts.

South-South dialogue and cooperation plays a very important role in this regard, especially given the active steps taken by several developing countries in regard to withdrawing from old investment protection treaties and designing more balanced alternatives that address investors' obligations and safeguards to the State's regulatory space.

ANNEXES

Annex 1. Timeframe of BITs' signature by the United States and other selected OECD countries



Number of BITs signed by country									
Years	**United States**	**United Kingdom**	**France**	**Netherlands**	**Germany**	**Belgium**	**Italy**	**Switzerland**	**Spain**
50s					1				
60s			1	4	31	1	5	18	
70s		7	20	10	14	7		14	
80s	10	32	18	13	22	16	11	9	2
90s	35	56	50	44	59	38	59	55	54
2000s	2	15	24	36	29	41	29	34	33

Graph prepared by: Daniel Uribe, South Centre.
Data source: UNCTAD Investment Policy Hub, 2016.
Note: *The data includes all BITs signed by the countries in the sample (BITs in force, not in force and terminated).*

Annex 2. US investor cases against developing countries

No	Year of Initiation	Case	Summary	Outcome
1	1993	AMT v. Zaire	Claims arising out of two alleged episodes of looting in which soldiers of the Zairian armed forces destroyed, damaged or took away certain property, finished goods, raw materials and other objects of value belonging to the local subsidiary of the investor.	Decided in favour of investor
2	1997	Azinian v. Mexico	Claims arising out of the cancellation by the Mexican city council of Naucalpan of a concession contract for commercial and industrial waste collection.	Decided in favour of State
3	1997	Lanco v. Argentina	Claims arising out of the alleged breach of a concession agreement entered into between the Argentinean Ministry of Public Works and Services on the one hand, and Lanco International on the other, for the development and operation of a port terminal in Buenos Aires.	Discontinued
4	1997	Metalclad v. Mexico	Claims arising out of the alleged interference of the Mexican local governments of San Luis Potosí and Guadalcázar with the investor's development and operation of a hazardous waste landfill.	Decided in favour of investor
5	1998	Houston Industries v. Argentina	Claims arising out of disagreements over a concession agreement for the provision of electricity distribution services in the Santiago del Estero province in Argentina.	N/A
6	1998	Waste Management v. Mexico (I)	Claims arising out of the alleged breach of a 15-year concession granted by the State of Guerrero and the municipality of Acapulco to Acaverde, USA Waste's Mexican subsidiary, for public waste management services.	Decided in favour of investor
7	1999	Feldman v. Mexico	Claims arising out of Mexico's application of certain tax laws to the export of tobacco products which allegedly denied claimant's local company, an exporter of cigarettes from Mexico, the benefits of a law that allowed certain tax refunds to exporters.	Decided in favour of investor
8	1999	Mitchell v. Congo	Claims arising out of the seizure by Congolese military forces of the premises of Mr. Mitchell's legal consulting firm, in which documents qualified as compromising and other items were seized and the employees of the firm were forced to leave the premises.	Decided in favour of investor
9	1999	Mobil Argentina v. Argentina	Claims arising out of a petroleum exploration and production venture.	Discontinued

10	2000	Mihaly v. Sri Lanka	Claims arising out of the unsuccessful conclusion of a contract between the Republic of Sri Lanka and the investor for the building, ownership and operation of a power generation facility.	Decided in favour of the State
11	2000	Waste Management v. Mexico (II)	Claims arising out of the alleged breach of a 15-year concession granted by the State of Guerrero and the municipality of Acapulco to the claimant for public waste management services.	Decided in favour of the State
12	2001	Adams v. Mexico	Claims arising out of the enforcement of a judicial decision ordering the return of certain land to its original owners, thus requiring the eviction of residents of a tourist/residential development built upon such land, many of whom were Americans.	Discontinued
13	2001	Azurix v. Argentina (I)	Claims arising out of Argentina's alleged interference with the tariff regime applicable to claimant's investment, as well as other alleged breaches of obligations under a water concession agreement.	Decided in favour of the investor
14	2001	CMS v. Argentina	Claims arising out of Argentina's suspension/termination of the claimant right to calculate tariffs in US dollars and to make inflation adjustments.	Decided in favour of the investor
15	2001	Enron v. Argentina	Claims arising out of certain tax assessments allegedly imposed by Argentinean provinces in respect to a gas transportation company in which the claimants participated through investments in various corporate arrangements, as well as the Government's alleged refusal to allow tariff adjustments in accordance with the US Producer Price Index.	Decided in favour of the investor
16	2001	F-W Oil v. Trinidad & Tobago	Claims arising out of claimants' alleged investment in the Soldado Fields, the site of an offshore oil and gas development and production project in Trinidad and Tobago, after the government sought to recommence resource production by soliciting the participation of foreign investors in the region.	Decided in favour of the State
17	2002	AES v. Argentina	Claims arising out of Argentina's alleged refusal to apply previously agreed tariff calculation and adjustment mechanisms with regard to claimant's investments.	Pending
18	2002	Ahmonseto v. Egypt	Claims arising out of the modification by a bank allegedly controlled by Egypt of its credit policy towards the claimants, certain customs duties and taxes assessed against the claimants, and four separate criminal proceedings initiated against them.	Decided in favour of the State
19	2002	Champion Trading v. Egypt	Claims arising out of the enactment of Egyptian laws in the mid-1990s privatizing and liberalizing cotton trade.	Decided in favour of the State

20	2002	Fireman's Fund v. Mexico	Claims arising out of the alleged government's facilitation of purchase of debentures denominated in Mexican pesos and owned by Mexican investors, but not facilitating the purchase of debentures denominated in U.S. dollars and owned by Fireman's Fund.	Decided in favour of the State
21	2002	Frank v. Mexico	Claims arising out of the alleged expropriation of a beachfront property belonging to the investor in Mexico's Baja California area.	Discontinued
22	2002	GAMI v. Mexico	Claims arising out of the issuance of a decree for the stated purpose of revitalizing the Mexican sugar industry under which Mexican authorities expropriated sugar mills owned by its local subsidiaries.	Decided in favour of the State
23	2002	IBM v. Ecuador	Claims arising out of the alleged lack of payment of monies to the investor's wholly-owned subsidiary under a concession contract entered into with the Ecuadorian Ministry of Finances and Public Credit.	Settled
24	2002	LG&E v. Argentina	Claims arising out of certain measures adopted by Argentina, in particular the adoption of the Emergency Law of 2002, which modified the regulatory environment under which the claimants invested in three natural gas distribution enterprises in Argentina.	Decided in favour of the investor
25	2002	Occidental v. Ecuador (I)	Claims arising out of resolutions issued by the Ecuadorian tax authority denying applications for VAT refunds by Occidental, and requiring the return of the amounts previously reimbursed in connection with a participation contract entered into by the claimant with Petroecuador, a State-owned corporation of Ecuador, to undertake oil exploration and production in Ecuador.	Decided in favour of the investor
26	2002	PSEG v. Turkey	Claims arising out of several disagreements concerning a concession contract entered into with the government for the construction of a lignite-fired thermal power plant, as well as subsequent measures adopted by the respondent such as preventing the claimant from obtaining certain necessary treasury guarantee for the project.	Decided in favour of the investor
27	2002	Sempra v. Argentina	Claims arising out of Argentina's suspension of the licensee companies' tariff increases based on the US producer price index and the subsequent pesification of these tariffs.	Decided in favour of the investor
28	2003	Azurix v. Argentina (II)	Claims arising out of Argentina's alleged interference with the tariff regime applicable to claimant's investment, as well as other alleged breaches of obligations under the relevant concession agreement.	Discontinued

29	2003	Continental Casualty v. Argentina	Claims arising out of a series of decrees and resolutions taken by Argentina in the course of an economic crisis (including restrictions on transfers, rescheduling of cash deposits and pesification of US dollar deposits) that allegedly affected the claimant's investment and frustrated the investor's ability to hedge against the risk of the devaluation of the pesos.	Decided in favour of the investor
30	2003	El Paso v. Argentina	Claims arising out of a series of decrees and resolutions taken by Argentina in the course of an economic crisis (including restrictions on transfers, rescheduling of cash deposits and pesification of US dollar deposits) that allegedly affected the claimant's investment and frustrated the investor's ability to hedge against the risk of the devaluation of the pesos.	Decided in favour of the investor
31	2003	MCI v. Ecuador	Claims arising out of a series of differences between the investor and Ecuador's Electricity Institute regarding the execution of a contract concerning an electric power generation project, including the suspension of operations alleging the non-payment of invoices, and the subsequent termination of the contract.	Decided in favour of the State
32	2003	Miminco v. Congo	Claims arising out of the seizure of MIMINCO's diamond mine located in Diboko, confiscating all diamonds, communications equipment and administrative documents at the mine, followed by the seizure of its headquarters by the DRC Office of Illegally Acquired Properties.	Settled
33	2003	Pan American v. Argentina	Claims arising out of a series of measures taken in the hydrocarbons and electricity sector by the Government to stem the country's economic crisis of 2001-2002 which allegedly affected the claimants' investments, including the exemption of hydrocarbon exports from export dues, the limitation of royalty rates and the right to freely export hydrocarbons and to transfer funds abroad.	Settled
34	2003	Pioneer v. Argentina	Claims arising out of a series of decrees and resolutions taken by Argentina in the course of an economic crisis (including restrictions on transfers, rescheduling of cash deposits and pesification of US dollar deposits) that allegedly affected the claimant's investment and frustrated the investor's ability to hedge against the risk of the devaluation of the pesos.	Settled
35	2003	Unisys v. Argentina	Claims arising out of alleged breaches of a contract for an information-storage and management project entered into between claimant's local subsidiary and	Settled

			the Argentinean Consejo de la Magistratura, an administrative body that at the time of the measures was in charge of the administration of the Argentine judiciary's assets and contracts.	
36	2004	ADM v. Mexico	Claims arising out of Mexico's 2002 adoption of a tax on beverages containing high fructose corn syrup, that allegedly affected the claimants' investments in the high fructose corn syrup industry in Mexico.	Decided in favour of the investor
37	2004	BP v. Argentina	Claims arising out of a series of measures taken in the hydrocarbons and electricity sector by the Government to stem the country's economic crisis of 2001-2002 which allegedly affected the claimants' investments, including the exemption of hydrocarbon exports from export dues, the limitation of royalty rates and the right to freely export hydrocarbons and to transfer funds abroad.	Settled
38	2004	CIT Group v. Argentina	Claims arising out of the alleged negative impacts that the government's mandatory pesification, undertaken by Argentina in its 2001-2002 economic crisis, had upon hundreds of commercial leasing agreements concluded by claimant's subsidiary and third parties, dismantling the foreign exchange financing component of CIT's investment strategy.	Settled
39	2004	Corn Products v. Mexico	Claims arising out of Mexico's 2002 adoption of a tax on high fructose corn syrup allegedly aimed at protecting Mexico's domestic sugar producers and excluding high fructose corn syrup from the soft drink sweetener market.	Decided in favour of the investor
40	2004	Duke Energy v. Ecuador	Claims arising out of alleged breaches of several agreements entered into between the parties for electrical power generation and supply to the city of Guayaquil in Ecuador.	Decided in favour of the investor
41	2004	Mobil v. Argentina	Claims arising out of measures taken by Argentina in response to its 2001-2002 economic crisis that allegedly affected the claimants' investment.	Pending
42	2004	Motorola v. Turkey	Claims arising out of the Government’s take-over of the telecommunications firm Telsim in which the claimant had invested, and the enactment of legislation ordering the firm's sale and placing Turkey's own financial claims against the telecoms firm ahead of those of the claimant.	Settled
43	2004	RGA v. Argentina	Claims arising out of a series of measures taken by the Government to stem the country's economic crisis of 2001-2002 which allegedly affected the claimants' investments in the retirement and pension administration market in Argentina.	Settled

44	2005	AHCA v. Congo	Claims arising out of an outstanding debt owed by the respondent to the company in which the investor acquired interests related to construction projects conducted in the late 1980s and early 1990s under certain contracts.	Decided in favour of the State
45	2005	Asset Recovery v. Argentina	Claims arising out of the adoption of measures by a local government that allegedly wiped out debt and extended payment deadlines under a contract to which the claimant was a party concerning the recovery of debts owned by public banks in the Mendoza province.	Discontinued
46	2005	Bayview v. Mexico	Claims arising out of Mexico's alleged capture, seizure and diversion of more irrigation water of the Rio Grande River than that to which the country had right under a bilateral US-Mexico treaty, to the benefit and use of Mexican farmers.	Decided in favour of State
47	2005	Cargill v. Mexico	Claims arising out of Mexico's 2002 adoption of a tax on beverages containing high fructose corn syrup, that allegedly affected the claimants' investments in the high fructose corn syrup industry in Mexico.	Decided in favour of investor
48	2005	EMELEC v. Ecuador	Claims arising out of the alleged expropriation of the investor's premises, bank accounts, and other property located in Ecuadorian territory through a combined military-police operation, followed by local litigation over contractual outstanding amounts.	Decided in favour of State
49	2005	Noble Energy v. Ecuador	Claims arising out of a series of decrees, acts and omissions of the respondents through which they allegedly altered the economic, regulatory, legal, and contractual framework upon which the claimants had relied in making their investment in Ecuador, including the modification of the mechanism for the payment of invoices which caused a significant increase in unpaid receivables for electricity supply from a power plant in Ecuador.	Settled
50	2006	Chevron v. Ecuador (I)	Claims arising out of seven breach-of-contract cases filed by Texaco against the Ecuadorian Government in local courts and the alleged egregious delay of all Texaco claims by the Ecuadorian judiciary.	Decided in favour of investor
51	2006	Nations Energy v. Panama	Claims arising out of communications from Panama's General Revenue Directorate and the Ministry of Economy and Finance that allegedly refused claimants the transfer of certain fiscal tax credits to third parties.	Decided in favour of State

52	2006	Occidental v. Ecuador (II)	Claims arising out of the termination (caducidad) of a 1999 participation contract between Occidental Exploration and Production Company and PetroEcuador for the exploration and exploitation of hydrocarbons in Block 15 of the Ecuadorian Amazon region.	Decided in favour of investor
53	2007	Mobil v. Venezuela	Claims arising out of Venezuela's nationalization of two oil projects in which the claimants had interests known as the Cerro Negro Project and La Ceiba Project (after having increased their applicable royalty rate and income tax) and subsequent disagreements between the parties concerning the amount of compensation owed to the investor.	Decided in favour of investor
54	2007	RDV v. Guatemala	Claims arising out of a "Lesivo Opinion" issued by Guatemala's Attorney General recommending the State to declare void certain usufruct contract concluded with the investor concerning infrastructure and other rail assets to provide railway services in Guatemala.	Decided in favour of investor
55	2007	TCW v. Dominican Republic	Claims arising out of the Government's alleged wrongful interference with TCW Group's indirect holdings in an electricity joint venture (Empresa Distribuidora de Electricidad del Este, S.A.) by, among other alleged actions and omissions, failing to pay compensation for negotiated tariffs and subsidies.	Settled
56	2007	Trans-Global v. Jordan	Claims arising out of claimant's oil exploratory work which confirmed the existence of oil deposits in the Dead Sea and Wadi Araba basin in a designated area of exploration, followed by the Government's alleged systematic campaign to prevent the investor from pursuing any further role in the development of those oil deposits despite an express contractual entitlement to participate.	Settled
57	2008	Burlington v. Ecuador	Claims arising out of Ecuador's enactment of a law imposing a 99 per cent windfall levy on foreign oil revenues as a result of an oil spike starting in 2002, the Government's decision to migrate to service contracts and the subsequent caducidad process to terminate the investor's production sharing agreements.	Pending
58	2008	Murphy v. Ecuador (I)	Claims arising out of Ecuador's enactment of Law No. 42 imposing a 99 per cent windfall levy on foreign oil revenues that allegedly resulted in the expropriation of Murphy's investment in Block 16 of the Ecuadorian Amazon, an oil-rich region bordering Peru and Brazil.	Decided in favour of State

59	2009	Chevron v. Ecuador (II)	Claims arising out of Texaco's historical participation as a minority member of a consortium with Ecuador and Ecuador's oil company Petroecuador that explored for and produced oil under concession contracts, and the alleged Government's misconduct in subsequent litigation proceedings against Texaco for environmental remediation.	Pending
60	2009	Commerce Group v. El Salvador	Claims arising out of the Government's termination of a 30-year mining concession to the claimants, following the withdrawal of environmental permits.	Decided in favour of State
61	2009	H&H v. Egypt	Claims arising out of disagreements between the parties concerning a contract to manage and operate a resort in Ain El Sokhna including the denial of claimant's alleged right to purchase the resort under an option to buy agreement leading to litigation before domestic courts and the Government's subsequent eviction of H&H from the resort.	Decided in favour of State
62	2009	Pac Rim v. El Salvador	Claims arising out of the Government's refusal to issue necessary mining licences for Pacific Rim's El Dorado gold mining project in northern El Salvador due to alleged environmental concerns including the company's use of certain chemicals in the extraction process.	Decided in favour of State
63	2009	Ulysseas v. Ecuador	Claims arising out of several Government measures that allegedly altered the legal and regulatory framework governing the power sector in Ecuador, including the payment system applicable to private thermoelectric generators like Ulysseas, and the State's subsequent withdrawal of claimant's operating permit due to alleged contractual breaches.	Decided in favour of State
64	2010	Guaracachi v. Bolivia	Claims arising out of the Government's nationalisation of Guaracachi America, Inc. and of Rurelec's controlling 50.001 per cent shareholding in the Bolivian electricity company Empresa Eléctrica Guaracachi, as well as the alleged failure by the claimants to obtain justice through the Bolivian court system and the subsequent seizure of assets owned by Rurelec's subsidiary, Energía para Sistemas Aislados Energais S.A.	Decided in favour of investor
65	2010	McKenzie v. Vietnam	Claims arising out of the alleged Government's failure to transfer certain land rights to claimant's locally incorporated subsidiary necessary for the development of a tourism resort.	Decided in favour of State

66	2010	Pan American v. Bolivia	Claims arising out of the Government's nationalization of the Chaco Petroleum Company, a subsidiary in which Pan American held a 50 per cent interest.	Settled
67	2010	RSM v. Ecuador	Claims arising out of the alleged Government's wrongful termination of a mining license for a tar-sands project in Ecuador.	Pending
68	2010	RSM v. Grenada	Claims arising out of the Government's refusal to grant RSM a petroleum exploration licence by considering that the application was untimely.	Decided in favour of State
69	2010	TECO v. Guatemala	Claims arising out of Guatemala's electricity regulator decision to set tariffs for the electricity company in which the claimant had investment based on an independently commissioned technical study rather than on a study commissioned by the electricity company, during the process of review and pricing of electricity distribution tariffs for the five-year period 2008-2013.	Decided in favour of the investor
70	2011	Merck v. Ecuador	Claims arising out of judicial proceedings before Ecuadorian courts concerning claimant's refusal to sell a pharmaceutical factory to the Ecuadorian company NIFA, which allegedly resulted in a denial of justice.	Pending
71	2011	Murphy v. Ecuador (II)	Claims arising out of Ecuador's enactment of Law No. 42 imposing a 99 per cent windfall levy on foreign oil revenues that allegedly resulted in the expropriation of Murphy's investment in Block 16 of the Ecuadorian Amazon, an oil-rich region bordering Peru and Brazil.	Pending
72	2011	Renco v. Peru	Claims arising out of alleged arbitrary and unfair application of government measures and contracts related to interests in the mining operations in La Oroya, which Renco owned through its wholly-owned affiliate, Doe Run Peru S.R. LTDA.	Pending
73	2012	Ampal v. Egypt	Claims arising out of alleged breaches of a long term contract for the supply of natural gas between the parties, including the prolonged interruption of gas supply and failure to deliver the agreed volume of gas.	Pending
74	2013	KBR v. Mexico	Claims arising out of the Mexican courts' annulment of an International Chamber of Commerce (ICC) arbitration award issued in favor of claimant's subsidiary, COMMISA, concerning a contractual dispute with a Mexican State-owned entity.	Decided in favour of State
75	2013	Spence International Investment v. Costa Rica	Claims arising out of the alleged expropriation of claimant's property to create an ecological park without fair compensation.	Pending

76	2013	Transglobal v. Panama	Claims arising out of the Government's cancellation of a hydro-electric power plant concession and its alleged subsequent failure to abide by Panama Supreme Court's decision that reinstated the investor in its rights to the concession.	Pending
77	2014	Aven and others v. Costa Rica	Claims arising out of the Government's termination of claimants' hotel, beach club and villas construction project, following the revocation of an environmental viability permit after determining that the property included wetlands and a protected forest, and involving criminal investigations against one of the claimants.	Pending
78	2014	Ballantine v. Dominican Republic	Claims arising out of the rejection by the Ministry of Environment and Natural Resources of the claimants' request to expand Jamaca de Dios, a residential and tourism project in the municipality of Jarabacoa, as well as other actions by the central and local government.	Pending
79	2014	Corona Materials v. Dominican Republic	Claims arising out of the Government's refusal to grant an environmental permit to the claimant which effectively prevented Corona Materials from building and operating a construction aggregate mine in the Dominican Republic, despite allegedly receiving assurances and previous formal approvals from senior government officials.	Pending
80	2014	IBT Group v. Panama	Claims arising out of disagreements with Panama's Public Works Ministry concerning the performance of a concession to rehabilitate and operate four asphalt manufacturing enterprises held by claimants' subsidiary that led to the unilateral termination of the contract by Panama.	Pending

Source: UNCTAD, 'Investment Dispute Settlement Navigator' (2016), Investment Policy Hub, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/223?partyRole=1 (accessed 8 April 2016).
Collated by: Daniel Uribe, South Centre.

Annex 3. United States FDI flows to BIT developing country partner

Reporting Country	United States																									
Type of FDI	Outward																									
Currency	Reported currency																									
Unit	US Dollar, millions																									
	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Albania	..	..	..	0	0	0	..	..	..	..	..	-4	0	0	..	-1	..	..	0	0	0	0	0	0	0	..
Argentina	115	59	379	367	558	1079	1455	2048	371	1701	983	2954	675	-511	-1445	-118	1760	859	4274	547	1542	1209	-2772	2607	1371	..
Armenia	..	..	..	..	..	..	..	..	..	..	..	..	..	0	0	1	1	1	1	1	1	0	0	0	..	..
Azerbaijan	..	..	..	..	..	..	..	..	..	..	..	..	..	681	207	864	330	1114	1313	..	..	..	..	..	..	..
Bangladesh	..	..	..	..	..	..	..	..	..	..	..	..	..	..	28	-22	-2	103	174	29	28	23	-26	..	..	..
Cameroon	..	..	..	..	-52	10	..	..	..	..	..	..	..	..	-6	163	-32	36	-11	-52	2	-50	48	-4	6	..
Congo	..	..	..	-34	..	..	..	..	..	..	..	..	..	..	-36	-26	25	-57	134	-15	..	52	-66	-43	..	..
Congo, the Democratic Republic of the	..	..	..	..	..	..	..	..	..	..	..	..	..	..	5	-70	21	-15	-18	..	..	..	..	..	..	..
Ecuador	..	..	..	49	12	253	..	..	..	..	..	..	..	..	178	243	-837	73	20	-43	128	196	103	101	93	..
Egypt	-85	42	-292	-28	65	-32	46	-1	118	259	575	-190	-99	578	127	470	447	1112	54	996	1617	1512	1919	2333	2160	..
Georgia	..	..	..	..	..	..	..	..	..	..	..	..	..	..	-288	-10	52	..	..	1	0	0	0	0	..	..
Grenada	..	..	..	..	..	1	..	..	..	..	..	..	..	..	0	0	..	..	-16	0	0	0	0	0	0	..
Honduras	..	..	..	-2	-16	-51	..	..	..	..	..	..	..	..	22	83	193	88	36	71	173	20	200	-107	65	..
Jamaica	..	..	..	144	137	173	..	..	..	..	..	..	..	..	225	334	247	-2441	-82	-267	173	-222	2	0	61	..
Jordan	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	6	37	79	32	-7	3	43	6	..	..
Kazakhstan	..	..	..	..	..	..	..	..	..	..	..	..	..	..	-752	168	6	-412	178	..	..	-142	1837	-68	36	..
Kyrgyzstan	..	..	..	..	..	..	..	..	..	..	..	..	..	..	-1	-1	..	..	0	0	0	15	0	0	0	..
Moldova, Republic of	..	..	..	..	..	..	..	..	..	..	..	..	..	..	0	0	1	1	1	1	1	1	-1	-1	-1	..
Mongolia	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	0	0	0	0	-4	-6	-5	9	..	..
Morocco	..	..	..	8	7	19	..	..	..	..	..	70	52	60	-5	18	-8	-22	-37	96	34	52	166	25	87	..
Mozambique	..	..	..	..	..	..	..	..	..	..	..	..	..	..	3	1	..	..	4	-3	-2	12	127	..	..	..
Panama	..	..	..	527	677	668	..	..	..	..	..	..	..	..	530	353	-71	106	214	1218	845	809	-759	120	-162	..
Romania	2	2	1	8	9	17	..	..	..	..	..	45	19	33	57	65	131	55	11	254	129	421	148	64	194	..
Rwanda	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1	1	1	1	0	0	0	0	..
Senegal	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	-11	-6	-14	1	-3	-6	-12	-53	-11	-14	..
Sri Lanka	..	..	..	..	..	..	..	..	..	..	..	..	..	..	-14	14	-5	8	19	8	24	-7	7	-9	8	..

Reporting Country	United States																									
Type of FDI	Outward																									
Currency	Reported currency																									
Unit	US Dollar, millions																									
	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Trinidad and Tobago	..	..	..	-2	55	122	..	..	..	..	..	..	..	..	225	117	112	-34	..	..	1389	1024	620	430	2137	..
Tunisia	..	..	..	..	..	..	..	..	..	..	..	..	..	..	19	6	59	28	-44	111	72	-21	30	-811	-10	..
Turkey	28	93	149	144	134	279	11	158	131	93	110	533	228	121	239	83	215	196	252	3740	218	703	495	3193	1336	..
Uruguay	..	..	..	91	81	12	..	..	..	..	..	135	9	-17	41	-17	-85	8	25	38	46	27	-11	60	141	..

Source: OECD, Dataset FDI by partner country (2016), https://stats.oecd.org/Index.aspx?DataSetCode=FDI_FLOW_PARTNER (accessed 12 April 2016).
Note: Columns highlighted in dark indicate the years in which the BIT with the US has been in force.

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