# Regulating under IIAs

## An analysis of the balance of the state's right to regulate and expropriation

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# Abstract

States or regions conclude IIAs to protect and promote foreign investments, among other things, by prohibiting states' from 'taking' or adopting measures equivalent to 'taking' the foreign investors' property, known as expropriation. However, the state needs regulatory space, but how much is unclear and controversial. The newly concluded EU and Singapore FTA and IPA are taking a new approach to the state's right to regulate and expropriation. This thesis describes and analyses the development of the balance between the 'state's right to regulate' and 'expropriation' from traditional BITs to the new IIAs. The methods used are the legal dogmatic method on the international and EU level. The main findings are the preambles inclusion of the state's right to regulate and references to sustainable development. Furthermore, the guide to interpretation in the annexes has similarities to the BIT case law. A developed version of the ISDS system shall enforce the new balance by being structured to increase transparency and independence in disputes. Overall, the new IIAs have given the contracting parties broader regulatory space.

**Keywords**: International investment agreements, the state's right to regulate, expropriation, sustainable development

# Foreword

I want to express my gratitude to my supervisor Johan Axhamn for his contribution and feedback on this thesis. Furthermore, I would like to thank all the teachers and students I have had the privilege to meet during this master's programme at Lund University.

# Abbreviations

| | |
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| BIT | Bilateral Investment Agreement |
| CJEU | Court of Justice of the European Union |
| EUSFTA | EU and Singapore Free Trade Agreement |
| FET | Fair and Equitable Treatment |
| GDP | Gross Domestic Product |
| ICS | Investment Court System |
| IIA | International Investment Agreement |
| IPA | Investment Protection Agreement |
| ISDS | Investor-to-State Dispute Settlement |
| SSDS | State-to-State Dispute Settlement |

# 1. Introduction

## 1.1 Background

Foreign investment creates long-term relations between countries and has increased in the last decades due to increased international economic integration, also known as globalisation.[1] International investment treaties (IIAs) are agreed upon between regions and states to promote and protect foreign investments.[2] IIAs is an umbrella term that includes different agreements depending on the purpose. One common type is bilateral investment treaties (BITs), which bind two parties.[3] In a concluded BIT or other IIA, the investors' domicile is the 'home state', and the country where the investment occurs is the 'host state'. Foreign investments can be a foreign direct investment (FDI) or foreign non-direct investment (hereinafter portfolio investment). FDI is when a foreign investor (hereinafter investor) organises or buys more than ten per cent of a judicial person in a country other than his domicile.[4] Portfolio investment is when an investor buys and holds less than ten per cent of the voting power of a judicial person.[5] Foreign investment provides the host state with capital inflow and spill-over effects such as knowledge, jobs, education, and technology transfers. In exchange, the host state provides the investor with a competitive position in the market, and some investors might enjoy beneficial tax rates or other regulations.[6]

[1] Organisation for Economic Co-operation and Development, 'Benchmark Definition of Foreign Direct Investment' (4th edn, 2008) 14. *See also,* Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law* (3rd edn, Hart Publishing 2018), 4.

[2] Jeswald Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 No 2 Harvard International Law Journal 427, 427.

[3] Kommerskollegium, 'Investeringsskyddsavtal (BITs) – så funkar de' (2013) [Investment protection (BITs) – how they work], 2.

[4] European Commission, 'Investment' (2022) <https://ec.europa.eu/trade/policy/accessing-markets/investment/> accessed 4 April 2022.

[5] Organisation for Economic Co-operation and Development, 'Benchmark Definition of Foreign Direct Investment' (4th edn, 2008) 67.

[6] ibid 14-15 42.

The general idea of BITs is to treat investors fairly under the fair and equitable treatment (FET)[7] principle and allow investors to sue the host state for breach of contract in investor-to-state dispute settlement (ISDS)[8]. Furthermore, it is prohibited for states to expropriate investments directly and indirectly. A direct expropriation is a formal transfer of the property from the investor to the state.[9] Indirect expropriation is when the host state adopts a measure or series of measures (hereinafter measures) that affect the economic value equivalent to what a direct expropriation does.[10] However, expropriation is lawful for measures aiming at the 'public interest', under the circumstances that the measures are non-discriminatory, in 'due process of law', and with 'fair' compensation to the investor.[11] At the same time, not all measures amount to expropriation, and such measures are therefore non-compensable.[12] Non-compensable measures have been regarding, for example, taxation and protection of health.[13] However, it is unclear where to draw the line between compensable and non-compensable measures since the circumstances play an essential role in the case-by-case evaluation.[14]

The investor desires high investment protection standards and desires compensation if the investment gets expropriated.[15] At the same time, the state needs regulatory space. However, the increase in measures under the 'public interest' is controversial. For instance, some stakeholders are demanding stricter regulations

[7] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Fair and Equitable Treatment' (2012) 1.

[8] Jeswald Salacuse, 'The Emerging Global Regime for Investment' (2010) Vol 51 No 2 Harvard International Law Journal 427, 446.

[9] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Fair and Equitable Treatment' (2012) 6.

[10] ibid.

[11] Jeswald Salacuse, 'The Emerging Global Regime for Investment' (2010) Vol 51 No 2 Harvard International Law Journal 427, 470.

[12] *Emanuel Too v Greater Modesto Insurance Associates and The United States of America,* Iran – United States Claims Tribunal (IUSCT) Case No 880 (award 29 December 1989) para 26. *See also, Saluka Investments B V v The Czech Republic,* United Nations Commission on International Trade Law (UNCITRAL) (partial award 17 Mars 2006) para 255.

[13] *Marvin Roy Feldman Karpa v the United Mexican States*, International Centre for Settlement of Investment Disputes (ICSID) Case No ARB(AF)/99/1 (English award 16 Dec 2002) para 103.

[14] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A (formerly Aguas Argentinas, S A, Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A) v Argentine Republic (II*), International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/19 (decision on liability 30 July 2010) para 134. *See also,* Noam Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) Vol 14 No 3 Manchester Journal of International Economic Law 318, 337.

[15] Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration' (2017) Vol 50 No 3 The International Lawyer 529, 531.

on sustainable development[16], at the same time, investors are increasingly suing states due to inter alia expropriation claims.[17] The traditional BITs do not give guidance on balancing the interests of the state and investors. Instead, they mainly focus on protecting the investor.[18]

Since the Lisbon Treaty, the EU has concluded comprehensive IIAs, which consider the state's right to regulate at a higher level than traditional BITs. Furthermore, non-economic values such as sustainable development shall be present in the new agreements.[19] One of the new IIAs is the EU and Singapore free trade agreement (EUSFTA)[20] together with the EU and Singapore investment protection agreement (IPA).[21] The agreements intend to improve the investment and trade conditions between the regions from the traditional BITs. As a result, the agreements have been referred to by the European Parliament as 'pathfinder' agreements.[22] The development from the BIT to the EUSFTA and IPA changes the balance between the state's right to regulate and expropriation. Therefore, states and investors need to understand the balance and the meaning of non-economic values to avoid disputes and financial expenses. Furthermore, this development can start a new era of investment protection.

[16] The Center for International Environmental Law, ClientEarth, and International Institute for Sustainable Development, 'Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate Change' (2022) 4.

[17] United Nations Conference on Trade and Development, 'Investor-State Dispute Settlement Cases: Facts and Figures 2020 - IIA issues note' <https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf> accessed 20 April 2022. *See also,* Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration' (2017) Vol 50 No 3 The International Lawyer 529, 531.

[18] Dilini Pathirana, 'Balancing Protection of Foreign Investments with the State's Right to Regulate in the Public Interest: A Sri Lankan Perspective' (2018) Vol 26 Sri Lanka Journal of International Law 103, 118.

[19] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (signed 13 Dec 2007), 200 /C 306/0. *See also,* the Comprehensive Economic and Trade Agreement is a free-trade agreement between Canada and the European Union (CETA) (signed 2016); the EU and Singapore FTA (entry into force 2019) and IPA (signed 2018); and the EU and Vietnam FTA (entry into force 2020).

[20] European Commission, 'The EU-Singapore Free Trade Agreement Enters into Force' (2019) 5.

[21] EU member states are currently ratifying the IPA.

[22] European Parliament, 'Resolution on Regional Free Trade Areas and Trade Strategy in the European Union' (2002/ 2044 (INI)), OJ C 68E (2003) para D.

## 1.2 Purpose and research questions

Against the background set out above in section one, the purpose of this thesis is to describe and analyse the development of the balance between the state's right to regulate and expropriation from traditional BITs to the EUSFTA and IPA. This purpose is achieved by answering the following questions:

1. How do the traditional BITs regulate the balance of the state's right to regulate and expropriation?
2. How do the EUSFTA and IPA regulate the balance of the state's right to regulate and expropriation?
3. How has the balance of the state's right to regulate and expropriation in the relevant BITs to the IIAs developed?

## 1.3 Delimitations

Due to the limit and purpose of this thesis, the content is delimited by not interpreting any relevant binding agreements in any other language than English, regardless of equal authority in the different versions.

## 1.4 Methods and materials

The 'legal dogmatic method' helps to answer this thesis's research questions that mainly concern the description, analysis, and systematisation of legal sources.[23] In addition, the types of sources used in this thesis require that more regional and sector-specific legal methods are applied when it comes to using these legal sources. The more specific methods applied in this thesis are the 'international legal method' and the 'EU legal method'. Therefore, applying the 'international legal method' and

[23] Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rethinking Legal Scholarship: A Transatlantic Dialogue (eds, van Gestel, Micklitz & Rubin, Cambridge University Press 2017) 207, s 5.3.

the ‘EU legal method’ constitutes integral parts of the legal dogmatic research in this thesis.

### 1.4.1 International legal method

Research questions one and two aim to describe and analyse investment agreements, such as BITs between European countries and Mexico and the FTA and IPA between the EU and Singapore. According to the United Nations Vienna Convention on the Law of Treaties, these agreements are ‘international agreement[s] concluded between states in written form and governed by international law’.[24] The interpretation of the included agreements needs to follow the rules on treaty interpretation set out in the Vienna Convention. This method can be referred to as the ‘international legal methodology’.[25] Therefore, the thesis describes the treaty texts by following the ‘general rule of interpretation’ in the Convention. Consequently, the interpretation of the treaty texts is done bona fide, in the context of the agreements and in the light of its object and purpose.[26] The treaty texts, preambles, and annexes in the relevant IIAs take authority when available.[27]

To further describe the treaty texts, it is relevant to include case law regarding the concepts of the state’s right to regulate and expropriation. There is no case law on the EUSFTA and IPA for research question two. However, there is case law for research questions one and three regarding the state’s right to regulate and expropriation in the traditional BITs. The included case law relates to various BITs and jurisdictions, and they are relevant for this thesis since the wording is equivalent in nearly all BITs.[28] Furthermore, some of the cases refer to the same old cases.

A selection of BITs is necessary to answer the first research questions since all BITs do not fit under the scope of this thesis. Furthermore, articles describe general

[24] United Nations ‘Vienna Convention on the Law of Treaties’ (Vienna 23 May 1969, entered into force on 27 January 1980) Art 2.1.a.

[25] Samantha Besson and Jean d’Aspremont, ‘The Sources of International Law: An Introduction’ (the Oxford Handbook of the Sources of International Law, Oxford University Press, 2018) 24.

[26] United Nations ‘Vienna Convention on the Law of Treaties’ (Vienna 23 May 1969, entered into force on 27 January 1980) Art 31.1.

[27] ibid Art 31.2.

[28] Sara Jamieson, ‘A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties’ (2012) Vol 53 South Texas Law Review 605P 615, 615.

known facts about BITs. The selection criterion of three BITs confirms that: A) They are the biggest economies in Europe. B) The BITs are between European and non-European countries. C) The BITs are in force. The size results in a more extensive representation of Europe, and the selection criteria rank countries after their gross domestic product (GDP) in 2021. BITs between European and non-European countries are more comparable to the EU and Singapore situation than two homogenous countries. The in-force criteria increase the relevance of how some investment conditions are in the year 2022.

One country that fitted these criteria was Mexico. Additionally to the selection criteria, this thesis author's home country is included out of personal interest. The four European countries with concluded BITs with Mexico are Germany, the United Kingdom, France, and Sweden.[29] To understand the negotiations of BITs, four model BITs are described, namely, Germany, the United Kingdom, Mexico, and Cambodia. Germany and the United Kingdom from the selection criteria as above. Mexico, since four of their BITs already are included. Lastly, Cambodia, since Singapore, another Asian country, is included.

To describe the development from BITs to EUSFTA and IPA and answer question two and three, all three agreement forms are described in this thesis. The thesis includes three 'old' Singapore BITs to describe the 'old' provisions on the state's right to regulate and expropriation. The same three significant European economies criterion as above are included, except Sweden since they do not have a BIT with Singapore. Finally, the EUSFTA and IPA are included as they shall be understood together and were originally intended to be one comprehensive agreement.

The selected material related to sustainable development is all atypical and non-binding sources. These documents are gathered by searching articles related to IIAs and sustainable development using related words to IIA and sustainable development on LUB-Search and Google Scholar. The selection criteria for these documents are that they shall provide information, non-legal perspectives, and statistics on sustainable development.

[29] Statista, 'Gross Domestic Product at Current Market Prices of Selected European Countries in 2021' <www.statista.com/statistics/685925/gdp-of-european-countries/> accessed 16 April 2022.

### 1.4.2 EU legal method

Relevant to this thesis are also sources of EU law, primarily to research question two as it concerns questions of the EU and its member states' competencies. EU law is a separate legal order within international law.[30] In this thesis, the relevant sources of EU law are the Treaty of the European Union[31] and the Treaty of the Functioning of the European Union[32]. In general, the EU legal method entails a systematic method of interpreting sources of EU law in a hierarchal order. Therefore, the highest authority relevant to this thesis is the binding treaties, international agreements, case law, and opinions of the Court of Justice of the European Union (CJEU). Non-binding sources of EU law follow the EU legal methods hierarchy and consist of preparatory work, communications, and doctrine.[33]

Regulations, opinions, communications, and other relevant EU material describe the development from BITs to the EUSFTA and IPA from an EU legal method perspective. However, some aspects of the material are international legal method. The comprehensive EUSFTA and IPA were separated due to the EU and its member states' competencies after the Lisbon Treatys amendment on the TEU and the TFEU.[34] The separation is described in section 3.4. In 2022, the FTA has been in force for one year and is therefore binding on Singapore and the EU member states. However, the IPA is not in force and has no binding effect. It was concluded at the EU level in 2019 and is currently being ratified by the EU member states.[35] The exact status of the IPA is currently unknown; however, it points to that it will enter into force in the coming years, and some minor adjustments might occur.

[30] Case 26/62, *Van Gend en Loos* (1963).

[31] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).

[32] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU).

[33] Jögren Hettne and Ida Otken Eriksson, *EU-rättslig metod – Teori och genomslag i svensk rättstillämpning* (Norstedts Juridik AB, 2011), 40.

[34] Opinion 2/15 para 243. *See also,* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.

[35] European Parliament, 'EU-Singapore Investment Protection Agreement (IPA)' Legislative train 03-2022 4 a stronger Europe in the world <www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-stronger-europe-in-the-world/file/eu-singapore-ipa> accessed 16 April 2022.

## 1.5 Structure

Chapter 2 relates mainly to question one. First, section 2.2 describes a brief history of IIAs and the idea of investment protection. Next, sections 2.3 and 2.4 generally describe the concepts of the state's right to regulate and expropriation (the relevant concepts). Next, section 2.5 describes the selected model BITs and their provisions on the relevant concepts. Next, section 2.6 describes the selected concluded BITs provisions on the relevant concepts. Finally, section 2.7 describes the case law of tribunals' interpretation of similar provisions and the relevant concepts.

Chapter 3 relates mainly to question two. First, section 3.2 describes Singapore as an investment destination and the importance of trade and investment between the EU and Singapore. Next, section 3.3 describes the provisions on the relevant concepts in Singapore's 'old' BITs. Next, section 3.4 describes the development and purpose of the EU and Singapore agreements. Finally, section 3.5 describes the provisions on the relevant concepts in the new IIAs and is the main section to answer question two.

Chapter 4 analyses all three research questions. First, section 4.1 analyses the relevant concepts in the traditional BITs. Next, section 4.2 analyses the relevant concepts in the EUSFTA and IPA. Finally, section 4.3 analyses the development of the balance of the related concepts from the BITs to the EUSFTA and IPA.

Chapter 5 concludes the previous chapters and the thesis by providing focused answers to the three research questions. Finally, the author's reflections and suggestions for future research are set out.

# 2. A brief history of IIAs and the general idea of the state's right to regulate and expropriation

## 2.1 Introduction

This chapter relates to research question one and will first give a brief history of the IIAs and investment protection. The following section 2.3 will generally describe the concepts of the state's right to regulate and section 2.4 expropriation. Next, section 2.5 presents an overview of the treaty texts on expropriation and the state's right to regulate in the model BITs used as a draft for negotiation. Next, section 2.5 will describe the state's right to regulate and expropriation in the concluded BITs. Finally, section 2.7 will describe how tribunals have interpreted the provisions on expropriation and the state's right to regulate.

## 2.2 A brief history of IIAs

Investment agreements have the purpose of protecting and promoting investment in foreign contracting countries. Likewise, property protection can be traced back to investment agreements in the eighteenth century.[36] Moving forward until the end of the second world war, attention to the treatment of foreign investment has increased. International standards and principles such as 'equitable treatment', 'most constant protection and security', and 'most favourable nation' became commonly used in agreements.[37] At the same time, some developing counties prohibited new foreign investments and expropriated the existing ones.[38] Between

[36] Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U C Davis Journal of International Law and Policy 157, 158.

[37] ibid 163.

[38] ibid 166.

the sixties and the seventies, there were over 800 cases of expropriation globally. Some of the reasons were socialism and increased state sovereignty without compensation rules.[39] The regulation on expropriation then developed in the seventies in the Charter of Economic Rights and Duties of States, which regulates that the state should pay 'appropriate compensation' to the investor in case of expropriation.[40] With this history, BITs became popular with the driving force from developed countries that wanted investment protection.[41] Furthermore, the BITs increased due to the expanding market ideology and the strategy of using FDI as a capital-inflow source in the eighties.[42] At this time, there were many BITs with the already established principles, but now additional provisions on expropriation and dispute settlements were added.[43] The provisions on expropriation in the BITs regulate that it is prohibited to expropriate unless it is for a public purpose and the investor is paid compensation at a 'fair market value'.[44] The provisions on dispute settlement allowed investors to sue the host state.[45] During the nineties, trade agreements with investment provisions between countries and regions started increasing due to the view that trade and investments are complements of each other.[46] The development of IIAs in the 21st century has come to a mixture of BITs, multilateral investment treaties, and regional agreements between all countries and not only between developed and developing countries.[47] Furthermore, IIAs have become an instrument of investment liberalisation and global economic integration.[48]

The latest developments in IIAs are the alignment of FDI to boost sustainable development. It would work best if the state's regulatory space is broader for inter alia environmental provisions. How the wordings in new IIAs will be interpreted is still unclear. However, it is becoming more common to refer to sustainable

[39] ibid 166-167.

[40] Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX, 1974) Art 2.2.C.
Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U C Davis Journal of International Law and Policy 157, 168-169 171.

[42] ibid 177.

[43] ibid 179.

[44] ibid 171.

[45] ibid 173.

[46] ibid 180.

[47] ibid 182.

[48] ibid 183.

development in IIAs.[49] Sustainability regulations could further limit unjustified damaging environmental effects by investors, even if it could lead to indirect expropriation.[50] In the EU, BITs between EU member states (intra-EU BITs) were non-compatible with EU law due to the established exclusive competence of the EU.[51] In 2020, the agreement to terminate intra-EU BITs was signed by the member states.[52] However, BITs between EU member states and non-EU member states (extra-EU BITs) are still in force.[53] Furthermore, the EU is currently concluding new agreements, such as the EUSFTA and IPA, which together are supposed to be a 'pathfinder' agreement.[54]

In nearly all BITs, provisions on expropriation are included. The provisions prohibit the contracting states from expropriating foreign investors' property except for measures that are in the public purpose and non-discriminatory in due process of law. Furthermore, the investor must be compensated, and the situation is open for judicial review.[55] Foreign investments shall be protected. At the same time, the states must have some extent of regulatory space.[56] There are still questions on how to balance these concepts. Globally, investment disputes have been raised due to expropriation from everything from smaller tax measures[57] to financial crisis's, war, and political instability. The wide range of situations makes the concepts hard

[49] Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey', (OECD Working Papers on International Investment 2011) 6.

[50] Lise Johnson, Lisa Sachs, and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) Colombia Journal of Transnational Law 58, 94. *See also,* Lorenzo Cotula, 'Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) Vol 24 No 3 The Review of European, Comparative & International Environmental Law 278, 278.

[51] European Commission, 'Press Release of 15 June 2015, Commission asks Member States to terminate their intra-EU bilateral investment treaties'.

[52] European Union, 'Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union' (2020) OJ L 169.

[53] United Nations Commission on International Trade Law, 'Investment Policy Hub - BITs in force globally' <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> accessed 18 April 2022.

[54] European Commission, 'The EU-Singapore Free Trade Agreement Enters into Force' (2019) 5.

[55] Sara Jamieson, 'A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties' (2012) Vol 53 South Texas Law Review 605P 615, 615.

[56] ibid.

[57] *Marvin Roy Feldman Karpa v the United Mexican States,* The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB(AF)/99/1) (English award 16 Dec 2002) para 103.

to balance.[58] However, many countries have developed a model BIT that they use in negotiations.[59]

## 2.3 The state's right to regulate in general

As explained above, states agree to BITs to inter alia attract capital. However, they still need regulatory space to develop their country. Therefore, states can regulate under the 'normal exercise of the state's regulatory powers'.[60] There is an increasing pressure on states to regulate sustainable development,[61] at the same time, the amount of ISDS cases claiming expropriation is increasing.[62] In international customary law, host states have a right to develop their legislation without being liable for compensation. Non-compensational state measures are those measures that are concluded not to be subject to indirect expropriation under the doctrine of 'police powers'.[63] The doctrine has been concluded to be a principle in customary law. The tribunal in *Sedco in Iran v. the United States* concluded that 'a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted *police power* of states.'[64] This approach is followed in *Saluka v. Czechoslovakia* and expressed that state regulations are not compensable if it is 'in the *normal exercise of their regulatory powers*, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.'[65]

As generally stated in IIAs, the compensable measures must be non-discriminatory, in 'due process of law', and in the 'public welfare objectives', such as for the 'public

[58] Sara Jamieson, 'A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties' (2012) Vol 53 South Texas Law Review 605P 615, 629.

[59] ibid 630.

[60] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements: Expropriation' (2011) 139.

[61] *Inter alia* United Nations, 'Agenda 2030' (2015).

[62] United Nations Conference on Trade and Development, 'Investor-State Dispute Settlement Cases: Facts and Figures 2020 - IIA Issues Note' (2021) 1.

[63] Suzy H. Nikièma, 'Best Practices: Indirect Expropriation' (2012) International Institute for Sustainable Development, 3.

[64] *Sedco, Incorporated v National Iranian Oil Company and The Islamic Republic of Iran,* Iran – United States Claims Tribunal (IUSCT) Case Nos 128 and 129 (interlocutory award 17 September 1985) para 90 (emphasis added).

[65] *Saluka Investments B V v The Czech Republic,* the United Nations Commission on International Trade Law (UNCITRAL) (partial award 17 Mars 2006) para 255 (emphasis added).

health, safety, and for the environment'.[66] The non-compensable 'police power' and 'normal exercise of the state's regulatory powers' doctrine is broad since it is unclear what it can include. However, there is consensus that the doctrine at least includes taxation, protection of health, morals, and the public order.[67] Furthermore, the measures must be done bona fide and be proportional to be non-compensable.[68] The measure must be evaluated in its context, intent, and extent and should not be an escape for states to avoid the responsibility of their agreements.[69] However, if there is suspicion of misuse of power, it raises questions if there were an expropriation. The suspicion increase if only specific individuals or businesses are affected.[70]

When IIAs bind a state, it limits the possibility of regulation, which is otherwise essential for sustainable development. Nevertheless, the need for regulatory development is constant, especially in developing countries where provisions on everything from taxation to human rights and the environment have room for improvement.[71] However, the risk is that IIA-bound states are afraid of being liable for compensation which might hinder 'public interest' measures.[72] The positive effects of capital inflow from FDI might outweigh the risk the states faces.[73] Some argue that IIAs in general needs to be updated to meet the needs and goals of the world today.[74]

[66] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 86. *See also,* Australia and the United States BIT (2004) annex 11-B 4.B.

[67] Noam Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) Vol 14 No 3 Manchester Journal of International Economic Law 318, 337.

[68] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 88.

[69] ibid 92-93.

[70] ibid 94.

[71] Lise Johnson, Lisa Sachs, and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) Colombia Journal of Transnational Law 58, 94-95.

[72] ibid 104.

[73] ibid 105.

[74] ibid 119.

## 2.4 Expropriation in general

As stated above, the uncertainty of foreign investors is one of the reasons that BITs came into play. The BITs are a way for states to increase investor trust towards the host state and their legal system. One part of the 'trust' are provisions that prohibit expropriation.[75] Expropriation (also known as nationalisation and dispossession) can be direct or indirect. Expropriation can be lawful if specific legal requirements are met; otherwise, it is unlawful.[76] The definition of the concept of direct expropriation is a 'formal transfer of title and outright seizure'.[77] In other words, the property is either legally or physically transferred or seized by the state and generally benefits the state. However, this type of expropriation is uncommon today.[78]

The definition of indirect expropriation is a more complex concept vis-à-vis direct expropriation. It also has a closer connection to the state's right to regulate.[79] The definition of indirect expropriation is when the result of a state's measure gives the investor a similar effect as a direct expropriation, that is, losing all or near all economic value without a change in ownership.[80] In *Starrett v. Iran*, the tribunal argues that indirect expropriation can result from measures taken by the state. The tribunal argued that the investor's property could be 'rendered so useless that they [the property] must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.'[81] Tribunals have evaluated indirect expropriation by the 'sole effect doctrine', which focuses on the wording 'equivalent', 'similar', or 'tantamount' to expropriation. That means that the effect

[75] Sara Jamieson, 'A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties' (2012) Vol 53 South Texas Law Review 605P 615, 615.

[76] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 139.

[77] ibid 127.

[78] ibid 7.

[79] Lorenzo Cotula, Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) Vol 24 No 3 The Review of European, Comparative & International Environmental Law 278, 278.

[80] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 127.

[81] *Starrett Housing Corporation, Starrett Systems, Incorporated and others v the Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, Iran – United States Claims Tribunal (IUSCT) Case No 24 (interlocutory award 19 Dec 1983) para 66.

on the economic value of measures is the central aspect of the evaluation and not the state's intention.[82]

During expropriation claims, the court must assess if the measure was lawful or not. If it was a lawful expropriation, the investor must be 'appropriate' compensated, which is worded differently depending on where it appears, but have a similar meaning.[83] In modern treaties, the provision state that the compensation must be at a 'fair market value'. The intention is to avoid interpretations that give less than a 'fair market value'.[84] An unlawful measure by the state is regulated in customary international law and obliges full reparation to the investor in both moral and material aspects.[85] The state is obliged to restore the situation; it could be to give back the property and compensate for the investor's troubles. However, it is more common for practical reasons to give an economic compensation to the investor.[86] Compensation for a lawful expropriation or reparation for an unlawful expropriation must be valued accordingly. To decrease the uncertainty about the value before the expropriation, tribunals usually appoint experts to evaluate the value.[87] Some methods that have been used are the following: discounted cash flow value, liquidation value, replacement value, and book value.[88] The evaluation of expropriation has many aspects to consider. Some of the aspects are whether the measures resulted in direct or indirect expropriation and whether the expropriation was lawful.[89]

[82] Suzy H. Nikièma, 'Best Practices: Indirect Expropriation' (2012) International Institute for Sustainable Development, 3.

[83] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation', 111.

[84] ibid.

[85] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Art 31.

[86] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 113.

[87] World Bank, 'Guidelines on the Treatment of Foreign Direct Investment' (1992), Ch 4 paras 1-5.

[88] ibid Ch 4 para 6.

[89] Suzy H. Nikièma, 'Best Practices: Indirect Expropriation' (2012) International Institute for Sustainable Development, 4.

## 2.5 Model BITs provisions on the state's right to regulate and expropriation

The provisions on the state's right to regulate and expropriation in nearly all BITs are similar.[90] Four model BITs are included in this thesis to describe the provisions, namely the model BITs of Germany, France, the United Kingdom, and Cambodia. The preamble in the model BITs suggests that it is an agreement for the promotion and protection of investments. The suggested preamble continues that the agreement aims to improve the 'economic cooperation' and create 'favourable' investment conditions in the contracting states. Notable, the Cambodia model BIT aims to have 'friendly and cooperative relations' with the contracting states.

The suggested provision on expropriation includes different terms to explain the prohibition of expropriation. The provisions start with that 'neither contracting' 'state' or 'party', 'may'[91] or 'shall'[92] 'expropriate'. The sentence explains that expropriation can be 'direct' and 'indirect'. It continues that expropriation and 'nationalisation' are comparable concepts; the France model BIT also mentions 'dispossession' as a similar concept. The final concept is 'other' or 'any' measures with 'equivalent' effects or are 'tantamount' to direct expropriation.

The exception for expropriation in the model BITs is for the public 'interest'[93], 'purpose'[94], or 'benefit'[95], which supposedly have the same meaning. Furthermore, the measures must be non-discriminatory and in 'accordance with due process of law'. Another aspect is the compensation to the investor, it shall be 'equivalent' to the 'value'[96] or the 'fair market value'[97] or 'prompt and adequate'[98] compensation. The compensation valuation shall be based on the date before the expropriation and the publicly known. In addition, the valuation shall be based on the 'going concern value, asset value including declared tax value of tangible property', and other

[90] ibid 615.
[91] German model BIT Art 4.2. *See also,* Mexico model BIT Art 6.1.
[92] France model BIT Art 6.2. *See also,* Cambodia model BIT Art 4.
[93] France model BIT Art 6.2.
[94] Mexico model BIT Art 6.1.a.
[95] Germany model BIT Art 4.2.
[96] ibid.
[97] Mexico model BIT Art 6.2.
[98] France model BIT Art 6.2. *See also,* Cambodia model BIT Art 4.c.

appropriate criteria to set the value.[99] Alternatively, in 'internationally acknowledged practices and methods' to determine the value.[100]

## 2.6 Concluded BITs provisions on the state's right to regulate and expropriation

In the concluded BITs between Mexico and Germany, France, the United Kingdom, and Sweden, the purpose is to protect and promote investments. In the preambles, it is stated that the agreement's purpose is to improve the economic cooperation between the contracting states and create 'favourable' investment conditions. The provision on expropriation state that 'either Contracting Party shall not' expropriate directly or indirectly. In the same sentences, 'nationalisation'[101] is mentioned as a similar concept. Expropriation can also be assessed through measures having an effect 'similar'[102], 'equivalent'[103], or 'tantamount'[104] to expropriation.

The state's right to regulate is provided as an exception to expropriation. The measures are allowed to be expropriating an investment under the concept public 'purpose'[105], or 'interest'[106]. The 'public purpose' also states that the measures shall be non-discriminatory and 'in accordance with due process of law'[107], and that the investor shall be compensated. Compensation shall be valuated at a 'fair market value' before the expropriation and before it was publicly known.[108] The valuation shall be based on the 'going concern value, asset value including declared tax value

[99] Mexico model BIT Art, 6.2.a

[100] Cambodia model BIT Art 4.c.

[101] Sweden and Mexico BIT Art 4.1. *See also,* the United Kingdom and Mexico BIT Art 7.1.

[102] France and Mexico BIT Art 5.1.i.

[103] Germany and Mexico Art 4.1. *See also,* the United Kingdom and Mexico BIT Art 7.1.

[104] Sweden and Mexico BIT Art 4.1.

[105] The United Kingdom and Mexico BIT Art 5.1.i; Germany and Mexico BIT Art 4.1; Sweden and Mexico BIT Art 4.1.a.

[106] France and Mexico BIT Art 5.1.i.

[107] Germany and Mexico BIT Art 4; the United Kingdom and Mexico BIT Art 7; France and Mexico BIT Art 5; Sweden and Mexico BIT Art 4.

[108] Germany and Mexico BIT Art 4.2; the United Kingdom and Mexico BIT Art 7.2; France and Mexico BIT Art 5.2; Sweden and Mexico BIT Art 4.2.

of tangible property', and other appropriate criteria. Lastly, the claim of expropriation and compensation shall be open for judicial review.[109]

## 2.7 Case law on the state's right to regulate and expropriation in BITs

An early statement on the state's right to regulate and their liability to compensate were concluded in *Emmanuel Too v. the United States*:

> [A] State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[110]

Following the same approach, the tribunal in *Saluka v. Czechoslovakia* concluded that 'States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.'[111]

Tribunals refer to the 'general welfare' with different wordings, for example, 'public interest'. In *James v. the United Kingdom*, it was concluded that the 'taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'.'[112] The court concluded that 'legitimate social, economic, or other policies' can be why a state results in 'taking' an investor's property for the 'public interest'. However, the 'community at large' does not have to be its beneficiaries.[113] Measures under the 'public interest' must have a proportionate effect on the investment, and if the effect

[109] The United Kingdom and Mexico BIT Art 7.3. *See also,* Germany and Mexico BIT Art 4.2.

[110] *Emanuel Too v Greater Modesto Insurance Associates and the United States of America*, Iran–United States Claims Tribunal (IUSCT) Case No 880 (award 29 December 1989) para 26.

[111] *Saluka Investments B V v The Czech Republic*, the United Nations Commission on International Trade Law (UNCITRAL) (partial award 17 March 2006) para 255.

[112] *James and others v the United Kingdom*, European Convention on Human Rights (ECHR) Application No 8793/79 (21 February 1986) para 41.

[113] ibid para 45.

brings an 'individual and excessive burden', the measure will be disproportionate. Furthermore, a 'fair balance' must exist between 'general interests' and 'individual fundamental rights'.[114] The tribunal in *Affiliate v. Hungary* discussed the limit of a state's right to regulate. They stated that 'a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries.' They continued that when a state agrees to a BIT, they cannot view the concept of a 'state's right to regulate' as an escape from responsibilities.[115]

The state's right to regulate was discussed in *Feldman v. Mexico*.[116] The tribunal argued that governments should be free to regulate, for example, taxes, access to infrastructure, and material, even if some measures will amount to expropriation. However, the tribunal continues that the host state's right to regulate in 'broader public interest' is a challenge if they fear investor claims as soon as businesses are 'adversely affected'. The tribunal refers inter alia to sustainability regulations.[117]

Environmental concerns and expropriation were discussed in *Tecmed v. Mexico*. The tribunal evaluated if refusing a licence renewal due to environmental concerns is 'proportional to the public interest'. Furthermore, if 'such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.'[118] The tribunal concluded that it was a case of expropriation.[119] The tribunal came to this decision based on the European Court of Human Rights definition of proportionality: an investor has been 'deprived' of the investment 'on the facts as well as in principle'. Moreover, state measures in the 'public interest' with a 'legitimate aim', need a 'reasonable' link between the actual measures and aim.[120] The evidence for damaging the 'environment or public health' was not found. Therefore, the argument that it was 'real crisis or disaster of great proportions' was disregarded.

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[114] ibid para 50.

[115] *ADC Affiliate v Hungary*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/16 (award 2 October 2006) para 423.

[116] *Marvin Roy Feldman Karpa v the United Mexican States*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB(AF)/99/1) (English award 16 Dec 2002) para 103.

[117] ibid.

[118] *Tecnicas Medioambientales Tecmed S A v the United Mexican States*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB (AF)/00/2 (award 29 May 2003) para 122.

[119] ibid para 151.

[120] ibid para 122.

The investors were promised relocation of the investment, but the permit did not get renewed due to environmental concerns.[121] Based on relevant facts of the case, the effect of the state's measures amounted to indirect expropriation in favour of the investor.[122]

The proportionality test in *Tecmed v. Mexico* has been guiding other tribunals. For example, in *Azurix v. Argentina*, the tribunal found that the state's measures did not 'sufficiently' affect the investment to be deemed expropriatory.[123] A similar proportionality test is followed in *El Paso v. Argentina* where the tribunal argues that general state regulations are not automatically expropriation. However, if they are 'unreasonable' and results in a 'neutralisation of the investment', they can be subject to expropriation.[124] In *Suez v. Argentina*, the respondent's measures during their financial crisis brought investor disputes. During the evaluation of expropriation, the tribunal stated that they 'will have to determine whether they [the measures] effected a substantial, permanent deprivation of the Claimants' investments or the enjoyment of those investments' economic benefits' The measures were not deemed to be permanent.[125]

Another case that discussed environmental protection is *Santa Elena v. Costa Rica*, where investors got their property expropriated due to 'conservationists objectives'.[126] The tribunal held that '[e]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies (…)' and compensation must be paid to the investor.[127] The tribunal concluded that it was a case of direct expropriation.

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[121] ibid paras 96 144–145.

[122] ibid para 151.

[123] *Azurix Corporation v The Argentine Republic*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/01/12 (award 14 July 2006) paras 311 312 322.

[124] *El Paso Energy International Company v The Argentine Republic*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/15 (award 31 October 2011) paras 233-234 752.

[125] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A (formerly Aguas Argentinas, S A, Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A) v Argentine Republic (II)*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/19 (decision on liability 30 July 2010) para 134.

[126] It shall be noted that there were no BITs in force, and it mainly related to the valuation of the property. However, the discussion on balancing environmental and investment protection is of interest.

[127] *Compañia del Desarrollo de Santa Elena S A v Republic of Costa Rica*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/96/1 (award 17 February 2000) para 72.

In *Gemplus v. Mexico*, expropriation claims were raised due to state measures. Therefore, the claimants claimed that the respondent has failed inter alia its obligation not to hinder the 'management, maintenance, use, enjoyment, or order of such investments'. These measures were argued to have an 'equivalent effect' to direct expropriation and 'deprived the use and enjoyment' of the investment.[128] The primary measure in the claim was argued to have caused direct expropriation without 'just cause' or compensation since the 'totality of their control, economic use and enjoyment of their investment' disappeared.[129]

The claimants build their case on the definition of indirect expropriation of older awards. One definition comes from *Starrett Housing v. the United States*:

> [I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[130]

Furthermore, a similar argument is put forward in *Tippetts v. the United States*, where the conduct of a government-selected manager, and not the selection itself, resulted in an indirect expropriation. The tribunal noted that a 'deprivation', rather than a 'taking', of a property could be the case if the state hinders the 'use' and 'enjoyment of its benefits' of the property without any change of ownership. Furthermore, the case focused on the 'sole effect doctrine', which concentrates on the actual economic effect of the investment, rather than the intention of the state's measures.[131] The 'sole effect doctrine' was followed in *Metaclad v. Mexico*, where the tribunal added that they do not need to consider the state's intention or if the state benefited from the 'expropriation'.[132]

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[128] ibid para 8–4 290.

[129] ibid para 8–4, 291.

[130] ibid para 8–5, 294. *See also, Starrett Housing Corporation, Starrett Systems, Incorporated and others v the Government of the Islamic Republic of Iran, Bank Markazi Iran and others,* Iran – United States Claims Tribunal (IUSCT) Case No 24 (interlocutory award 19 December 1983) para 66.

[131] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran,* Iran – United States Claims Tribunal (IUSCT) Case No 7 (award June 1984) paras 225-226.

[132] *Metalclad Corporation v Mexico,* The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB (AF)/97/1 (English award 30 August 2000) paras 111 103.

Back to *Gemplus v. Mexico*, the respondent responded that the measures were bona fide, in the 'light of the public opposition' and that there was no 'interference'.[133] However, the tribunal concluded that the state had 'deliberately deprived' the possibility for the investor to use the investment in 'any meaningful way'. Furthermore, the main measures were concluded to be a result of direct expropriation as the measures 'deliberately' removed the investment from the investor.[134] It is also relevant to evaluate the duration of the effect as the tribunal argued in *LG&E v. Argentina*, 'the expropriation must be permanent, that is to say, it cannot have a temporary nature.'[135]

## 2.8 Summary

Investment protection traces back to agreements in the eighteenth century. Expropriation has been a historical issue, and especially the developed countries have encouraged more vital protection of expropriation under BITs. Therefore, there are now provisions on compensation to the investor. However, the state's right to regulate is needed for the country to develop and adapt to new situations. Under the 'normal exercise of the state's regulatory powers, the state can adopt measures without being liable for compensation. However, if the measures are suspected of misusing power or specific individuals or businesses are affected, it could be a case of expropriation. Expropriation in its broad form is when the state transfers the title of ownership from the investor to the state or takes measures that have an equivalent effect on the economic value of the investment as a direct expropriation would have.

Both the model and the concluded BITs provide a preamble that mainly aims at improving the economic cooperation and the investment conditions in the contracting states. In all included BITs they mention that 'neither party shall' directly or indirectly expropriate. Under the 'public interest', the exception is non-

[133] *Gemplus, S A, SLP, S A and Gemplus Industrial, S A de C V v the United Mexican States*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB(AF)/04/3 (English award 16 June 2010) paras 8-15 – 8-22.

[134] ibid para 8-27.

[135] *LG&E Energy Corporation, LG&E Capital Corporation, and LG&E International, Incorporated v Argentine Republic*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/02/1 (decision on liability 3 October 2006) para 193.

discriminatory measures against compensation at a 'fair market value' and in 'due process of law'. The state's right to regulate is not further mentioned in the BITs.

The tribunals' evaluation of expropriation in claims by investors have paid attention to inter alia: A) The extent of interference by the state.[136] B) The purpose and context of the measures.[137] And C) the proportionality of the measures.[138] Furthermore, the extent of the measure must 'have its boundaries', and many claims have been concluded expropriatory. It shall be noted that the evaluation is conducted on a case-by-case basis, and the concept of indirect expropriation is still evolving.

[136] *Starrett Housing Corporation, Starrett Systems, Incorporated and others v the Government of the Islamic Republic of Iran, Bank Markazi Iran and others,* Iran – United States Claims Tribunal (IUSCT) Case No 24 (interlocutory award 19 December 1983) para 66.

[137] *Gemplus, S A, SLP, S A and Gemplus Industrial, S A de C V v the United Mexican States,* The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB(AF)/04/3 (English award 16 June 2010) paras 8-15 – 8-22.

[138] *James and others v the United Kingdom*, European Convention on Human Rights (ECHR) Application No 8793/79 (21 Febuary 1986) para 41. *See also, Tecnicas Medioambientales Tecmed S A, v The United Mexican States*, International Centre for Settlement of Investment Disputes (ICSID) Case No ARB (AF)/00/2 (award 29 May 2003) 96 144–145. *See also, Azurix Corporation v The Argentine Republic*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/01/12 (award 14 July 2006) paras 311 312 322. *See also, El Paso Energy International Company v The Argentine Republic*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/15 (award 31 October 2011) paras 233-234 752.

# 3. The developing investment conditions between European countries and Singapore

## 3.1 Introduction

This chapter relates to research question two and will first describe Singapore as a destination for investment and trade. Next, in section 3.3, the provisions on the state's right to regulate and expropriation in the 'old' Singapore BITs will be described. Next, in section 3.5, the development of the EUSFTA and IPA will be described together with competence questions, proposed provisions, and the aims of the new agreements. Finally, in section 3.6, the provisions on expropriation and the state's right to regulate will be described in the EUSFTA and IPA.

## 3.2 Singapore as an investment destination

Singapore has a significant portion of its GDP coming from FDI inflow. In 2020, FDI inflow was 25 per cent of their GDP vis-à-vis 16 per cent in the year 2000.[139] In current US dollars, their FDI inflow in 2020 amounted to $87 billion vis-à-vis $15 billion in 2000.[140] This history could be one of the reasons that the EU has paid attention to Asia by inter alia developing the new EUSFTA and IPA. However, the development could also result from the increase in investment disputes and the

[139] The World Bank, 'Foreign direct investment, net inflows (% of GDP) – Singapore' (2022) <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2020&locations=SG&start=1970&view=chart> accessed 12 April 2022.

[140] The World Bank, 'Foreign direct investment, net inflows (BoP, current US$) – Singapore' (2022) <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2020&locations=SG&start=1970&view=chart> accessed 12 April 2022.

financial cost it brings.[141] From Singapore's perspective, it must use its position in the market to develop and improve the issues of waste, energy, and efficiency.[142] From a business perspective, Singapore has a tactical position in Asia with its port that holds the title of the second biggest container port in the world.[143] Furthermore, Singapore has attractive tax rates, which are beneficial for foreign investors. Singapore's corporate tax rate is 17 per cent. Property tax ranges from zero to 20 per cent, depending on the usage classification. Finally, there is no capital gains tax, no transfer tax, no net worth tax, and no inheritance tax.[144]

Singapore is a member of a cooperation and a gathering of southeast Asian nations, namely, the Association of Southeast Asian Nations.[145] The association includes Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.[146] The Association of Southeast Asian Nations region is one of the EU's priorities for future economic growth and inter alia sustainable development goals.[147] Singapore is the EU's 14th largest trading partner and the sixth most desired destination for FDI by EU member states.[148]

## 3.3 The 'old' provisions on the state's right to regulate and expropriation in Singapore BITs

The following BITs are still in force but will be terminated and replaced with the EUSFTA and IPA. However, investments made before the IPA comes into force are bound by the 'sunset clause'. A sunset clause means that the treaties have an

[141] United Nations Conference on Trade and Development, 'Investor-State Dispute Settlement Cases: Facts and Figures 2020' <https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf> accessed 20 April 2022.

[142] The Singapore Green Plan 2030, 'Key Focus Areas' (2022) <www.greenplan.gov.sg/key-focus-areas/key-targets> accessed 19 April 2022.

[143] World Shipping Council, 'The Top 50 Container Ports' (2022) <www.worldshipping.org/top-50-ports> accessed 4 May 2022.

[144] Deloitte, 'International Tax: Singapore Highlights' (2021) 4 13 <www2.deloitte.com/content/dam/Deloitte/sg/Documents/tax/sg-tax-international-tax-singapore-highlights-2021.pdf> accessed 4 May 2022.

[145] Association of Southeast Asian Nations, 'About ASEAN' (2022) <https://asean.org/about-us> accessed 10 April 2022.

[146] ibid 'ASEAN Member States'

[147] European Commission, 'Asia and the Pacific, Regional Multi-Annual Indicative Programme 2021-2027' (2021) 2.

[148] European Commission 'How big is the Singaporean market? How much Trade does the EU do with Singapore?' (2022).

extended time in force after being terminated.[149] These current provisions on expropriation and the state's right to regulate will bring light to the development of newer agreements. The included BITs with Singapore are Germany, the United Kingdom, and France.

The BITs with Singapore are introduced with the preamble that the agreements purpose is the promotion and protection of investments. Furthermore, the purpose is to strengthen economic relations and improve investment conditions. Expropriation is prohibited in the contracting states. The articles regulate the prohibition of direct expropriation and measures having 'equivalent' effect. However, the Germany and Singapore BIT only prohibited direct expropriation but later included the prohibition on expropriation resulting from 'acts of sovereign power' (indirect expropriation).

The exception to expropriation is measures for the public 'purpose'[150], or 'benefit'[151]. The criteria for a lawful expropriation under the 'public interest' and similar wording are when they are non-discriminatory and against compensation. The compensation shall be 'prompt, adequate, and effective' at a 'market value' before the expropriation and the public knowledge. The state's right to regulate is not further mentioned in the BITs. The sunset clauses range from 10 to 20 years.

## 3.4 The development of the EUSFTA and IPA

The Lisbon Treaty gave the EU 'full legal personality' in 2009 and gave new investment powers to the EU.[152] The EU used these powers under the negotiation with Singapore on an FTA that began in 2010. A year later, the EU started negotiating investment provisions within the FTA. The two main aims were to create excellent access for EU operators in Singapore and develop an agreement

[149] European Parliament, 'Sunset Clauses in International Law and their Consequences for EU Law' Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies (2022), 10.

[150] The United Kingdom and Singapore BIT (1975), *See also,* the France and Singapore BIT (1975).

[151] Germany and Singapore BIT (1976).

[152] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed 13 December 2007, 200 /C 306/0. *See also,* Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 31-38.

that is more beneficial to Singapore than their other FTAs. This new FTA is said to influence developments in other agreements.[153] The IIA situation in the EU is developing. Intra-EU BITs have been terminated since they have been incompatible with EU law.[154] However, extra-EU BITs are still in force between EU member states and non-EU member states.[155] The EU is now concluding additional treaties with non-EU member states with investment provisions, including extended provisions on sustainable development compared to the traditional BITs.[156]

When setting the standard for the new agreements, non-discrimination has been one of the main aspects. Furthermore, the FET principle and 'full protection and security protection' have also been one of the main aspects in new agreements. Regarding expropriation, the Commission has stated that the new agreements and provisions must be more precise vis-à-vis the old BITs on the balance of the state's right to regulate and expropriation. Furthermore, it is stated that the protection of the environment, human health and rights, and related development objectives should not be limited in newer agreements.[157]

The EU and Singapore negotiations continued until 2014. Then, the Commission asked for an opinion of the Court of Justice of the European Union (CJEU) on the competence questions in the FTA. The CJEU stated that the proposed EUSFTA was not a wholly EU exclusive competence.[158] In the proposed FTA, the EU has exclusive competence on FDI, all trade matters, intellectual property, public procurement, market access, sustainable development related to trade, state-to-state dispute settlement (SSDS), and termination of BIT provisions on the named

[153] Regulation (EU) 2018/196 OJ L 044. *See also,* COM 195 final [2018] 7.

[154] European Union, 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' (2020). *See also,* European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (2020)

[155] Case C-284/16 *Achema* [2018]. *See also,* Quentin Declève, 'Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements' (2019) Vol 4 No 1 European Papers 99, 100. *See also,* United Nations Conference on Trade and Development Investment Policy Hub, 'Most recent IIAs' (2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 5 April 2022.

[156] United Nations Conference on Trade and Development Investment Policy Hub, 'EU Treaties with Investment Provisions' (2022) <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union-> accessed 5 April 2022.

[157] COM 343 final [2010] 9.

[158] Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) Vol 14 No 1 European Constitutional Law Review 231, 263.

matters.[159] The two matters in the proposed FTA which fell under shared competence were portfolio investment and ISDS.[160] The proposed FTA would therefore be concluded as a 'mixed agreement'.[161] The EU and Singapore split the comprehensive agreement into two agreements to separate the competencies, namely the EUSFTA and the IPA. After the split, the EUSFTA is an EU exclusive competence. The IPA is a shared competence between the EU and its member states on dispute resolution and investment protection.

The IPA will keep the protection of investments that the old BITs did. However, in a way that improves the way, primarily Singapore can regulate and develop 'legitimate public policy objectives'. Further provisions in the IPA which fell under shared competence were portfolio investment[162], ISDS[163], and SSDS.[164] The ISDS will be the new investment court system (ICS) that shall increase transparency and independence.[165] Those parts, together with other provisions, were gathered in the IPA.[166] The other provisions in the IPA are on regulatory measures[167], national treatment[168], the standard of treatment (FET principle)[169], compensation[170], expropriation[171], transfer of capital[172], ISDS[173], and final provisions[174]. The IPA is only signed by the parties today, but it will replace the individual EU member state's BITs with Singapore as soon as it comes into force.[175]

[159] Opinion 2/15 paras 225-256 285-293 and 294-304.

[160] ibid.

[161] ibid.

[162] Opinion 2/15 paras 225–256.

[163] ibid paras 285–293.

[164] ibid paras 294–304.

[165] Regulation (EU) 2018/196 OJ L 044. *See also*, COM 195 final [2018] 8.

[166] Treaty of the Functioning of the European Union, Art 4.1 and 4.2.a. *See also*, Opinion 2/15 para 243.

[167] EU and Singapore IPA, Art 2.2.

[168] ibid Art 2.3.

[169] ibid Art 2.4.

[170] ibid Art 2.5.

[171] ibid Art 2.6.

[172] ibid Art 2.7.

[173] ibid Ch 3 Art 3.1-3.46.

[174] ibid Ch 4 Art 4.1-4.19.

[175] EU and Singapore IPA, the disclaimer on the first page states that the agreement will first become binding when it is signed. Annex 5 presents the BITs that will be non-binding after signing. The BITs are between Singapore and Bulgaria, Belgium-Luxemburg, Czech Republic, Germany, France, Latvia, Hungary, Netherlands, Poland, Slovenia, and Slovakia.

A transition is necessary when the IPA is signed and goes into force. Therefore, Regulation 1219/2012 was adopted following the entry into force of the Lisbon Treaty.[176] The purpose of the regulation is to give 'explicit transitional provisions' on BITs between EU member states and third countries due to the EU's newly established exclusive competence.[177] Furthermore, the Commission is given authority to require the EU member states not to negotiate BITs and to terminate or remove clauses in their existing BITs that are inconstant with the EU's investment policy.[178]

## 3.5 The EUSFTA and IPA provisions on the state's right to regulate and expropriation

In the EU and Singapore IPA, direct and indirect expropriation provisions are regulated.[179] Article 2.6 in the IPA prohibits the contracting states from directly expropriating and adopting measures that have an 'equivalent' effect. The exception of expropriation is if the measures are adopted for a 'public purpose' in 'due process of law' and without discrimination. Furthermore, such expropriation must result in 'prompt, adequate and effective compensation' at a 'fair market value' before the expropriation and before it was known by the public. The article continues that interest shall be on a 'commercially reasonable rate', and the compensation shall be 'effectively realisable' and 'freely transferable'. The valuation can be based on 'going concern value, asset value including the declared tax value of tangible property', and other appropriate criteria. However, licences relating to intellectual property rights do not apply. Lastly, investors have the right to get their case of expropriation and valuation tested by judicial or other independent authority.[180]

[176] Regulation (EU) No 1219/2012 OJ L 351, recital 1.

[177] ibid recital 4-6.

[178] Treaty of the Functioning of the European Union, Art 91 100.2 and 207; Regulation (EU) No 1219/2012 OJ L 351, Art 9.2; Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019), 31-38.

[179] EU and Singapore IPA Art 2.6 and Annex 1.

[180] ibid Art 2.6.

The article on expropriation shall be interpreted according to its annexes in the IPA.[181] Annex one explains expropriation as either direct or indirect. Direct expropriation is when the ownership experiences a 'formal transfer of title or outright seizure'.[182] Indirect expropriation can result from measures by the state that have an 'effect equivalent' to direct expropriation on the investment. Furthermore, when determining the indirect expropriation, aspects such as the 'right to use, enjoy, and dispose of its covered investment' shall be evaluated even if the criterion for direct expropriation is not fulfilled.

Since indirect expropriation is a complex issue, the article continues with three aspects to be considered. The situation still requires a case-by-case evaluation based on the relevant facts. The first aspect is the decreased economic value of the investment; even if an 'adverse' effect occurs, it does not automatically establish indirect expropriation. The second aspect is how the measures hinder the investor from the possibility to 'use, enjoy or dispose' of the investment. The third aspect is regarding the wholeness of the measures, that is, 'its object, context, and intent'.[183] However, the 'rare circumstances' concept in annex one states that although some measures can be hurtful to investments, it does not necessarily amount to indirect expropriation if it is for protecting 'legitimate public policy objectives'. These measures must then be for inter alia public health, safety, and the environment. Furthermore, the measures must be non-discriminatory and have a clear purpose to improve the named objectives, not to be subject to indirect expropriation. However, the measures which are 'so severe in light of its purpose that it appears manifestly excessive' could amount to expropriation.[184]

Annex two covers land expropriation only in Singapore. Such measures must follow the land acquisition act[185] and compensation valued at 'market value'.[186] Furthermore, land expropriation 'should' be for a 'public purpose'.[187] Annex three covers the expropriation of intellectual property rights. The 'revocation, limitation,

[181] ibid, the footnote in Art. 2.6 states that Annex 1 – 3 shall help interpretation of the article.

[182] ibid Annex 1.

[183] ibid Annex 1.1.

[184] ibid Annex 1.2 Last sentence

[185] Land Acquisition Act 1966, Ch 152 (revised version will prevail at the entry into force of the IPA).

[186] EU and Singapore IPA, Annex 2.1.

[187] ibid Annex 2.2.

or creation' of such rights affected by a state measure does not amount to expropriation. However, the state measure must be consistent with the TRIPS agreement and the EUSFTA.[188]

When it comes to the sunset clauses in the IPA, it has one clause which regulates that after either a written notice of withdrawal from the agreement by one of the parties, the agreement will remain in force for six months longer.[189] The second sunset clause regulates investments made before the termination, which the agreement protects 20 years after the termination.[190]

When it comes to the state's right to regulate, it is mentioned in the preamble of the IPA. 'REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity.'[191] Furthermore, the preamble focuses on sustainable development and how it shall be implemented in social, economic, and environmental dimensions and that the parties shall be mindful of 'relevant internationally-recognised standards'.[192] The IPA refers to the EUSFTA, and the IPA shall follow the commitments to sustainable development and transparency as regulated in the FTA.[193] Furthermore, the IPA states that it recognises that transparency in both trade and investment is essential.[194]

Although the FTA is on trade, provisions on the establishment are included to provide the possibility to constitute or acquire a judicial person or an office in the contracting state.[195] Some exceptions in the general provisions related to the establishment and cross-border supply of services regulate measures that an investor could perceive as arbitrary or discriminatory. However, they should not prevent measures aiming to 'protect public security or public morals or maintain public order'. Furthermore, states shall be allowed to take measures to protect human, animal, plant life or health, exhaustible natural resources, and historical and

[188] ibid Annex 3 relating to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement (1994), and the EU and Singapore FTA, Ch 10.

[189] ibid Art 4.16.

[190] ibid Art 4.17.

[191] ibid preamble REAFFIRMING.

[192] ibid preamble DETERMINED and REAFFIRMING.

[193] ibid preamble REAFFIRMING.

[194] ibid preamble RECOGNISING.

[195] EU and Singapore FTA, Art 8.8.d

artistic treasuries.[196] States are also allowed to adopt measures on taxation in their countries which is needed for their 'public policy interests'.[197] However, provisions on 'consideration of public interest' regulate that anti-dumping and countervailing measures are outside the 'public interest'.[198]

Related to expropriation and the state's right to regulate are provisions on the FET principle. It provides a closed list of prohibited state measures.[199] Such measures are denial of justice, a fundamental breach of due process, manifestly arbitrary conduct, harassment, coercion, abuse of power, or similar bad faith conduct.[200] Specifically, how 'similar bad faith conduct' is to be interpreted is not known yet.[201] Furthermore, legitimate expectations are one aspect when determining a breach of the FET principle.[202] 'Legitimate expectations' are explained in the article as the state's representations to an investor and the information 'reasonably relied upon by the covered investor'.[203]

Another new provision is that the ISDS system has been reformed into the ICS. The ICS shall further legitimise the ISDS system and avoid the misuse that the traditional system has been criticised of.[204] The ICS were first included in the Canada and European Comprehensive Economic and Trade Agreement, where the Commission gave their view in Opinion 1/17. The Commission concluded that the ICS, its general principles on equal treatment and effectiveness, and the requirement of independence and accessibility of the tribunal are compatible with EU law.[205] In the Canada and European Comprehensive Economic and Trade Agreement, some rules have been inspired by the International Centre for the Settlement of Investment Disputes, the United Nations Commission on International Trade Law,

[196] ibid Art 8.62.a-e.

[197] ibid Art 16.6.5.a.

[198] ibid Art 3.4.

[199] EU and Singapore IPA, Art 2.4.

[200] ibid Art 2.4.2.a – d.

[201] European Parliament, Directorate-General for Internal Policies of the Union, Carl-Philip Sassenrath and Steffen Hindelang, 'The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective' (2015) 141.

[202] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Fair and Equitable Treatment' (2012) 63.

[203] EU and Singapore IPA, Art 2.3.

[204] European Parliament, 'From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules' (2017)

[205] Opinion 1/17 S V Position of the Court and paras 79–86 106-119 162-178 179-186 187-188 and 244.

and other rules on the agreement of the disputing parties.[206] The two new elements in ICS are a permanent tribunal and a broad appeal mechanism.[207] During the development of the court system, Frans Timmermans in the European Commission stated that the ICS will improve inter alia transparency, the state's right to regulate, and the rule of law in dispute settlements.[208] The long term aim is to replace the traditional ISDS with the ICS.[209] The Commission state that the EU has a special responsibility as the leading actor in the global investment regime.[210] The Commission wants to keep the modern provisions on ISDS in BITs but improve the state's right to regulate. Furthermore, the reform aims to result in a more precise code of conduct, courts operating traditionally, and independent judges.[211]

## 3.6 Summary

Singapore is, for many stakeholders, an attractive country both for trade and investments due to its global location and beneficial regulations. Furthermore, Singapore is to some extent dependent on FDI as a source of capital. The 'old' BITs that Singapore has concluded trace back to the seventies and have similar provisions on the state's right to regulate expropriation as BITs in general. The BITs aim to improve economic cooperation and create 'favourable' investment conditions in the contracting states. Prohibit direct and indirect expropriation except for 'public purposes' under the circumstances that the measures are in 'due process of law' and compensation is paid to the investor. The state's right to regulate is not further regulated in the Singapore BITs.

The competence question of the content in the EUSFTA was established in Opinion 2/15. It was concluded that the EU has exclusive competence on FDI, all trade matters, intellectual property, public procurement, market access, sustainable

[206] Canada and European Comprehensive Economic and Trade Agreement (CETA) Art 8.23.2.

[207] Permanent tribunal: EU and Singapore FTA, Section C on Dispute settlement (Cf CETA, Art. 8.23 and 8.27), Broad appeal mechanism: EU and Singapore IPA, Ch 14 on Dispute Settlement (Cf CETA, Art 8.28).

[208] Frans Timmermans in European Commission, 'Commission Proposes new Investment Court System for TTIP and other EU Trade and Investment Negotiations' (2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651> accessed 19 April 2022.

[209] European Commission, 'Commission proposes a new Investment Court System for TTIP and other EU Trade and Investment Negotiations' (2015).

[210] COM 497 final [2015] 15.

[211] ibid.

development related to trade, SSDS, and termination of BIT provisions on the named matters. The shared competence in the original EUSFTA were portfolio investment and ISDS. Therefore, the EU and Singapore moved those shared competence provisions into an IPA, and the rest were kept in the EUSFTA.

The preamble to the EUSFTA and IPA clarifies that the agreements shall be understood together. The preamble further clarifies that the states can regulate for 'legitimate policy objectives'. Furthermore, sustainable development shall be implemented in social, economic, and environmental dimensions. Furthermore, the EUSFTA regulates that, for example, taxation measures shall be allowed for 'public policy interests'.

The Singapore IPA prohibits expropriation both directly and indirectly in the contracting states except for the 'public interest', in 'due process of law', and non-discriminatory. Furthermore, it must be compensated at a 'fair market value'. The article shall be interpreted with its annexes which further clarify the definition of both direct and indirect expropriation. The indirect expropriation should be evaluated according to how the state's measures affect the economic value of the investment. Furthermore, how the measures hinder the investor from the possibility to 'use, enjoy or dispose' of its investment, and the measures 'object, context, and intent'. The 'rare circumstances' allow some measures to negatively affect the economic value only for the 'legitimate public policy objectives'. However, if the measures have 'excessive' effects on the investments, they could be subject to indirect expropriation. The IPA also includes the developed ISDS system, namely the ICS, which shall improve transparency and independence in disputes.

# 4. Analysis

## 4.1 The balance in the traditional BITs

Chapter two of this thesis describes that when states regulate for the 'public interest' and it negatively affects investors, expropriation claims increase. The preamble in the model BITs and the concluded BITs presents the agreements as a tool to 'protect and promote investments'. Furthermore, to improve 'economic cooperation', and create 'favourable' investment conditions in the contracting states. It could be argued that the state's right to regulate is avoided in the wording of the agreements as it is only mentioned as an exception to expropriation. Therefore, tribunals interpret agreements that subjectively and objectively focus on investment protection.

As presented in sections 2.5 and 2.6, the provisions on expropriation in the BITs state that the contracting parties 'shall' not expropriate directly nor indirectly. The allowed measures to expropriate are those for the 'public interest' if they are non-discriminatory. Furthermore, such measures must be concluded in 'due process of law' and against compensation at a 'fair market value' before the expropriation and before it was publicly known. Interestingly, even the Cambodia model BIT had similar wording as the developed countries. The reason could be that they want to market their country as a 'good' destination for foreign investment.

Consequently, as the model BITs are drafts for negotiations, the wording in the concluded BITs is not dissimilar from the model BITs. Expropriation is an old concept, and the wording in the BITs has remained like that since the early BITs. On the one hand, it is helpful with comparable wordings regarding the foreseeability of the tribunals' interpretations of the provisions as described in section 2.7. On the other hand, the wording has not developed and is criticized by stakeholders for being outdated.

Non-compensable measures under the 'normal exercise of the state's regulatory powers', 'police powers', and 'regulatory powers' have been established in the BIT

case law to include inter alia taxation, access to infrastructure, material protection, health, morals, and the public order.[212] However, if the measures raise suspicion of a state misusing their power and only specific individuals or businesses are affected, all measures are possibly subject to indirect expropriation.[213] The case law states that the economic value of individuals' and businesses' investments may be negatively affected under certain circumstances. Those circumstances are if the 'commonly accepted' bona fide measures are adopted in a non-discriminatory manner. The proportionality test of the measures evaluates if they amount to the 'normal exercise of the state's regulatory powers' or 'indirect expropriation'. Some measures do not 'sufficiently' affect investments to amount to expropriation, meaning the measures can affect investments without being expropriatory. However, if the measures are 'unreasonable' or 'permanent', they may amount to expropriation.

The tribunals have established that measures are allowed to expropriate investments to benefit 'public health, safety, and for the environment' against compensation.[214] The measures must be proportional to their purpose and not result in an 'individual and excessive burden'.[215] The tribunals balance 'general interests' and 'individual fundamental rights', and the tribunals argue that the state's right to regulate 'must have its boundaries'.[216] Furthermore, the intention does not excuse the state of compensation, 'no matter how laudable and beneficial to society as a whole'. The measures that could amount to indirect expropriation will also be evaluated on if they 'deprive the use and enjoyment' and 'control' of the investors' property.[217] The 'sole effect doctrine' evaluates the economic effects on the investment rather than the state's intention.[218]

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[212] Lise Johnson, Lisa Sachs, and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) Colombia Journal of Transnational Law 58, 94-95.

[213] United Nations Conference on Trade and Development, 'Series on Issues in International Investment Agreements II: Expropriation' (2012) 94.

[214] ibid 86.

[215] *James and others v the United Kingdom*, European Convention on Human Rights (ECHR) Application No 8793/79 (21 February 1986) para 50.

[216] *ADC Affiliate v Hungary*, The International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/03/16 (award 2 October 2006) para 423.

[217] *Compañia del Desarrollo de Santa Elena S A v Republic of Costa Rica*, The International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/96/1 (award 17 February 2000) para 291.

[218] *Tippetts v Iran, the Iran v the United States*, No 141-7-2 (award 29 June 1984) paras 225-226.

Other aspects, such as the purpose of BITs to attract foreign investment is worth considering. Hypotactically, if a developing country negotiated a more beneficial agreement for themselves, it might be good to a certain extent. However, the agreement might channel investments to more 'beneficial' host states from the investors' perspective. That is because the host state competes with other countries for capital. The capital-exporting countries have the upper hand in negotiations since the capital-importing countries need the capital and might accept less beneficial agreements, simply since it is better than not concluding a BIT. The developing countries' sovereignty gets limited in this way.

## 4.2 The balance in the EUSFTA and IPA

The EUSFTA and IPA, as described in section 3.4, were negotiated based on the new aims and competencies of the EU. One of the aims relates to promoting sustainable development, which could be a reason to expand the space for the state's right to regulate. Such aims are non-economic in principle and a form of a statement from the EU to strive to catalyst trade and investments to pursue sustainable development goals.

The preambles in both the EUSFTA and IPA clarify the state's right to regulate for 'social, environmental, security, public health, public safety, promotion and protection of cultural diversity' under the 'legitimate policy objectives'. However, it could be more helpful if this clarification in the preamble was included in an article instead. It would still require a broad wording to cover all accepted measures since a specific wording would potentially miss related measures. At the same time, the inclusion of such clarification in the preamble is a big step toward increasing the state's right to regulate compared to the traditional BITs. This development will most likely be significant for future agreements when balancing the state's right to regulate and expropriation, even if a 'balance' will be a slow process and difficult to determine. At some point, the result of limiting investment protection to benefit the state's right to regulate, foreign investments will decrease, and sustainable development might halt.

In the IPA, the article on expropriation state that neither contracting party ‘shall’ expropriate directly or indirectly, except for the ‘public purpose’, in ‘due process of law’. Furthermore, the measures must be non-discriminatory and against ‘prompt, adequate, and effective’ compensation to the investor. The article shall be interpreted according to annexes in the IPA. Annex one states that expropriation can be interpreted as two situations. The first one is direct expropriation which is a straightforward concept of the transfer of ownership, and the second is the interpretation of indirect expropriation.

The annex clarifies that indirect expropriation is when measures have an ‘effect equivalent’ to direct expropriation. The annex includes three aspects intended to guide the indirect expropriation interpretation. The first aspect is the economic effect on the investment. However, the effect alone does not amount to expropriation. The second aspect is how the measures hinder the investor from the possibility to ‘use, enjoy, or dispose’ of the investment. The third aspect is the measures ‘object, context, and intent’. The annex also refers to ‘rare circumstances’ which prohibit discriminatory measures for ‘legitimate public policy objectives’ if they are ‘so severe in light of its purpose’ and ‘excessive’. The ‘rare circumstances’ seem to extend the limit of allowed state measures for the 'legitimate policy objectives' that otherwise would be expropriatory. Therefore, it can make it challenging for investors to claim expropriation for such measures and, consequently, extend non-compensable measures by the state.

The criticised ISDS system has been updated to an ICS to increase transparency and independence. This development can be an additional factor that shifts the balance toward the state’s right to regulate. Updating the traditional BITs with the new ICS system could potentially shift the balance by increasing transparency and independence. If the intentions work out, the interpretations of tribunals in the ICS will most likely shift the balance towards the state’s right to regulate due to less conflict of interest, transparency, and independence. Consequently, the state will have more regulatory space at the cost of investment protection. Furthermore, the investors’ reasonable ‘legitimate expectations’ will change under the FET principle. However, a safeguarding provision on the FET principle in the IPA provides a closed list of prohibited measures consisting of ‘denial of justice’, ‘breach of due process’, ‘arbitrary conduct’, and ‘bad faith conduct’.

## 4.3 The development of the balance from the traditional BITs to the EUSFTA and IPA

When discussing the development of the balance of the state's right to regulate and expropriation, the different perspectives might suggest that moving in one direction will limit the other. More protection for the state results in less protection for the investor and vice versa. Furthermore, including a broader regulatory space for sustainable development is entirely different from the typical explicit investment protection in BITs. Although investment protection is still a strong force in the EUSFTA and IPA, new non-economic values occur in the agreements. It is easy to argue that states should be able to adopt measures in their country, particularly when it comes to sustainable development goals. At the same time, agreements shall be followed under the principle pacta sunt servanda, meaning that the concept of 'public interest' and 'normal exercise of the state's regulatory powers' cannot be an escape from responsibility and compensation by the state. Such behaviour should not be accepted as it will disrupt future foreign investment in the country. Consequently, such conduct will likely postpone sustainable development goals and global economic integration.

The EUSFTA and IPAs inclusion of the state's right to regulate in the preamble is one of the most significant developments from the BITs to the EUSFTA and IPA. It can guide the tribunals' interpretation of the purpose of the agreements. Again, if the state's right to regulate were in the actual treaty text, it would potentially have more effect according to the hierarchy of sources in the Vienna Convention on the Law of Treaties. The new article on expropriation itself is not unique. However, together with the preamble and annexes, it becomes unique. Therefore, the balance of the state's right to regulate and expropriation has potentially shifted towards the state's right to regulate vis-à-vis BITs preamble mainly on investment protection and creating 'favourable' investment conditions. The interpretation of the EUSFTA and IPA is still theoretical until case law becomes available. Therefore, a complete comparison of the effect is not possible yet.

Evaluating a suspected indirect expropriation in the IPA has incorporated a non-exhaustive list of interpretations like tribunal awards on BITs. In the first aspect in the IPA, the measures shall be evaluated after their 'economic impact', which has similarities with the case law concept 'sole effect doctrine'. Both concepts focus on the economic effect rather than the intent of the measures. However, the IPA clarifies that the economic effect alone does not amount to expropriation. The second aspect of the IPA is the 'duration', and 'interference' of the 'possibility to use, enjoy, or dispose' of the investment. It resembles some awards where the measures 'duration' and 'permanent deprivation' of the investment were evaluated.

Furthermore, the case law evaluated how the measures interfere with the possibility to 'use', 'enjoy', and 'control' the investment. In the case law, tribunals have evaluated measures after their hindrance to the 'management, maintenance, use, enjoyment, order, or control of investments'. The third aspect of the IPA is that the 'object, context, and intent' of the measures should affect the interpretation. The third aspect has similarities with the case law that evaluated the measures 'purpose and context'. The IPA annexes and preamble on the 'legitimate public policy objectives' will likely give the contracting parties extra regulatory powers, primarily under the concept of 'rare circumstances'. The concept allows economic damage under the circumstances that the measures are not 'severe' and 'excessive'. The concept has not been noted in the BIT case law, except the fact that measures shall not result in an 'individual or excessive burden'. However, the way the 'rare circumstances' is formulated points to the purpose of extending the limit of the damage measures can have on the economic value of investments to develop suitability regulations. Therefore, the IPA annexes can be a more straightforward tool for future tribunals to evaluate indirect expropriation than the traditional way.

The principle of non-discrimination is mentioned in the new agreements and will probably be one of the vital principles protecting investments and interpretations in ICS. When investors have the EUSFTA and IPA or similar comprehensive agreements as a base during investments, certain 'legitimate expectations' will occur in the host state. The 'legitimate expectations' could be less investment protection and more acceptance of the state's right to regulate than investments in countries with traditional BITs.

# 5. Conclusions

## 5.1 How do the traditional BITs regulate the balance of the state's right to regulate and expropriation?

The purpose of BITs is explicitly to protect and promote investments and to protect the investors' from measures that negatively affect investments. Under the provision on expropriation, the state's right to regulate is the 'public interest' exception to expropriation. Furthermore, the BIT case law has concluded that the 'public interest' measures cannot interfere too much with investments, and most disputes have resulted in compensation to the investor. Furthermore, the purpose and context of the measures must be clear and proportional. Alternatively, if the measures are deemed to be aimed at the 'normal exercise of the state's regulatory powers', for example, taxation and health protection, they are non-compensable to the investor. However, if the measures are potentially a result of misuse of power or if specific individuals or businesses are affected, it could instead be considered an expropriation.

Therefore, the balance in the BITs is focused on strong and explicit investment protection for the investors to create 'favourable' investment conditions. Consequently, the tribunals have interpreted the disputes accordingly. Measures by the state are expropriatory if they 'sufficiently' and 'permanent' affect investments. At the same time, the states shall be free to adopt measures to some extent without compensating. Such measures must still be adopted in a bona fide and non-discriminatory manner to be for the 'normal exercise of the state's regulatory powers'. Under BITs, there have been many expropriation claims, many of which have been concluded expropriatory. Concludingly, the balance in the traditional BITs protects investors more than it protects the state's right to regulate. The primary evidence is the wording in the agreements and the number of disputes that have been concluded to be expropriatory and compensable.

## 5.2 How do the EUSFTA and IPA regulate the balance of the state's right to regulate and expropriation?

The EUSFTA and IPA are to be understood together. The preambles clarify that the contracting parties have the right to implement measures under the 'legitimate policy objectives', which have references to sustainable development. The IPA prohibits direct and indirect expropriation except for the 'public interest', in 'due process of law', and against compensation. The annexes in the IPA help the evaluation of indirect expropriation. Annex one states that the measures' effect on the economic value, interference, and intention is the base for expropriation interpretation. Additionally, the 'rare circumstances' further extends the possibility for the state's right to regulate non-composable measures under 'legitimate public policy objectives'. The new ICS shall have a higher degree of transparency and independence vis-à-vis traditional ISDS systems to enforce the new provisions.

Therefore, the EUSFTA and IPA aim to protect and promote investments and, at the same time, extend the state's right to regulate sustainable development dimensions. Including these non-economic values in the IIAs could be viewed as an encouragement for states to improve regulations on sustainable development. However, the result is a limitation of investment protection by accepting more measures under the 'the state's right to regulate'. Therefore, investors might experience economic damage because of stricter sustainability regulations on their investment without compensation. Furthermore, the EU and scholars expect the ICS to be impartial and able to enforce the new agreements with increased transparency and independence. Consequently, expropriation cases will probably decline under the EUSFTA and IPA. Concludingly, the agreements intend to balance the state's right to regulate and expropriation to allow states to pursue sustainable development without being liable for compensation as often.

## 5.3 How has the balance of the state's right to regulate and expropriation in the relevant BITs to the IIAs developed?

The balance of the state's right to regulate and expropriation has developed from the BITs to the EUSFTA and IPA. The preamble in the traditional BITs mainly focuses on protecting and promoting investment and creating 'favourable' investment conditions. Compared to the EUSFTA and IPA, which focuses on investment protection and encourages the state to regulate sustainable development. The EUSFTA and IPA have shifted the balance in the new agreements towards the state's right to regulate at the cost of investment protection.

The state's right to regulate non-compensable measures under its 'normal exercise of the state's regulatory powers' in BITs must have boundaries according to the case law. Many claims of expropriation result from the state's measures, and many have been concluded to be expropriatory. There are similarities between the BIT case law and the IPA interpretation guide on expropriation. Some BIT case law concluded that the economic effect alone could be the sole factor for expropriation. The IPA clarifies that more aspects must be considered. It is stated in the IPA annex that only under 'rare circumstances' will 'legitimate policy objectives' measures be expropriatory. The annexes and preamble ensure and develops the state's right to regulate sustainability concerns. Consequently, claims of expropriation and awards will likely decrease under the EUSFTA and IPA compared to under BITs, all things equal.

The new ICS might also develop the balance; enforcing the EUSFTA and IPA is intended to increase transparency and efficiency. As a result, the balance in the EUSFTA and IPA seems to become 'fairer' and encourages the parties to develop sustainability regulations. That is done by extending the state's right to regulate and limiting possible expropriation claims related to 'legitimate public policy objectives'. The liability of compensation, that is, measures not deemed expropriatory, seems to be a significant factor in encouraging sustainable development.

## 5.4 The author's reflections and future research

This thesis's findings indicate that the described development has gone from explicit economic values in BITs to additional non-economic values in the EUSFTA and IPA. The non-economic values are dimensions of promoting sustainable development and are entirely different from investment protection. As described in this thesis, foreign investments are essential and can work as a catalyst for global economic integration and sustainable development. However, a shift in the balance of IIAs towards more regulatory space will limit investment protection as the economic value of investments might be damaged without compensation. Therefore, the solution is not black and white, and there are different stakeholder perspectives.

The investors are the ones who risk their capital in pursuit of profits. Therefore, if the risk-reward ratio is negatively affected, the willingness to invest is likely to decline. Consequently, the capital might stay in the investors' pockets or will be channelled to regions with higher investment protection. Overall, the author of this thesis believes that solid legal property rights are crucial in terms of incentives and responsibility for investments. However, legislation to promote sustainable development is necessary. Therefore, the legislation must not unreasonably disrupt ownership or investment conditions. Instead, small steps resembling the EUSFTA and IPA seem to be a preferable way to go.

Lastly, the EUSFTA and IPA development on the state's right to regulate and the promotion of sustainable development will likely lead the way to a new era of IIAs. Therefore, the investment conditions will change in the contracting states and, consequently, the investors 'legitimate expectations'. Therefore, it would be interesting in future research to analyse how the investors 'legitimate expectations' under the FET principle have changed in Singapore and other countries where the EU and its member states have concluded similar comprehensive IIAs.

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