

En route to the US BIT Program . . .

The first BIT: Germany-Pakistan (1959)

Preamble: Object and purpose

Art. 8: Definition of protected investment: assets brought into the country

Art. 1: States should 'endeavor' to admit investments

Art. 2: Non-discriminatory treatment post entry

Art. 3(1): 'Protection and Security'

Art. 3(2): Realizable compensation upon expropriation

Art. 3(3): NT on post-conflict restitution

Arts. 4, 6: Unimpeded capital transfers

Art. 7: Umbrella clause

Art. 11: Enforced by state-to-state arbitration or ICJ

En route to US BIT (part II) . . .

US-Japan FCN (1953):

Contains Germany-Pakistan BIT provisions (on expropriation, free transfers, protection and security, state to state dispute settlement) **plus**:

- Right of Admission (Nationals “shall be permitted to enter”)
- Residual protections “under international law”
- Bar on ‘arbitrary’ and ‘discriminatory’ treatment
- NT and MFN treatment post-entry
- No unreasonable or discriminatory impairment of legally acquired rights
- No unlawful entry or molestation of dwellings or businesses
- Requirement for transparent law and regulations
- Required appeals process for prompt/effective review
- Protection for arbitration clauses in contracts
- No FET (but other US WWII FCNs do include FET)
- But also residual rights of state to regulate

Why FCNs remain relevant

1. Suggest baseline protections for all businesses
2. FCNs remain in effect
3. May be only relevant bilateral treaty for the parties
4. FCNs provisions imported into later IIAs
5. FCN design elements imported into later BIT negotiations
6. FCNs set precedents for other broad trade/investment agreements like contemporary Free Trade Agreements (FTAs) with investment chapters

Essential elements of US BITs at start (1977-early 1980s)

- Reflective of rationales for Jay Treaty
- Grounded in David Ricardo's theory of comparative advantage as 'win-win'
- Not a trade facilitation agreement, designed to let free market work
- Designed to protect existing as well as prospective investment
- To be negotiated off a Model US text
- 'Take it or leave it' negotiating stance with respect to certain core investor rights
- Useful to affirm existing US laws and practice for free trade/capital flows
- Useful to serve as vehicle for export of 'rule of law' values
- Useful to reaffirm rules of CIL despite NIEO challenges
- Useful to add to CIL additional treaty protections for capital investors
- Comparable to European BIPAs but going beyond them in terms of some investor protections and level of detail and also to affirm ISDS as enforcement tool

US-Argentina BIT (negotiated 1991)

Art. I: Broad definition of protected “investment” and “associated activities”

Art. II: NT and MFN on entry and post-entry treatment subject to negotiated list of sectoral exceptions

Art. II(2)(a): FET as **autonomous** treaty right

Art. II(2)(a): Full protection and security

Art. II(2)(b): Bar on arbitrary or discriminatory treatment

Art. II(2)(c): Umbrella clause for “any obligation” entered into with regard to investments

Art. II(5): Ban on certain performance requirements

Art. II(6): Right to “effective means” to defend claims

Art. II(7): Duty make laws/regs/admin practices public

Art. IV(1):Hull Rule applied to direct/indirect expropriations, and also to measures “tantamount to expro”

Art. V(1): Unimpeded capital transfers

Art. X: Residual right to any more favorable treatment under national or international law (including CIL)

Art. VII: Unimpeded investor resort to ISDS, including ICSID as one option

Art. XI: Essential security exception for host state

Art. XIV: Limits on terminating the treaty

The 'Americanization' of the BIT Universe

Typical investor guarantees in IIAs (including US BITs prior to the NAFTA):

- NT and MFN post entry [US IIAs: for entry and post entry]
- Guarantees against “arbitrary” and/or “discriminatory” treatment
- Fair and Equitable Treatment (FET)
- Full Protection and Security (FPS)
- Prompt, Adequate and Effective Compensation for direct/indirect takings of property (expropriation)
- Unimpeded transfer of profits subject to limited exceptions
- Umbrella clauses/assurance of “effective means” of asserting rights
- Ban on certain performance requirements (e.g., export requirements)

All above principally enforced by investor-state dispute settlement (ISDS) at investors' option.

The Evolution of US IIAs Over Time

- North American Free Trade Agreement (US, Mexico, Canada)(NAFTA) (1994)
- US Model BIT 2004
- US Model BIT 2012
- United States, Mexico, Canada Agreement (USMCA)(negotiated 2018)



Examples of shrinking investor rights in US Model BITs 2004 (and 2012):

1. Shrinks the definition of protected or covered investments
2. Narrows MFN
3. Deletes the umbrella clause
4. Deletes the ban on 'arbitrary/non-discriminatory' treatment
5. Limits the meaning of FET and FPS to CIL

US Model BIT, 2004

Article 5:

(1) Each Party shall accord to covered investments treatment in accordance with customary international law, **including** fair and equitable treatment and full protection and security.

(2) For greater certainty, paragraph 1 prescribes the customary **international law minimum standard** of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” **do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.** The obligation in paragraph 1 to provide (a) “fair and equitable treatment” **includes the obligation not to deny justice** in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) “full protection and security” requires each Party to provide the level of **police protection** required under customary international law.

(3) A determination that there has been a **breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach** of this Article.

Shrinking Investor Rts in US Models of 2004 and 2012 (conti)

6. Deletes assurance of any more favorable rights
7. Deletes assurance of 'effective remedies'
8. Reduces scope of expropriation guarantee, e.g., introduces 3 factor test and broad public welfare exception for indirect takings
9. Limits on expro claims based on intellectual property
10. Limits on expro claims based on tax measures
11. Adds more explicit exceptions for state measures to protect labor/environment
12. Modifies ISDS in ways that may disfavor investor claimants
13. Enables state parties to issue binding interpretations of the treaty
14. Modifies 'essential security' or 'measures not precluded' exception

Modification of Essential Security exception

US Model BIT 2004

Article 18:

(1) Nothing in this Treaty shall be construed . . .

(2) to preclude a Party from applying measures **that it considers** necessary for 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.

Note: Shrinking investor rights and expanded host state defenses have spread to other IIAs not involving US as party: see, e.g., Investment Chapter of Comprehensive and Progressive Agreement for Transpacific Partnership (2018)(TPP-II) between 11 countries

USMCA (2018-2020), Investment Chapter

- **Generally tracks the shrinking investor rights found in US Model BITs of 2004/2012 but further narrows investor protections by:**
- By eliminating ISDA (after 3 years) as between US and Canada and narrowing its availability to govt contracts as between US and Mexico;
- Imposing further limits on ISDS as between US and Mexican investors by limiting substantive rights subject to ISDS to violations of NT/MFN/direct expro and by requiring exhaustion of local remedies for up to 30 months and where no more than 4 years have passed from the date of the breach;
- Affirming that states have an ‘inherent right to regulate’;
- Exempting local govt measures generally from investor rights such as NT and MFN;
- Suggesting that investors’ claims to that ‘legitimate expectations’ have been violated in cases of expro should be based on “binding written assurances.”