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A Comparative Analysis on the Evolution of EU and US's International Rules of Investment and its Defining Characteristics

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A Comparative Analysis on the Evolution of EU and US's International Rules of Investment and its Defining Characteristics

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ABSTRACT

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The past decade saw an increased global proliferation of Regional Trade Agreements (RTAs), Free Trade Agreements (FTAs) and Mega Free Trade Agreements by countries seeking trade opportunities. Powerful institutions and countries such as the European Union (EU) and United States (US) have been diligently pursuing their interests and promoting their standards and rules of trade as a means to 'pave the way'. This paper examines the unique characteristics of International Investment Agreements (IIAs) by the EU and the US through a comparative analysis on the historical evolution of investment agreements from the 1980's to 2016. Frameworks by Lesher and Miroudot (2005), from the Organisation for Economic Cooperation and Development (OCED) and Chornyi et al. (2016) of the World Trade Organisation (WTO) were synthesized for the analysis of IIAs, using a coded matrix assessment to study the extent and the depth of the investment provisions. Results reveal that both EU and US IIAs have progressively changed over time in their attempts to achieve an overall investment-friendly

environment. The EU and US have distinctive differences in their historical development of IIAs, influenced by political and economic factors as well as trade arrangements. In more recent years, there has been a trend of regulatory convergence in investment provisions of IIAs by the EU and US, especially in the latest agreements signed 2016, which indicates future normalization towards investment liberalization.

Keywords: Investment, International Investment Agreements, United States, European Union, Historical Evolution, Normalization

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LIST OF ABBREVIATIONS

AAs	Association Agreements
ASCM	Agreement on Subsidies and Countervailing Measures
ATEC	Agreement on Trade and Economic Cooperation
BITs	Bilateral Investment Treaties
CARIFORUM	Caribbean Forum
CCP	Common Commercial Policy
CETA	Comprehensive Economic Trade Agreement
EC	European Commission
EEAA	European Economic Area Agreement
EPA	Economic Partnership Agreement
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GPA	Government Procurement Agreement
ICSID	International Centre for Settlement of Investment Disputes
IIAs	International Investment Agreements
IMF	International Monetary Fund
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NAMA	Non Agricultural Market Access
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
PCA	Partnership and Cooperation Agreement
RTA	Regional Trade Agreement
TFEU	Treaty of the Functioning of the European Union

TIFA	Trade and Investment Framework Agreement
TIPs	Treaties with Investment Provisions
TRIMs	Trade Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
WAEMU	West Africa Economies and Monetary Union
WTO	World Trade Organisation

1. INTRODUCTION

1.1.Research Question and Methodology

In the absence of an overarching multilateral framework coupled with an on-going struggle for consensus in regulating the rules of investment, the European Union (EU) and the United States (US) have been diligently pursuing their interests through the proliferation of bilateral and regional trade agreements over the last few decades. Thus, the EU and the US are actively trailblazing new paths, through the promotion of their standards and rules of trade, as a means to 'pave the way' for other countries. Against this background, the objective of this paper is to examine the unique characteristics of investment provisions from the EU and the US respectively through a comparative analysis on the historical evolution of their International Investment Agreements (IIAs). Moreover, this paper seeks to study the models and styles pursued by these respective countries as a means to examine and evaluate any apparent patterns from these IIAs and their evolution over time.

This paper is structured in three layers of analysis. The first part consists of a literature review on international investment rules and issues. In particular, this first layer looks at the complexities involved in the definition of foreign investments and the shift in focus from a multilateral level trading system to the regional or bilateral level, marking a new trend in establishing full - fledged investment agreements.

This is followed by an examination of the historical evolution of foreign direct investment agreements in the EU and US respectively in order to understand the intricacies of history, politics and trade in shaping the country's modern legal foundation. In particular, the framework from the original work of Lesher & Miroudot (2005) from the Organisation for Economic Cooperation and Development (OCED), as well as Chornyi et al (2016) of the World Trade Organisation (WTO) working paper, will be used as a basis to conduct the analysis. The sample consists of 11 IIA's each from the EU and the US, ranging from those starting in the 1980's to 2016. This will provide a deep analysis of any repetitive patterns and unique characteristics countries pursue in defining their objectives and motives for concluding IIAs. This will be followed by numeric coding to investigate the extent of investment liberalization.

The last section of the analysis will be conducted in two parts. First part of the analysis is a numerical results based on the coding arrangement of all the substantive investment – related provisions. It looks at the measures of central tendencies such as mean, median, mode, the range etc to understand the extent of Foreign Direct Investment (FDI) friendliness. The second part of the analysis will examine the general trends underlying the historical evolution of IIAs in EU and the US, looking at the changes in investment friendliness or the level of liberalization across substantive investment provisions to determine future directions or implications.

2 INTERNATIONAL INVESTMENT AGREEMENTS: LITERATURE REVIEW

2.1 Background of International Rules for Investment

Foreign investment activities between countries saw steady progress post World War II, serving as a vehicle for economic growth and prosperity. With the emergence of decolonization of economies coupled with market liberalization in the period between 1945 and 1990, investment rose at every step of economic growth and development since.

The post-colonial period has often been regarded as the beginnings of the building blocks that prompted the need for a systematic protection of foreign investment, by the formal imperial power countries which started out of hostility and much heated confrontation (Sornarajah, 2010).

The establishment of the New International Economic Order in 1974, adopted by the United Nations Assembly was a direct result of a collective concern for a new world order from the newly independent developing countries (Dimopoulos, 2011). This was driven by strong-willed nationals of the former colonial powers that wanted to put an end to their dominance, and thus called for the enactment of a Permanent Sovereignty over Natural Resources (Dolzer & Schreuer, 2012). This resulted in a wave of nationalisation. One of its cornerstone achievements was the apparent abolition of rules of international law governing expropriation:

> Each State has the right: … (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means (Charter of Economic Rights and Duties of States, 1974).

This new climate of nationalisation led to a period of confrontations between developing and developed countries, raising concerns about the existence of customary international law norms for foreign investment and reversely, the need to establish protection for foreign investors.

Nonetheless, in the midst of all insecurities, there has been a simultaneous shift in the international economic scene with the emergence of Washington Consensus from the 1980s. Financial institutions such as International Monetary Fund (hereafter IMF) and World Bank emphasized the rise of free market economies and reforms of macroeconomic disciplines which promoted private foreign investments as key ingredients to economic development and financial assistance, and revised their position on the role of investment.

In 1992, the new approach towards investment emerged and made clear of its benefits as shown in the Preamble of World Bank Guidelines on the Treatment of Foreign Direct Investment. It reads:

> "…that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade" (World Bank, 1992).

The arrival of the 1990's saw a new climate of international economic relations and a rapid adaptation to the neo – liberalized foreign investment regimes that prevailed the economic philosophy. Bilateral investment treaties (hereafter BITs) between what was traditionally defined as capital – importing and capital – exporting countries became the norm and as a result of this, the boundaries that differentiated the two economies became blurred as the transition progressed.

The stream of focus for many developing countries shifted towards prioritizing economic development via attracting foreign capital by granting more protection to foreign investors, much the contrary to the traditional belief of customary law. This became the basis of treaties that started to proliferate as developing countries willingly negotiated and concluded more and more IIAs.

2.2 Types of International Investment Agreements

International Investment Agreements consists of two types; bilateral investment treaties (BITs) and treaties with investment provisions.

According to United Nations Conference on Trade and Development, a BIT is defined as "An agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory" (UNCTAD, 2013).

On the other hand, treaties with investment provisions (hereinafter TIPs) are constituted with various types of investment treaties that are not BITs. According to UNCTAD (2013), there are three types of categories of TIPs:

i. broad economic treaties that include obligations commonly found in BITs (e.g. a free trade agreement with an investment chapter);
ii. treaties with limited investment-related provisions (e.g. only those concerning establishment of investments or free transfer of investment-related funds); and
iii. treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues.

Against this background, the EU and the US have negotiated and concluded many different types of IIAs. For the EU, BITs, FTAs & RTAs were the most common types of IIAs signed by both countries. Additionally, there are legally binding treaties with

commitments promoting liberalization and capital movements found in TIPs such as the European Economic Area Agreement (EEAA) and Association Agreements (AAs), which refers to agreements between EU and the third country, that serve as the basis for their EU accession process. Furthermore, there are Euro-Mediterranean Agreements, Partnership and Co-operation Agreements (PCAs), which are also legally binding agreements between EU and third countries, to support the democratic and economic development of the respective country. Lastly, the Economic Partnership Agreement (EPA) refers to free trade agreements for negotiating with countries in Africa, the Caribbean and the Pacific.

As for the US, similar to EU, BITs, FTAs, RTAs are amongst the common types of IIAs concluded. Moreover, unlike the EU, there are specific type of treaties, such as the Trade and Investment Framework Agreement (TIFA) that serves as a strategic framework and principles for dialogue on trade and investment issues between the US and the other parties (USTR, n.d.). Furthermore, there are Agreement on Trade and Economic Cooperation (ATEC), Investment Development Agreements as well as Trade Relations Agreement.

2.3 Definition of Foreign Investment

In contrast to the accumulation of international foreign investment agreements, there is none or lack of consistency in the definition of the concept. In other words, no one single definition exists to capture precisely all the elements that is recognized under the

terminology ‘foreign investment’. Therefore, the common approach stresses the importance of taking into consideration, the scope and the extent of each agreement and its unique content that are outlined in the agreement.

According to the Encyclopaedia of Public International Law (1987), foreign investment is broadly defined as ‘a transfer of funds materials from one country (capital – exporting country) to another country (called host country) in return for a direct or indirect participation in the earnings of that enterprise’ (p. 246).

In contrast, the IMF’s Balance of Payments Manuel (1980), demonstrates a narrower definition which states; ‘investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor’s purpose being to have an effective choice in the management of the enterprise (para 408).

In that regard, it is important to explore the distinctions between these different accounts of foreign direct investment and of portfolio investment, to understand the nature of each kind as well as their breadth of coverage and scope. The predominant distinction between the two is made on the assumption that “direct managerial control of a company is a basic characteristics of investment” (Dimopoulos, 2011, p.31). Other differing characteristics can be found in the duration and its direct impact or contribution to the host state. Thus, portfolio investment in comparison to foreign direct investment represents no managerial control over the company, only via holdings of equity or debt securities such as bonds or stocks; and can be of limited duration that may not directly

contribute to the host state through technology transfers or other beneficial effects, otherwise present in a direct foreign investment (Sornarajah, 2010).

2.4 Benchmark Definitions

In spite of the apparent fragmented nature of the concept, foreign direct investment has seen a sharp acceleration of growth through globalisation and technological innovations. Such environment has fostered an ultimate climate for a surge in cross – border capital transactions as well as in the diversification of the different types of foreign direct investments.

Thus, statistical information on foreign direct investment and its analysis has become integral to understanding the macroeconomics and cross – border financial analysis of economies (OECD, 2008). By all means, highlighting the significance of statistical methodologies employed in the process and most importantly, emphasizing the need for such methodologies to be adapted to measure the new realities, thereby ensuring reliability and confidence of the statistics.

The OCED has published operational guidelines on how foreign direct investment activity should be measured consistently through developing a Benchmark definition. The 4th edition of the benchmark definition is fully compatible with the underlying concepts and definitions of the International Monetary Fund's (IMF) Balance of Payments and International Investment Position Manuel 6th edition as well as the general economic concepts set out by the United Nation's System of National Accounts (SNA).

It states, “Direct Investment is a category of cross – border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor” (OCED, 2008, p.19). The notion of ‘lasting interest’ mentioned emphasizes the strategic long – term relationship that has a direct influence in the management of the enterprise, by which the direct investor owns at least 10% of the voting power of the direct investment enterprise (OCED, 2008). Thereby, excluding the aspects of portfolio investment within the coverage of the definition.

2.5 Trends in International Investment Agreements

In the absence of an overarching framework for international investment, investment flows have been primarily governed by bilateral agreements or treaties agreed upon mutually acceptable terms otherwise known as BITs (Akhtar & Wiss, 2013). In much the same way, FTAs have also been utilized for negotiating provisions on foreign investment in the context of wider agreements, promoting and protecting global direct investment flows (Akhtar & Wiss, 2013). Canada, Mexico and the United States are pioneers of setting the trend in concluding the North American Free Trade Agreement (NAFTA) in 1994.

Over the past several decades, saw a surge of cross – border transactions of goods, capital and labour, where it lead to efforts being put into developing a multilateral framework through international organisations. There had been a number of attempts in

the past however, due to the sensitive nature of such agreements, none of the organisations could conclude their initiatives. Namely, the OCED proposed a Multilateral Agreement on Investment (MAI) in 1995 to provide a basis for introducing dispute settlement mechanism and non – discriminatory treatment for investment. However, due to the conflicting policy disagreements between participating members, as well as the business communities, nongovernmental organisations, came to a halt.

Much relatedly, the WTO, has also made several attempts to address investment issues on a multilateral level. Some can be argued to have been successful while others have been given doubts due to the split consensus amongst the members. As such, the WTO was able to partly include investment related issues in several of their agreements such as:

- The Trade – Related Investment Measures (TRIMs) Agreement which listed disciplines for measures restricting foreign investment relating to Article III, the national treatment obligations and Article XI, quantitative restrictions under the General Agreement on Tariffs and Trade (GATT) 1994 (WTO, 2017);

- The General Agreement on Trade in Services (GATS) includes investment related provisions in trade in services; and

- The Agreement on Subsidies and Countervailing Measures (ASCM) and the Government Procurement Agreement (GPA) contains several indirect

investment related incentives and provisions in its definition of subsidies and public procurement services (Gugler & Tomsik, 2006).

In 2001, following the WTO Doha Declaration, there has been a momentum to include investment issues in the negotiations at the Singapore Ministerial Conference in 2003. For example, in chapters involving public procurement, investment and competition, so called 'Singapore issues', as well as addressing the issues on services and non – agricultural market access (NAMA).

However, yet again the widespread opposition has made it doomed to fail. Such negativity towards Investment issues has taken its toll on the significance of multilateralism, especially in its inability to adapt to the changing trade environment. Therefore, in recent years of long – stalled Doha round of negotiations, there has been a trend amongst nations to fall for the alternative and conclude broad natured, mega free trade agreements or regional trade agreements, to compensate for the absence of multilateralism as well as to move away from concluding agreements aimed at specific matters of trade (Dolzer & Schreuer, 2012).

As of 20 June 2017, 297 RTAs were in force and 13 new RTAs have been notified between January and June this year (WTO, 2017). As a result of this, all WTO members have one or more RTAs in force, following the notification of the RTA between Mongolia and Japan in June 2016 (WTO, 2017). According to OECD, there has been an

average of 13 RTAs per country, while others claim of 20 or more agreements (OCED, 2015).

Hence, a new generation of IIA has emerged seeking to actively facilitate trade and investment transactions. These agreements cover a range of trade liberalization and promotion provisions, and also contain investment – related issues that were mentioned in the Singapore Issues, such as intellectual property rights, competition, services and the movement of labour, where investment serves as one of the key developments in the international economic relations (UNCTAD, 2006)

2.6 The Regulatory Scope of Investment Provisions

Despite the challenges posed at the multilateral level, international investment rules have been maintained and proliferated by bilateral and regional agreements. Acknowledging reciprocity as the standard baseline for all agreements, the regulatory scope of investment provisions are standardized with a number of basic obligations for the home and the host countries, allowing for investor – state dispute dissolution (Akhtar & Weiss, 2013). These typically contain provisions on: fair and equitable treatment, national treatment and most favoured nations (MFN) treatment which ensures that foreign investors and or investment is treated no less favourable than that accorded to investors and or investment of the host state. Also, the right to transfer of funds and payment related to investments, the right to compensation in an event of direct or indirect expropriation.

i) Dispute Settlement

Unlike the WTO and its dispute settlement mechanism, investment treaties have different avenues for dispute resolution. Most unique of all, is the convention on the Settlement of Investment Dispute between States and Nationals of other States (ICSID); it provides a procedural framework for dispute settlement between host states and foreign investors through conciliation or arbitration (Dolzer & Schreuer, 2012). Moreover, arbitration rules governed by the United Nation Commission on International Trade Law (UNCITRAL) are also commonly referred to within investment treaties. Other times, there are avenues for commercial arbitration provided by the Arbitration Institute of the Stockholm Chamber of Commerce or arbitration at the International Chamber of Commerce (UNDP, 2005).

3 EU INTERNATIONAL INVESTMENT AGREEMENTS

3.1 Historical evolution of EU Foreign Investment Law

In understanding the evolution and development of EU's foreign investment competence and its regulations, there are number of factors that needs to be taken into consideration. Developments in internal regimes between the Member states coupled with the establishment of EU and finally the developments leading up to the Treaty of Lisbon, have all played a part in the establishment. Up until 2009, the EU did not have exclusive, but shared competence in tackling international investment matters given the limited exclusive competence in the area or lack thereof.

In regards to foreign investment, the Union's main goal has been to establish a framework allowing free entry and non – discriminatory treatment of European investors, unlike the rest of the world securing protection for foreign investors' properties in third countries. Thus, priority was aimed at creating a foundation of the common market with liberal regimes of free movement of capital, freedom of establishment amongst EC Member states, enabling European investors to freely invest without discrimination against other member states (Barnard, 2010).

In 1992, the Maastricht Treaty was undertaken to integrate Europe, which was marked by the creation of an internal market. This brought about the development of common rules for the internal market, covering various sectorial investment operations

(Dimopoulos, 2011). The process of European Integration therefore, acted as a tool for harmonization of rules and mutual recognition in establishing common norms, facilitating the operations of foreign investors. Thus, the evolution and development of EU foreign investment policy and regulations has been in direct correlation with the existence of EU competence in foreign direct investment.

However, much to the contrary of momentum created in the development of intra-EU investment frameworks and facilitation of investment operations, the EU took its time in emerging as a dominant player in the world of international investments. This is because the EC treaty had not been inclusive of foreign investment within its legal provisions, which prevented the EU from being granted power to regulate this sector. The predominant reason behind this lag is seen in the reluctance and unwillingness from EU member states to hand over any power in foreign investment related issues to the EU. This had been the case due to the widely concerned belief amongst the EU member states that international foreign investment competence is to remain under their excusive autonomy, especially in concluding BITs with third countries.

One of the widely misconceived perception about the EU law and foreign investment is that, the Lisbon treaty has been the first to address such issues together. However, this is proved wrong throughout the history of EU's international investment policy, beginning from the patchworks from the Spaak Report in 1956 to Treaty of Maastricht, Treaty of Amsterdam, Treaty of Nice, all the way to the Lisbon Treaty (Basedow, 2016).

Throughout these times, the EU had attempted to gradually acquire and extend legal competence in foreign investment.

As such, the EC treaty had included a number of provisions enabling EC to conclude international agreements with third countries in the area of foreign investment, such as the provisions on capital movements, establishment and the Common Commercial Policy (Dimopoulos, 2011). As a result, the EC concluded IIA's with third countries covering areas such as capital movements and investment promotion and cooperation, all of which were excluded from individual Member State agreements, making the EC foreign investment policy complementary to that of Member State BITs (Dimopoulos, 2011). Furthermore, it should be noted that EC was a pioneer in the introduction of Investment – related parts in multilateral agreements such as the Agreement on Trade – Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) within the WTO (Hoekman & Newfarmer, 2005).

Against this background, the EU has gradually broadened the scope of their competency over time, as well as strengthened their external powers to meet the objectives of EU external economic relations. Hence, the EU foreign investment policies have been developed within the wider framework of the EU external relations. Thus, unlike other countries that may focus on negotiating international agreements on the basis of foreign investments, the EU takes on a more holistic approach in incorporating foreign investment in broader types of agreements for the purpose of taking into account the general objectives pursued by such agreements (Dimopoulos, 2011).

3.1.1 Lisbon Treaty and Common Commercial Policy (CCP)

Since the entry into force of the Lisbon Treaty in 2009, the EU's competency in the fields of trade, investment and other commercial relations have significantly changed. The inclusion of 'foreign direct investment' in the 'Common Commercial Policy (CCP)' of the EC Treaty, established the Treaty of the Functioning of the European Union (TFEU). In particular, Articles 206 and 207 of the TFEU relates directly to the Union's competency in FDI. They are as follows:

> Article 206
>
> By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade *and on foreign direct investment*, and the lowering of customs and other barriers.
>
> Article 207
>
> 1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The

common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

…

6. The exercise of the competences conferred by this Article in the field of the common commercial policy *shall not affect the delimitation of competences between the Union and the Member States*, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation [emphasis added].

Firstly, it is important to recognize that the Lisbon Treaty only accounts for the Union's competence in FDI, disregarding the inclusion of portfolio investment and foreign investment in the form of concession contracts (Dimopoulos, 2011). Therefore, Article 206 TFEU outlines the objectives of the common commercial policy, and in particular, it mentions about the commitment to progressively prohibit restrictions in international trade and foreign direct investment. In contrary to the beliefs of standing an exclusive competence of the EU, the matter of fact is, limited only to the extent that the EU Treaties empower the Union to regulate these investment agreements (Dimopoulos, 2011). Therefore, it is important to examine the implications on the interpretations of the Article 207 TFEU, to understand the scope of the substantive content of the competence over FDI that can be exercised under this article.

Despite the lack of explicit reference to FDI in paragraph one of the Article 207 TFEU, the overall scope of the FDI competence is determined by assessing in relation to other relevant TFEU chapters. Having said that, under the CCP, market access of foreign investors such as the issues involving the initial establishment of foreign investors fall within the scope of FDI competence (Dimopoulos, 2011). Interestingly however, there are partial overlaps between FDI competence and the Union competence for trade in services which includes establishment in service sectors.

3.1.2 Understanding Intra and Extra EU trade: EU IIAs and Member State BITs

In understanding the relations between EU IIAs and Member State BITs, it is important to point out that existing IIAs do not directly address or make reference to Member State BITs or the relations between them (Szepesi, 2004). However, it is by no surprise that there are aspects of overlaps between the two. For instance, both sets of agreements include areas of capital movement and post – entry treatment of foreign investment (non- discriminatory provisions), however differ in their inclusion of establishment provisions. Thus, in such instances, the overlap between EU IIAs and Member State BITs raises the danger of an infringement of one another's agreement (Dimopoulos, 2011).

Against this background, the European Commission has initiated infringement proceedings to terminate intra – EU BITs that were agreed in the 1990's before the EU enlargements of 2004, 2007 and 2013 (European Commission, 2015). Such initiatives

have been put in place since the enlargement of the EU, as BITs were considered as an 'out of date' treaties inside a single market of 28 countries. This is due to the discriminatory implications that follow in intra – EU BITs which confers right to only some EU investors on a bilateral basis, fragmenting the single market, as well as issues regarding compatibility with the EU law. Therefore, to ensure that all Member States are subject to the same EU rules in the single market, including those on cross – border investments and investment protection, such measures have been arranged. Thus far, the Commission released formal notice to 5 of the Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to terminate their intra – EU BITs. To date, Ireland and Italy, the two Member States that have already terminated their intra – EU BITs in 2012 and 2013 respectively. As for the other remaining 21 Member States, the Commission is trying to initiate a dialogue to bring about change across all EU (European Commission, 2015).

Furthermore, despite EU's exclusive competency to legislate and adopt legally binding acts following the Lisbon treaty, there are opportunities for Member States to conclude or amend existing BITs with third countries. Such authority is held by the EU in their decision to empower the Member States, therefore Member States can only do so if such power has been granted to them[1]. Accordingly, this 're-empowerment' is usually adopted through secondary law (for example, EU regulations) and is often used

1 TFEU, *supra* note *1*, Art. 2, para. 1.

to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence[2] (IISD, 2016, para 3).

As such, EU Regulation 1219/2012[3] regulates the two aspects of the transitional arrangement, addressing firstly, the status under EU law of EU Member States' BITs that existed before the entry into force of the Lisbon Treaty, and secondly, it allows Member States to amend existing BITs or conclude new treaties with third countries provided that the terms, conditions and procedures set out in the regulation are respected (Art. 1, para. 1).

[2] Since, the European Union gained exclusive competence in the field of judicial cooperation in civil matters, transitional arrangements were adopted under Regulation 662/2009 of the European Parliament and of the Council of 13 July 2009. This established a procedure for negotiations of agreements between Member States and third countries, in regards to contractual and non-contractual obligations. (2009) OJ L200/25. Retrieved from http://eur-lex.europa.eu/eli/reg/2009/662/oj.

[3] Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. (2012) OJ L351/40. Retrieved from http://eur-lex.europa.eu/eli/reg/2012/1219/oj.

4 US INTERNATIONAL INVESTMENT AGREEMENTS

4.1 Historical Evolution of US Foreign Investment Law

The year 1977, marked the beginning of BIT Programs in the US, with the principal purpose of protecting US investments in foreign countries. Up until the 1960s, Friendship, Commerce and Navigation (FCN) treaties had been the American alternative to the European BITs as well as a pre successor of today's US BIT models. FCN treaties aimed at establishing a "friendly, political and commercial relations between the newly independent American colonies and the Old Continent" (Vandevelde, 2010, pg. 21). It was a comprehensive agreement, primarily signed by developed countries, covering trade, navigation, intellectual property as well as human rights furthering the scope of the investment disciplines reflecting the symmetrical political and economic relations (Alschner, 2013).

However, unlike the European BITs which were short and focused on investment protection, the US FCN treaties were experiencing increasingly difficult conditions in the midst of the Cold War and decolonization to sustain its comprehensive framework, especially in relation treaties being stalled over human rights issues. By the 1970s, US decides to abandon its approach and follow the steps of retaining a European BIT program (Alschner, 2013).

Despite the lack of success resulting in the abandonment, the FCN treaty continued to influence the makings of US BIT program. US retained a number of FCN features in shaping the BIT program that were different from that of European BITs, these include;

> "1) an important liberalization dimension, 2) reservations to safeguard policy space, 3) references to the international law minimum standard, 4) a greater focus on the investing individual (rather than just her investment) and, finally, 5) positive integration-type obligations" (Alschner, 2013, pg. 459).

Furthermore, according to Alschner (2013), BITs were very much advocated by the American business communities in the hopes of establishing "a more concise treaty model tailored to the specific needs of American investors especially in developing countries could close the gap of treaty protection separating from their European competitors" (as cited in, Ruttenberg, 1987, pg. 122). This was further backed by growing numbers of expropriation of foreign investments and confusions around the implications of the customary international law.

These FCN features inspired many of the IIAs witnessed today around the world, most notably the NAFTA which became one of the predominant types of approaches pursued by many. In addition to this, FCN elements continue to be used and evolved within IIAs concluded by countries such as Australia, Canada, Chile, Japan, South Korea, Peru, Singapore, Taiwan and others (Alschner, 2013).

4.2 BIT Models

Much like the European BITs, investment protection had also been a priority for the US, especially in regards to their new BIT program which started in 1977. Its motivations were to provide a mechanism for protection beyond what is constituted under the international customary law, enabling a systematic way of addressing issues of compensation from host states for unlawful investment – related matters (Vandevelde, 2009).

As explained previously, US BIT program was influenced by FCN treaties as well as cases of successful European BITs already concluded. The very first BIT model was completed in 1981, followed by number of subsequent revisions that resulted in new models in 1983, 1984, 1987, 1991, 1992, 1994, 2004 and 2012 (Vandevelde, 2009).

The first wave of negotiations began in January 1982, resulting in 10 BITs predominantly with countries in African and the Caribbean Basin[4]. However in 1986, after its initial success, the US suspended the first wave of negotiations and the 10 BITs that were concluded were submitted to the Senate for consent for ratification. The reason being, the State Department wished to ensure that the BIT program was supported by the Senate before concluding more treaties. In 1989, with the consent from Senate, US resumed negotiations reaching 35 BITs in over a decade (Vandevelde, 2009). A big

[4] With Bangladesh, Cameroon, Democratic Republic of Congo, Egypt, Grenada, Haiti, Morocco, Panama, Senegal and Turkey.

majority of 21 treaties were concluded with transitional economies, namely those from the collapse of the socialist bloc[5], eight from countries in Latin America, Caribbean[6] and the remaining three from Bahrain, Jordan and Sri Lanka. Overall, such trends reflected the change of mind sets and attitudes towards foreign investment by developing countries, and its future prospects for further advancement in the area.

In 1992, in the midst of second wave negotiations, US concluded NAFTA with Canada and Mexico which included an investment chapter which was based on US BITs. However, due to the apparent number of legal violations committed from US in 1999, US suspended negotiations for the second time while revisions and investigations were conducted to resolve the discrepancies between NAFTA and the BIT model (Vandevelde, 2009). From 2000's, US negotiators invested more attention and focus into FTA negotiations and as a result of this, by 2004, US had developed a new draft model of BIT that resembled the likes of an investment chapter of the FTAs (Vandevelde, 2009).

In 2012, under the Obama Administration, a new Model BIT was announced after its three – year review period. The 2012 Model BIT did not differ much from its 2004 Model, including all of its major substantive provisions. The Administration wanted to ensure that the Model BIT 'was consistent with the public interest and the Administration's overall economic agenda' (US Department of State, 2012), in addition

[5] These included, Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, Croatia, Poland, Romania, Russia, Slovak Republic, Ukraine, and Uzbekistan

[6] These included, Argentina, Bolivia, Ecuador, El Salvador, Honduras, Jamaica, Nicaragua, and Trinidad and Tobago.

to addressing global economic issues such as the international financial crisis and the growth of state – owned enterprises (Akhtar & Weiss, 2013).

Hence, the 2012 Model BIT provided the capacity to recognize issues relating to labour and environment that are central when negotiating with developing countries such as China. Furthermore, the investment language of the 2012 Model BIT had been utilized as a baseline for the Trans – Pacific Partnership negotiations and FTA between the US and the EU.

5 RESEARCH DESIGN

5.1 Framework

This paper analyses investment provisions in IIAs signed by the EU and the US. The framework used comes from Molly Lesher and Sebastien Miroudot (2005) of the OECD Trade Directorate, in their working paper titled, "Analysis of the Economic Impact of Investment Provisions in Regional Trade Agreements". The study above by OCED, was one of the first to present a metric assessment of the extent and depth of investment provisions, in the aim of measuring the impact of investment – related provisions in Regional Trade Agreements on trade and FDI flow (Lesher & Miroudot 2005). In addition to this, minor adaptations from WTO's working paper "A Survey of Investment Provisions in Regional Trade Agreements" by Chornyi et al (2016), have been used to synthesize with the prior work, making the overall framework more up – to – date with the current investment environment. Much the contrast to their studies, this paper analyses the historical evolution of IIA's by EU and US, in regards to the substantive investment provisions pursued by each country and how this changed over time. The metric assessment used will indicate the variations found in provisions of each IIA's individually and collectively, as well as the extent of liberalization by the total value calculated from coding of the matrix.

5.2 Sample IIA's

A total of 22 IIA's are used for this study, 11 from each respective countries, EU and the US. Samples from both countries consist of all types of investment related agreements that are classified under an IIA, dating from those signed in 1980's to 2016. 2 – 5 years periodic gap between each agreements was chosen to capture any political and economic changes that may influence the style or the contents of the agreements. In terms of the selection of the agreements, random sampling was carried out in order to avoid selection bias. This was done through using Wolfram Mathematica program. To note, due to the 2 – 5 years periodic gap arrangement between the agreements, this study does not have a full coverage of all BIT models concluded by US.

Table 1: EU Sample IIAs

Agreements	Date Signed	Date of entry into force
China - EC Trade & Cooperation Agreement	21-May-85	22-Sep-85
EC GCC Cooperation Agreement	15-Jun-88	1-Jan-90
EC - Uruguay Cooperation Agreement	4-Nov-91	1-Jan-94
EC – Russia Partnership & Cooperation Agreement	17-Jul-95	1-Mar-98
EC - Jordan Association Agreement	24-Nov-97	1-May-02
EC - Chile Association Agreement	18-Nov-02	1-Feb-03
EC - Tajikistan Partnership Agreement	11-Oct-04	1-Jan-10
CARIFORUM - EC Economic Partnership Agreement	15-Oct-08	1-Jan-09
EU - Korea Free Trade Agreement	6-Oct-10	1-Jul-11
Colombia - Ecuador - EU - Peru Trade Agreement	26-Jun-12	1-Jun-13
EU - Canada (CETA - Comprehensive Economic Trade Agreement)	30-Oct-16	21-Sep-17

Table 2: US Sample IIAs

Agreements	Date signed	Date of entry into force
BIT Panama	27-Oct-82	30-May-91
BIT Turkey	3-Dec-85	18-May-90
BIT Tunisia	15-May-90	7-Feb-93
North America Free Trade Agreement	17-Dec-92	1-Jan-94
BIT Albania	11-Jan-95	4-Nov-98
US – Viet Nam Trade Relations Agreement	13-Jul-00	13-Mar-07
US – WAEMU TIFA	24-Apr-02	24-Apr-02
US – Australia FTA	18-May-04	01-Jan-05
US – Korea FTA	30-Jun-07	15-Mar-12
Brazil - US Agreement on Trade & Economic Cooperation	18-Mar-11	18-Mar-11
Transpacific Partnership Agreement	04 Feb 2016	NA

5.3 Classification of Investment Provisions

Lesher & Miroudot (2005) presented the results of the analysis based on six broad categories of substantive investment provisions. However, for the purpose of this study, additional provisions have been added from the study by Chornyi et al (2016), to incorporate all aspects of substantive provisions that are relevant to modern day agreements. As such, two additional provisional categories have been added; scope of the investment framework and sustainable and socially responsible investment, in addition to one extra provision 'transparency', under the existing category of Investment Regulation and Protection. To this end, the framework for this study contains of 8 broad categories of investment provisions:

1. Scope of the Investment Framework (definition of investor, definition of investment);

2. Right of establishment and non – discrimination in the pre – establishment phase(national treatment (NT) and most – favoured – nation treatment (MFN));

3. Non – discrimination for post – establishment (NT, MFN);

4. Investment in services (specific provisions on establishment, NT and MFN in services sectors);

5. Investment regulation and protection (provisions on performance requirements, ownership requirements, expropriation, fair and equitable treatment, free transfer of funds and temporary entry and stay for key personnel, transparency);

6. Dispute Settlement (State – state and State – Investor dispute settlement);

7. Investment promotion and co-operation (co-operation mechanisms, harmonisation of rules, asymmetries and future liberalization) and;

8. Sustainable and socially responsible investment.

These categories cover all types of investment provisions found in IIAs. The binary approach to the framework demonstrates the extra detail captured in the matrix of investment provisions which allows for a more inclusive analysis of individual provisions as well as their combined effect as a whole (Lesher & Miroudot, 2005).

5.4 Typology

5.4.1 Scope of the Investment Framework

To establish an understanding for the scope of each investment agreement, provisions that include definitions of 'investor' and 'investment' are of great significance. The definitions are never absolute however, are a great determinant of all transactions and assets that are open for liberalisation and protection by the agreement. The first column of the section is dedicated to the scope of investment framework in table 3 with a typology of 'yes' or 'no' on the inclusion of such definitions in the agreements.

5.4.2 Establishment (non – services sectors)

This typology is also based on the original work by Lesher & Miroudot (2005). The conditions of pre-establishment is one of the core elements of an investment agreement[7]. The 'right' to invest provides foreign investors with market access component which determines their legitimacy of permanent presence and any other conditionality that may exists[8]. According to Lesher & Miroudot (2005), the effectiveness of establishment provisions depends on the existence of remedies to address violations of the pre-establishment principle from the host state. The second

[7] It does not describe the actual conditions potential investors face in the host country.
[8] According to Lesher & Miroudot (2005), the right of establishment must be married with provisions on the treatment of foreign investors post establishment to be effective.

column of the appendix A is dedicated to establishment, and the right of establishment is described from the following typologies:

- "No" signifies that there is no provision granting a generic right to set up a permanent presence in the host country[9]. Therefore, the host countries reserve full control of entry and establishment regulated by domestic laws and regulations. National measures that restricts access and establishment are expressed in various forms such as, screening of FDI, quantitative restrictions, conditions of entry or measures relating to ownership or management.

- "NT" indicates that pre-establishment is granted on the basis of National Treatment. This means that it covers the right of establishment, entry only. This enables foreign investors to set up operations or presence on an equal footing with domestic investors.

- "NT+MFN" indicates that in addition to NT, most – favoured nation treatment is granted together to investors. This is the most liberalizing approach from the host country to grant right to establish as a foreign investor. The most favoured

[9] The absence of pre-establishment provisions also characterises agreements focused on investment promotion and co-operation rather than on investment liberalization. Agreements with no provisions on establishment may also have a liberalized regime through domestic regulations or another international investment agreement (Lesher & Miroudot, 2005).

nation's treatment refers to the host country's commitment in ensuring that foreign investors or investments will be treated no less favourable than the treatment granted to investors or investments of any third country. Therefore, in combination of the two treatments, foreign investors benefit from a right of establishment on a national basis or, if better, from third investors that have been granted the most desirable treatment.

Given the sensitivities of regulating the right to investment, it is common to witness governments posing exceptions or derogations for the purpose of protecting the public as well as industries or sectors. General exceptions are such kind, with measures relating to national security, public health and morals. Outside of general exceptions, agreements can take four different approaches of liberalization; positive list, negative list, hybrid list and none. This typology has been adopted from Chornyi et al (2016). Column 4 of Annex A shows the type of limitations found in each agreement that contain pre-establishment provisions.

- "Positive list" refers to agreements that explicitly lists all sectors and subsectors in which market access and national treatment commitments applies to. In so doing, it also lists all exceptions or conditions to these commitments, stating the NT or MFN limitations it wants to apply (European Commission, 2016).
- "Negative list" refers to agreements that excludes selected sectors or imposes sector – specific limitations. Negative list do not list the sectors which they take commitments, instead only list those sectors or subsectors which they limit or

exclude by inscribing reservations. Therefore, all sectors and subsectors that are not listed are open to foreign investment under the same conditions as domestic investors, and allows for automatic inclusion of new sectors (European Commission, 2016).

- "Hybrid list" refers to approaches that combined both positive and negative list.
- "None" no limitations have been posed.

According to Lesher & Miroudot (2005), it is important to keep in mind that in order to determine the extent of liberalization for each agreement, the content of all sectors needs to be taken into account. Therefore, Table 3 is insufficient to provide such detailed information, and thus the level of concession and limitations have been equalized giving positive and negative lists equal scores in the index.

5.4.3 Provisions on non – discrimination (non – services sectors) post – establishment

As touched upon earlier, standards on treatment are essential in the pre – establishment for foreign investors in determining the investment conditions. Much similarly, this goes hand – in – hand in the post – establishment phase, in determining the standard of treatment granted to foreign investors in their local markets. Lesher and Miroudot (2005), listed the following widely accepted typology for the criteria of non-discrimination:

- *National Treatment (NT).* The underlying principle of national treatment concerns of treating foreign investors or investments no less favourably than

one's own investors or investment. This implies that the host country may not discriminate against foreign goods and services in favour of its own domestic goods and services. Column 5 in Appendix A indicates whether such clause is included in the agreement.

- *Most – favoured Nation Treatment (MFN).* The underlying principle of most – favoured nations treatment concerns of treating everyone equally, without discriminating between their trading partners. This is captured in the phrase 'no less favourable than the treatment granted to investors or investment of any third country'. Column 7 in Appendix A indicates whether such clause is included in the agreement.

Limitations and exceptions for NT and MFN are laid out in the same manner as Establishment typology, consisting of positive list, negative list, hybrid list or none.

5.4.4 Investment in Services Sectors

The typology used in this section is based on the original work by Lesher & Miroudot (2015), to capture the services element within IIAs. According to their work, agreements with substantive investment provisions are difficult to claim for just goods and as such, services are too handled via cross – border trade and commercial presence. Thus, if an agreement contains a services section, it is also likely to cover investment. If provisions on trade in services through commercial presence are under the 'investment

section' of the agreement, then the rules (provision on establishment) will the same for goods and services, regardless of whether services section exists within the agreement.

An extra typology introduced in this chapter by Lesher & Miroudot (2015) to describe non – discrimination, in the columns 10 – 15 in Appendix A, is the General Agreement in Trade in Services (GATS). GATS[10] refers to the treaty of the WTO which entered into force in 1995, as a result of the Uruguay Round negotiations. The typology "GATS" therefore indicates market access[11] and national treatment granted to services included in a schedule of commitments (positive list) with a general obligation of MFN treatment (and exemptions).

5.4.5 Investment Regulation & Protection

Similarly to the above sections, this too have been kept consistent with the original work of Lesher & Miroudot (2015), in their coverage of all relevant sub – sections relating to investment regulation and protection. With an input from Chornyi et al., 2016, a minor addition of 'transparency' has been accommodated to the sub – sections.

[10] "The GATS includes both the non-discrimination and the market access principles. It is the prime example of a multilateral agreement that provides for pre-establishment rules on FDI in the services sectors based on a positive-commitments (or positive list) approach. While the MFN principle applies across the board, the NT principle and market access rules apply only in those sectors in which WTO members have taken specific commitments in their schedule" (WTO, 2002, P.4)

[11] "Market access, unlike MFN and NT, which are relative standards of treatment, market access provisions address the host country's regulations on the entry and establishment of investment in absolute terms. In other words, in addition to the principles of non-discrimination, a host country may commit to refrain from applying certain specific restrictive measures to the entry of foreign investment, regardless of whether they are discriminatory or not" (WTO, 2002, p.3).

i) *Provisions prohibiting performance requirements (PRs)*(Column 16 & 17). PRs are requirements imposed on investors from the host state that can have trade – restrictive effects on trade and local production. PRs are often negotiated in the pre-establishment phase, examples include but not limited to[12], local content requirements, trade balancing requirements, restrictions on domestic sales tied to export performance, technology transfer requirements and prescriptions on imports and exports (OCED, 1996). For example, "No Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party[13]". Beyond TRIMs agreement refers to extra elements that fall outside of local content requirements, trade balancing requirements, foreign exchange restrictions and export restricts otherwise known as domestic sales requirements. In other words, non – trade requirements such as technology transfer and exclusive supplier arrangements (OCED, 1996).

ii) *Free Transfer of funds* (Column 19). This involves granting foreign investors free flow of all investment – related transactions and capital movement. A typical clause may require a party to; "With regard to

[12] "Another major category relates to the capital structure and management of an investment such as local equity requirements, local hiring targets, technology transfer, nationality of management and repatriation of funds and profits" (OCED, 1996, p.2)
[13] See for instance Article 23 of Colombia – Ecuador – EU – Peru Trade Agreement

transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance…"[14]

iii) *Transparency* (Column 23). Transparency obligations varies across different agreements, ranging clauses that refer to examples such as; minimum requirements to publish, make all relevant measures publicly available, explanation upon request of the adoption of laws or regulations, to whole chapters dedicated to ensuring transparency through the agreement for all sections (Chornyi et al., 2016). Specific examples of transparency may include; "…the Government of Tajikistan shall inform the Community of its intentions to submit new legislation or adopt new regulations... the Community may request…drafts of such legislation or regulations[15]". Such provisions support the investment framework, this could be embedded within the Investment section itself (number of agreements in total) and or has a separate transparency chapter within an RTA or FTA.

[14] See for instance Article 123 of EC – CARIFORUM Agreement
[15] See for instance Article 40 of EC – Tajikistan Agreement

5.4.6 Dispute Settlement Provision

When disputes arise between states or between investor and state, it is important to distinguish the different mechanisms that are in place to resolve disputes concerning interpretation or implementation of the agreement. This section categories state – state dispute settlement (Column 24) and investor – state dispute settlement (Column 25). The typology utilized to describe the mechanisms have been adopted from the original study by Lesher & Miroudot, 2005.

In the instances of State – state dispute settlement, dispute settlement is resolved through one of the following consultation options or in combinations; "ad – hoc arbitration" which refers to the proceedings that is not administered by others and requires participating parties to make their own arrangements for selecting arbitrators (US Legal Inc, 2016) or is resolved through a "political" body formed by the parties to the agreement.

In the instances of State – Investor dispute settlement, dispute settlement is resolved through one of the following options or in combination; "ad – hoc arbitration" indicates that it involves an independent international arbitrator such as the rules of the UNCITRAL or "permanent arbitration" indicates the ICSID.

5.4.7 Investment Promotion & Cooperation

Provision on investment promotion and cooperation are mostly prevalent in agreements that do not contain provisions on establishment or non – discrimination. This

section will also the follow the structural footsteps of the original work by Lesher & Miroudot (2005), to examine the subsections and its typologies.

i) *Investment promotion* (Column 26). The value "yes" for Investment promotion section accounts for all IIAs that contain provisions relating to investment promotion and cooperation in either the investment chapter itself or in other clauses within the coverage of trade in goods[16]. Typical promotion clauses may require a party to, "promote and encourage greater and mutually beneficial investment"[17], "strive to take steps for the mutual promotion and protection of investment…with a view to improving reciprocal investment conditions"[18].

ii) *Cooperation mechanism* (Column 27). The value "yes" indicates that in addition to cooperating, detailed list of actions parties intend to take in the future are also provided. Specific examples of cooperation activities may include, "…the exchange of available information on short and medium – term prospects and forecasts for production, consumption and

[16] "Investment promotion may moreover extend to any field of investment or be limited to specific sectors only. Investment promotion obligations are often formulated in a broad manner, leaving states with ample discretion as to their implementation. Their efficiency almost entirely depends on the good faith efforts of the parties to an IIA" (Chornyi et al, 2016, p.38).
[17] See for instance Article 12 of China – EC Trade & Cooperation Agreement
[18] See for instance Article 7 of EC – GCC Corporation Agreement

trade"[19], "encourage the application of the various forms of industrial and technical cooperation…joint production and joint ventures…"[20].

iii) *Harmonisation of rules* (Column 28). Agreements with commitments to harmonize investment rules and regulations, or clauses that encourage consistency and standardization of rules and policies.

iv) *Any type of asymmetries?* (Column 29). This refers to agreements that has provisions allowing for differential treatment in favour of developing country. According to Lesher & Miroudot (2005), when asymmetries exist, the preferential treatment given benefits the developed, more so than the developing country.

v) *Clause foreseeing the future liberalization of investment* (Column 30). This is most applicable for those agreements with few or no provisions on pre-establishment and non-discrimination. Clauses regarding future liberalization is commonly found amongst such agreements however vague in its description.

[19] See for instance Article 3 of EC – GCC Corporation Agreement
[20] See for instance Article 11 of China – EC Trade & Cooperation Agreement

5.4.8 Sustainable & Socially Responsible Investment

Sustainable development and investment are hot topics in the realm of international trade, making top priority agendas in many of the international summits and forums attended by leaders of many countries. As such, this new section has been added in Column 31 of Appendix A, not only to promote such investments but to see how well these issues and concerns are addressed in IIAs, especially in the most recent ones. As demonstrated in the study by Chornyi et al., 2016, provisions that refer to issues such as the environment, public health, labour standards or corporate social responsibility, beyond preambular language has been taken into account. Moreover, clauses that prohibit parties from lowering certain standards in order to attract foreign investment can also be regarded as having a sustainable and socially responsible investment section.

Specific examples of sustainable & socially responsible investment activities include; "…shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards…"[21]. Or "The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development,

[21] See for instance Article 73 of EU – CARIFORUM Agreement

including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability"[22]

5.5 Coding

Numerical coding of the investment provisions have also been adopted from the original work by Lesher & Miroudot, 2005. The range of scores are from zero to one, where zero indicates the absence of a provision and one represents the most FDI – friendly provision in the list possible. The other option is the mid value of 0.5, indicating the middle ground provision possible in the list. The score is out of a total of 31, indicating that 31 is the score representing the most liberalized and FDI – friendly agreement.

Table 3: Coding of Investment Provisions

Category	Score
Scope of the Investment Framework	
Definition of investor	
No	0.00
Yes	1.00
Definition of investment	
No	0.00
Yes	1.00
Establishment (non - services sectors)	
Right of establishment	
No	0.00
NT	0.50
MFN + NT	1.00

[22] See for instance Article 13.6 of EU – Korea Free Trade Agreement

Pre-established limitations	
(n/a)	0.00
Positive or negative list or both	0.50
None	1.00
Non - Discrimination Post - Establishment (non-services sectors)	
National Treatment	
No	0.00
Yes	1.00
Limitations to national treatment	
(n/a)	0.00
Positive or negative list or both	0.50
None	1.00
Most favoured nation treatment	
No	0.00
Yes	1.00
Limitations to most-favoured nation	
(n/a)	0.00
Positive or negative list or both	0.50
None	1.00
Investment in Services Sectors	
Investment in services covered by IIAs	
No	0.00
Yes	1.00
Provisions on establishment	
None	0.00
NT	0.50
MFN + NT / Market access/GATS	1.00
Pre-establishment limitations in services	
(n/a)	0.00
Positive list/negative list/both/GATS	0.50
None	1.00
National treatment	
No	0.00
Yes	1.00
Limitations to national treatment in services	

(n/a)	0.00
Positive list/negative list/both/GATS	0.50
None	1.00
Most - favoured nation	
No	0.00
Yes	1.00
Exceptions to most - favoured nation	
(n/a)	0.00
List of exceptions	0.50
None	1.00
Investment Regulation and Protection	
Provisions prohibiting performance requirements	
No	0.00
Yes	0.50
Yes, beyond TRIMs	1.00
Specific provision prohibiting ownership requirements	
No	0.00
Yes	1.00
Free transfer of funds	
No	0.00
Yes	1.00
Temporary entry and stay for key personnel	
No	0.00
Yes	1.00
Provisions on expropriation	
No	0.00
Yes	1.00
Specific reference to fair and equitable treatment	
No	0.00
Yes	1.00
Transparency	
No	0.00
Yes	1.00
Dispute Settlement Provisions	
State - state dispute settlement	

No	0.00
Ad hoc or permanent arbitration (one or the other)	0.50
Ad hoc & permanent arbitration (both)	1.00
State - Investor dispute settlement	
No	0.00
Ad hoc or permanent arbitration (one or the other)	0.50
Ad hoc & permanent arbitration (both)	1.00
Investment Promotion and Co-operation	
Investment promotion	
No	0.00
Yes	1.00
Co-operation mechanisms	
No	0.00
Yes	1.00
Harmonisation of rules	
No	0.00
Yes	1.00
Any type of asymmetries (in favour of the developing economy)	
No	0.00
Yes	1.00
Clause foreseeing the future liberalization of investment	
No	0.00
Yes (services only)	1.00
Sustainable and Socially Responsible Investment	
Sustainability and socially responsible investment	
No	0.00
Yes	1.00

6 COMPARTIVE ANALYSIS OF INTERNATIONAL INVESTMENT AGREEMENTS IN EU AND US

6.1.Differences in IIA models

6.1.1. Structural

Table 4: Results of the Structural Analysis of EU & US IIAs

Measures of Central Tendency	EU (total out of 31)	US (total out of 31)
Mean	14.2	16.6
Median	15.5	19
Mode	6 &15.5	18.5, 19, 20
Highest Value (agreement, year)	22 (CETA, 2016)	23 (TPP, 2016)
Lowest Value (agreement, year)	6 (China – EC Trade and Cooperation Agreement, 1985), 6 (EC – GCC Cooperation Agreement, 1988)	2 (Brazil – US ATEC, 2011)
Time Trend (positive or negative correlation)	0.84 (High Positive Correlation)	-0.23 (Negative Correlation) due to the outliers 0.76 (High Positive Correlation) without outliers

The overall structural analysis of EU and US IIA's presented in Table 4, is a numerical result based on the coding arrangement of all the substantive investment – related provisions out of 31. The results portray how high EU and US's IIA's measure in terms of FDI investment friendliness, in terms of mean average score and the individual agreement score itself, in addition to its scoring range and the scoring trend over time as an indicator to positive or negative correlation, if any.

Figure 1: Scatterplot of EU Coding Values

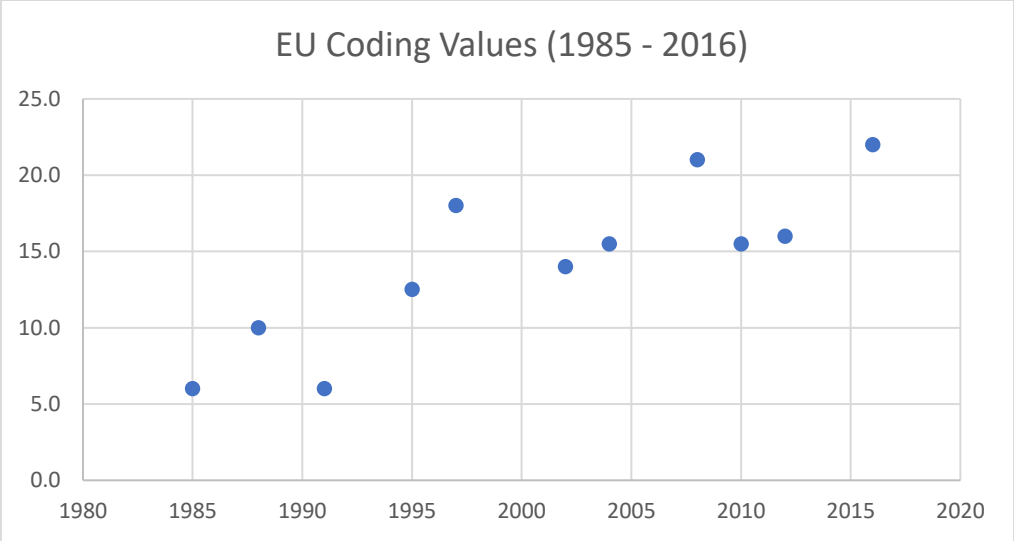
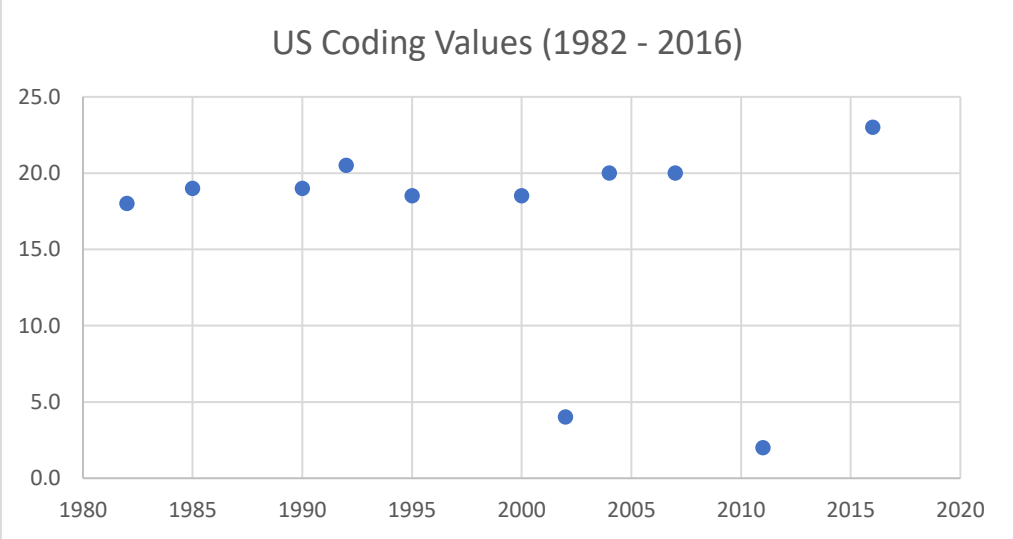


Figure 2: Scatterplot of US Coding Values



US scored higher in general across the indicators, notably in the average (mean) score of 16.6, which amounts to 2.4 higher than EU, in addition to having the highest valued IIA of 23 out of 31 from the total sampling, albeit by one point. When compared with EU, US's most frequently valued IIA (mode) starts from 18.5, followed by 19 and 20, all of which are higher than that of EU's score by 3 to 4.5. This indicates that across the sampling of 11 IIA's, US has a higher threshold value and thus the level of liberalization is higher when compared with EU.

However, it is interesting to note that the lowest value comes from US, not that of the EU given the prevailing pattern seen above. This is due to the difference in agreement styles pursued by the US; the Brazil – US ATEC (2011), and the US WAEMU TIFA (2002) have been designed for the purposes of creating a dialogue relating to investment issues and promotion, rather than a fully – fledged legally binding agreement. Therefore, the scoring is drastically low in relation to its mode and median values.

Therefore, unlike the EU, which presents a positive correlation over time, the US has a negative time trend of value of -0.23 due to the outliers. However, when the outliers are discarded, US also portrays a positive time trend where an increase in time leads to an increase in investment friendliness score of IIAs. However, there are variances within the time trend between EU and US as shown in Appendix 1, especially in relation to the steepness of the pattern witnessed in EU, indicating a bigger change over time compared to a more linear pattern shown in the US of small changes.

6.1.2. General Trends

There are three general trends that can be witnessed based on the results presented in Appendix 2 & 3. General trends analysis is based on the historical evolution of IIAs in EU and US, looking at the changes in investment friendliness or the level of liberalization across substantive investment provisions to determine future directions or implications. That said, the purpose of this research is to also look for individual changes within specific provisions as well as to see if such patterns present a positive or a negative trend over time.

Homogeneity VS Heterogeneity

The first general trend is homogeneity versus heterogeneity. US follows a well – established pattern of strong provisions on investment, consistent with the BIT models, which reveals a homogenous approach to their IIA's, with the exception of TIFA and ATEC. As such, US IIA's are predominantly either NAFTA inspired or 'Post – NAFTA' model[23], which means they all consist some form or another, common features that classifies their model's characteristics. For example, negative listing of commitments, performance requirements beyond TRIMs, a national treatment clause based on 'like circumstances', ratchet principles, Investor – State dispute settlement etc. This is also

[23] Post – NAFTA model includes a mandatory market access clause (Latrille & Lee, 2012).

evident in the coding matrix of US IIA's (Appendix A), by its scoring but as well as the consistency in the colour shades presented in green and yellow.

Furthermore, the US has a clear division of IIA's with investment promotion and cooperation provisions and those without. For example, TIFA and ATEC agreements have very weak legal binding provisions but have clear objectives for strategic dialogues on trade and investment issues as well as expanding trade and investment cooperation.

Much the contrary to the US, EU has historically had a limited coverage of investment in its IIAs, which has largely been due to the fact that FDI did not fall under the European Union Competence. Hence, EU lacks consistency in their IIAs with more variance in the depth and the coverage of agreements. Moreover, given the absence of BIT models like the US, third countries have signed separate BITs with individual EU member states for investment protection provisions. For example, Korea signed 19 separate BITs with individual EU members).

Thus, EU is heterogeneous in their mix use of GATS based, positive list scheduling approach together with structures that go beyond GATS commitments or in combination with non – GATS or NAFTA style with an alternative approach to scheduling of commitments and domestic regulation policies aimed at investment promotion and cooperation of rules (Latrille & Lee, 2012). Such pattern is evidently portrayed in the discrepancies found in the scoring of provisions across agreements and

the colour shading pattern that presents inconsistency with lack of clear trends. For example, EU shows consistent development over time in areas such as services, sustainable and socially responsible investment, and transfer of funds etc., but not in others as mentioned above with mixed approaches.

Emphasis on Investment Promotion & Cooperation

The second salient trend to US and the EU, is in regards to the varying emphasis on investment promotion and cooperation. US shows consistent lack of attention to major investment promotion and cooperation provisions when compared to the EU. As explained previously in the above trend, with the exception of TIFA and ATEC, which are designed for dialogues relating to investment issues and promotion, the rest of the agreements show very minimum or no engagement in such commitments. The investment promotion and cooperation provision contains five sub – divisions each relating to a specific commitment. US, as a whole, scored 8 out of the total 55, which equates to only 15%. When examined more closely, US scored 3 out of 11 in investment promotion, 3 out of 11 in cooperation mechanisms, 0 out of 11 in harmonization of rules, 1 out of 11 in asymmetries and 1 out of 11 in clause foreseeing the future liberalization.

On the other hand, the EU has shown progressive commitment to investment promotion and cooperation mechanism. EU shows consistent inclusion of investment promotion and cooperation mechanisms when compared to the US, of a total percentage

of coverage of 78% which is almost a fivefold increase. EU also shows increased inclusion of harmonization of rules (7 out of 11), asymmetries (4 out of 11), and clauses foreseeing the future liberalization of investment (5 out of 11). It is interesting to note that the total 6 out of 7 sectional scores of harmonization of rules, comes after 1991, and the asymmetries provision all come after 1995.

Such trends are important because it indicates that EU and US have differing styles for achieving investment friendliness or liberalization. In other words, there are multiple ways in which countries can achieve investment friendliness in accordance with their strategy and circumstances.

Normalization towards Investment Liberalization

The final trend captures the essence of whether or not EU and US's IIAs are normalizing towards regulatory convergence. Based on the findings, EU and the US are emerging over time, especially in reference to the investment friendliness scores as well as the provisions which they commonly fall under. In particular, the most recent agreements, TPP and CETA could either indicate this converging similarities or the possibility of being an outlier. On the basis of apparent historical evidence, it seems to be trending towards normalization of regulatory provisions. This is evidently shown in the results below:

Out of the total 31 investment – related provisions, 42% of them have either scored the same or have less than 1 point difference between them. In other words, EU and US IIA's are becoming increasingly similar with less discrepancies between them. Moreover, the Investment in Services Sector provision stood out as being the most compatible, with just 1 out of 7 sub – provision that had more than one point difference. Such findings contribute to the apparent trend towards normalization, given the significance of services trade in the modern trading system accounting for a total of US $4.8 trillion in 2016, up from US $2.9 trillion in 2006 (WTO, 2017).

7. CONCLUSION

In conclusion, both EU and US IIAs have seen a progressive change over time, establishing a more investment friendly environment overall. The results reveal that the degree of change is subject to the differing models or styles pursued by each country.

The EU and the US have distinctive differences in their historical developments of IIAs; in particular the political restraints that the EU experienced prior to the Lisbon Treaty and the lack of models, which served as a foundation for US IIAs. On the contrary, US kept a consistent model of investment liberalization through the historical evolution of BIT models whilst systematically differentiating the agreements in accordance to their purpose and nature, such as the TIFA and ATEC agreements that served purely for dialogues relating to investment promotion and issues.

In more recent years; however, there has been trends of regulatory convergence found in investment provisions. CETA and TPP are examples of the latest agreements signed in 2016 that have similarities in many of the substantial investment provisions, indicating the future normalization of IIAs. Against this backdrop, in the near future we may expect to find harmonization of investment rules between the EU, US and the rest of the world, making IIA's globally acceptable and compatible.

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APPENDIX A

Matrix of Investment – related Provisions in EU (Part 1 – Column 1 to 15)

Agreement	Date of signature	Scope of the Investment Framework		Establishment (non-services sectors)		Non-discrimination (non-services sectors)				Investment in services sectors						
		Definition of Investor (1)	Definition of Investment (2)	Right of establishment? (3)	Pre-establishment limitations (4)	National treatment? (5)	Limitations to national treatment (6)	Most Favoured Nation? (7)	Exceptions to MFN? (8)	Investment in services covered by IIA? (9)	Provisions on establishment (10)	Pre-establishment limitations in services (11)	National treatment? (12)	Limitations to national treatment in services (13)	MFN? (14)	Exceptions to MFN? (15)
China - EC Trade & Cooperation Agreement	21-May-85	No	No	No	-	No	-	Yes	None	No	No	-	No	-	No	-
EC GCC Cooperation Agreement	15-Jun-88	No	No	No	-	Yes	Positive list	Yes	None	No	No	-	Yes	Positive list	No	-
EC - Uruguay Cooperation Agreement	4-Nov-91	No	No	No	-	No	-	Yes	None	No	No	-	No	-	Yes	None
EC - Russia PCA	17-Jul-95	No	No	No	-	No	-	No	-	Services section	GATS	GATS	GATS	GATS	GATS	GATS
EC - Jordan Asscociation Agreement	24-Nov-97	No	No	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
EC - Chile Association Agreement	18-Nov-02	No	No	NT	Positive list	No	-	No	-	Services section	Market access	Positive list	Yes	Positive list	No	-
EC - Tajikistan Partnership Agreement	11-Oct-04	No	No	NT + MFN	Negative list	No	-	Yes	Negative list	Services section	NT + MFN	Negative list	Yes	Positive list	Yes	Negative list
CARIFORUM - EC EPA (2008)	15-Oct-08	Yes	No	NT + MFN	Positive list	Yes	None	Yes	None	Investment section	Market access	Positive list	Yes	Positive list	GATS	GATS
EU - Korea FTA	6-Oct-10	Yes	No	NT	Positive list	Yes	None	No	-	Investment section	Market access	Positive list	Yes	Positive list	Yes	Negative list
Colombia - Ecuador - EU - Peru Trade Agreement	26-Jun-12	Yes	No	NT	Positive list	Yes	None	No	-	Investment section	Market access	Positive list	Yes	Positive list	No	-
EU - Canada (CETA)	30-Oct-16	Yes	Yes	NT + MFN	Negative list	Yes	None	No	-	Investment section	Market access	Positive list	Yes	None	Yes	None

APPENDIX B

Matrix of Investment – related Provisions in EU (Part 2 – Column 15 to 31)

Agreement	Investment Regulation and Protection								Dispute Settlement		Investment Promotion and Cooperation					Sustainable and Socially Responsible Investment
	Provisions prohibiting performance requirements? (16)	Prohibition on performance requirements beyond TRIMs? (17)	Specific provision prohibiting ownership requirements? (18)	Free transfer of funds? (19)	Temporary entry and stay for key personnel? (20)	Provisions on expropriation? (21)	Specific reference to fair and equitable treatment (22)	Transparency? (23)	State-state dispute settlement? (24)	State-investor dispute settlement? (25)	Investment promotion? (26)	Cooperation mechanisms? (27)	Harmonization of rules? (28)	Any Type of Assymetries? (29)	Clause foreseeing the future liberalization of investment (30)	Sustainable and Socially Responsible Investment (31)
China - EC Trade & Cooperation Agreement	No	-	No	No	Yes	No	No	No	Consultation	No	Yes	Yes	No	No	Yes	No
EC GCC Cooperation Agreement	No	-	No	No	No	No	No	Yes	Ad hoc & Political	No	Yes	Yes	Yes	No	No	Yes
EC - Uruguay Cooperation Agreement	No	-	No	No	No	No	No	No	No	No	No	Yes	No	No	Yes	No
EC - Russia PCA	No	-	No	Yes	No	No	No	No	Ad hoc & Political	No	Yes	Yes	Yes	No	Yes	Yes
EC - Jordan Asscociation Agreement	No	-	No	Yes	Yes	No	No	No	Ad hoc & Political	No	Yes	Yes	Yes	Yes	No	Yes
EC - Chile Association Agreement	Yes	No	Yes	Yes	No	No	No	Yes	Ad hoc	No	Yes	Yes	Yes	No	Yes	Yes
EC - Tajikistan Partnership Agreement	No	-	No	Yes	No	No	No	Yes	Political	Ad hoc & perm.arb.	Yes	Yes	No	Yes	No	Yes
CARIFORUM - EC EPA (2008)	No	-	No	Yes	Yes	No	Yes	Yes	Ad hoc & Political	No	Yes	Yes	Yes	Yes	Yes	Yes
EU - Korea FTA	No	-	No	Yes	Yes	No	Yes	Yes	Ad hoc & Political	No	No	No	Yes	No	No	Yes
Colombia - Ecuador - EU - Peru Trade Agreement	Yes	No	No	Yes	Yes	No	No	Yes	Ad hoc & Political	No	Yes	Yes	No	Yes	No	Yes
EU - Canada (CETA)	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Ad hoc & Political	Ad hoc & perm.arb.	No	No	Yes	No	No	Yes

APPENDIX C

Matrix of Investment – related Provisions in US (Part 1 – Column 1 to 15)

Agreement	Date of signature	Scope of the Investment Framework		Establishment (non-services sectors)		Non-discrimination (non-services sectors)				Investment in services sectors						
		Definition of Investor (1)	Definition of Investment (2)	Right of establishment? (3)	Pre-establishment limitations (4)	National treatment? (5)	Limitations to national treatment (6)	Most Favoured Nation? (7)	Exceptions to MFN? (8)	Investment in services covered by IIA? (9)	Provisions on establishment (10)	Pre-establishment limitations in services (11)	National treatment? (12)	Limitations to national treatment in services (13)	MFN? (14)	Exceptions to MFN? (15)
BIT Panama	27-Oct-82	No	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
BIT Turkey	3-Dec-85	No	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
BIT Tunisia	15-May-90	No	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
NAFTA	17-Dec-92	Yes	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
BIT Albania	11-Jan-95	No	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
US - Viet Nam Trade Relations Agreement	13-Jul-00	No	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Services section	Market access	Negative list	Yes	Negative list	Yes	Negative list
US - WAEMU TIFA	24-Apr-02	No	No	No	-	No	-	No	-	No	-	-	-	-	-	-
Australia - US FTA	18-May-04	Yes	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
US - KOREA FTA	30-Jun-07	Yes	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list
Brazil - US ATEC	18-Mar-11	No	No	No	-	No	-	No	-	No	-	-	-	-	-	-
TPP	4-Feb-16	Yes	Yes	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list	Investment section	NT + MFN	Negative list	Yes	Negative list	Yes	Negative list

APPENDIX D

Matrix of Investment – related Provisions in US (Part 2 – Column 15 to 31)

Agreement	Investment Regulation and Protection								Dispute Settlement		Investment Promotion and Cooperation					Sustainable and Socially Responsible Investment
	Provisions prohibiting performance requirements? (16)	Prohibition on performance requirements beyond TRIMs? (17)	Specific provision prohibiting ownership requirements? (18)	Free transfer of funds? (19)	Temporary entry and stay for key personnel? (20)	Provisions on expropriation? (21)	Specific reference to fair and equitable treatment (22)	Transparency? (23)	State-state dispute settlement? (24)	State-investor dispute settlement? (25)	Investment promotion? (26)	Cooperation mechanisms? (27)	Harmonization of rules? (28)	Any Type of Assymetries? (29)	Clause foreseeing the future liberalization of investment (30)	Sustainable and Socially Responsible Investment (31)
BIT Panama	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	No	No
BIT Turkey	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	No	No
BIT Tunisia	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	No	No
NAFTA	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	No	Yes
BIT Albania	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	No	No
US - Viet Nam Trade Relations Agreement	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Ad hoc	Ad Hoc & Perm.arb.	No	No	No	No	Yes	No
US - WAEMU TIFA	No	No	No	No	No	No	No	No	Ad hoc & Political	No	Yes	Yes	No	No	No	Yes
Australia - US FTA	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Ad hoc & Political	No	No	No	No	No	No	Yes
US - KOREA FTA	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Ad hoc & Political	Ad Hoc & Perm.arb.	No	No	No	No	No	Yes
Brazil - US ATEC	No	No	No	No	No	No	No	No	No	No	Yes	Yes	No	No	No	No
TPP	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Ad hoc & Political	Ad Hoc & Perm.arb.	Yes	Yes	No	Yes	No	Yes

APPENDIX E

Coding of Investment – related Provisions in EU (Part 1 – Column 1 to 15)

Agreement	Date of signature	Scope of the Investment Framework		Establishment (non-services sectors)		Non-discrimination (non-services sectors)				Investment in services sectors						
		Definition of Investor (1)	Definition of Investment (2)	Right of establishment? (3)	Pre-establishment limitations (4)	National treatment? (5)	Limitations to national treatment (6)	Most Favoured Nation? (7)	Exceptions to MFN? (8)	Investment in services covered by IIA? (9)	Provisions on establishment (10)	Pre-establishment limitations in services (11)	National treatment? (12)	Limitations to national treatment in services (13)	MFN? (14)	Exceptions to MFN? (15)
China - EC Trade & Cooperation Agreement	21-May-85	0.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
EC GCC Cooperation Agreement	15-Jun-88	0.0	0.0	0.0	0.0	1.0	0.5	1.0	1.0	0.0	0.0	0.0	1.0	0.5	0.0	0.0
EC - Uruguay Cooperation Agreement	4-Nov-91	0.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0
EC - Russia PCA	17-Jul-95	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5
EC - Jordan Asscociation Agreement	24-Nov-97	0.0	0.0	1.0	0.5	1.0	0.5	1.0	5.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5
EC - Chile Association Agreement	18-Nov-02	0.0	0.0	0.5	0.5	0.0	0.0	0.0	0.0	1.0	1.0	0.5	1.0	0.5	0.0	0.0
EC - Tajikistan Partnership Agreement	11-Oct-04	0.0	0.0	1.0	0.5	0.0	0.0	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
CARIFORUM - EC EPA (2008)	15-Oct-08	1.0	0.0	1.0	0.5	1.0	1.0	1.0	1.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5
EU - Korea FTA	6-Oct-10	1.0	0.0	0.5	0.5	1.0	1.0	0.0	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5
Colombia - Ecuador - EU - Peru Trade Agreement	26-Jun-12	1.0	0.0	0.5	0.5	1.0	1.0	0.0	0.0	1.0	1.0	0.5	1.0	0.5	0.0	0.0
EU - Canada (CETA)	30-Oct-16	1.0	1.0	1.0	0.5	1.0	1.0	0.0	0.0	1.0	1.0	0.5	1.0	1.0	1.0	1.0
Total		**4.0**	**1.0**	**5.5**	**3.5**	**6.0**	**5.0**	**6.0**	**5.0**	**8.0**	**8.0**	**4.0**	**9.0**	**5.0**	**7.0**	**4.5**

APPENDIX F

Coding of Investment – related Provisions in EU (Part 2 – Column 15 to 31)

Agreement	Investment Regulation and Protection								Dispute Settlement		Investment Promotion and Cooperation					Sustainable and Socially Responsible Investment	
	Provisions prohibiting performance requirements? (16)	Prohibition on performance requirements beyond TRIMs? (17)	Specific provision prohibiting ownership requirements? (18)	Free transfer of funds? (19)	Temporary entry and stay for key personnel? (20)	Provisions on expropriation? (21)	Specific reference to fair and equitable treatment (22)	Transparency? (23)	State-state dispute settlement? (24)	State-investor dispute settlement? (25)	Investment promotion? (26)	Cooperation mechanisms? (27)	Harmonization of rules? (28)	Any Type of Assymetries? (29)	Clause foreseeing the future liberalization of investment (30)	Sustainable and Socially Responsible Investment (31)	Total
China - EC Trade & Cooperation Agreement	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	0.0	**6.0**
EC GCC Cooperation Agreement	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	0.0	1.0	1.0	1.0	0.0	0.0	1.0	**10.0**
EC - Uruguay Cooperation Agreement	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	0.0	0.0	1.0	0.0	**6.0**
EC - Russia PCA	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	1.0	0.0	1.0	1.0	1.0	0.0	1.0	1.0	**12.5**
EC - Jordan Asscociation Agreement	0.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0	1.0	0.0	1.0	1.0	1.0	1.0	0.0	1.0	**18.0**
EC - Chile Association Agreement	0.5	0.0	1.0	1.0	0.0	0.0	0.0	1.0	0.5	0.0	1.0	1.0	1.0	0.0	1.0	1.0	**14.0**
EC - Tajikistan Partnership Agreement	0.0	0.0	0.0	1.0	0.0	0.0	0.0	1.0	0.5	0.5	1.0	1.0	0.0	1.0	0.0	1.0	**15.5**
CARIFORUM - EC EPA (2008)	0.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	1.0	1.0	1.0	**21.0**
EU - Korea FTA	0.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0	1.0	0.0	0.0	1.0	**15.5**
Colombia - Ecuador - EU - Peru Trade Agreement	0.5	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	**16.0**
EU - Canada (CETA)	0.5	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	0.0	0.0	1.0	0.0	0.0	1.0	**22.0**
Total	**1.5**	**0.5**	**1.0**	**8.0**	**6.0**	**1.0**	**1.0**	**6.0**	**8.0**	**1.5**	**8.0**	**9.0**	**7.0**	**4.0**	**5.0**	**9.0**	

APPENDIX G

Coding of Investment – related Provisions in US (Part 1 – Column 1 to 15)

Agreement	Date of signature	Scope of the Investment Framework		Establishment (non-services sectors)		Non-discrimination (non-services sectors)				Investment in services sectors						
		Definition of Investor (1)	Definition of Investment (2)	Right of establishment? (3)	Pre-establishment limitations (4)	National treatment? (5)	Limitations to national treatment (6)	Most Favoured Nation? (7)	Exceptions to MFN? (8)	Investment in services covered by IIA? (9)	Provisions on establishment (10)	Pre-establishment limitations in services (11)	National treatment? (12)	Limitations to national treatment in services (13)	MFN? (14)	Exceptions to MFN? (15)
BIT Panama	27-Oct-82	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
BIT Turkey	3-Dec-85	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
BIT Tunisia	15-May-90	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
NAFTA	17-Dec-92	1.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
BIT Albania	11-Jan-95	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
US - Viet Nam Trade Relations Agreement	13-Jul-00	0.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
US - WAEMU TIFA	24-Apr-02	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Australia - US FTA	18-May-04	1.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
US - KOREA FTA	30-Jun-07	1.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
Brazil - US ATEC	18-Mar-11	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TPP	4-Feb-16	1.0	1.0	1.0	0.5	1.0	0.5	1.0	0.5	1.0	1.0	0.5	1.0	0.5	1.0	0.5
Total		**4.0**	**9.0**	**9.0**	**4.5**	**9.0**	**4.5**	**9.0**	**4.5**	**9.0**	**9.0**	**4.5**	**9.0**	**4.5**	**9.0**	**4.5**

APPENDIX H

Coding of Investment – related Provisions in US (Part 2 – Column 15 to 31)

Agreement	Investment Regulation and Protection								Dispute Settlement		Investment Promotion and Cooperation					Sustainable and Socially Responsible Investment	
	Provisions prohibiting performance requirements? (16)	Prohibition on performance requirements beyond TRIMs? (17)	Specific provision prohibiting ownership requirements? (18)	Free transfer of funds? (19)	Temporary entry and stay for key personnel? (20)	Provisions on expropriation? (21)	Specific reference to fair and equitable treatment (22)	Transparency? (23)	State-state dispute settlement? (24)	State-investor dispute settlement? (25)	Investment promotion? (26)	Cooperation mechanisms? (27)	Harmonization of rules? (28)	Any Type of Assymetries? (29)	Clause foreseeing the future liberalization of investment (30)	Sustainable and Socially Responsible Investment (31)	Results
BIT Panama	0.5	0.0	1.0	1.0	1.0	1.0	1.0	0.0	0.5	1.0	0.0	0.0	0.0	0.0	0.0	0.0	18.0
BIT Turkey	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	0.5	1.0	0.0	0.0	0.0	0.0	0.0	0.0	19.0
BIT Tunisia	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	0.5	1.0	0.0	0.0	0.0	0.0	0.0	0.0	19.0
NAFTA	0.5	0.5	1.0	1.0	1.0	1.0	1.0	0.0	0.5	1.0	0.0	0.0	0.0	0.0	0.0	1.0	20.5
BIT Albania	0.5	0.5	0.0	1.0	1.0	1.0	1.0	1.0	0.5	1.0	0.0	0.0	0.0	0.0	0.0	0.0	18.5
US - Viet Nam Trade Relations Agreement	0.5	0.5	0.0	0.0	1.0	1.0	1.0	1.0	0.5	1.0	0.0	0.0	0.0	0.0	1.0	0.0	18.5
US - WAEMU TIFA	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	0.0	1.0	1.0	0.0	0.0	0.0	1.0	4.0
Australia - US FTA	0.5	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	20.0
US - KOREA FTA	0.5	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	0.0	0.0	0.0	0.0	0.0	1.0	20.0
Brazil - US ATEC	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0	0.0	2.0
TPP	0.5	0.5	0.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	0.0	1.0	0.0	1.0	23.0
Results	**4.5**	**3.0**	**4.0**	**8.0**	**9.0**	**9.0**	**9.0**	**7.0**	**7.0**	**8.0**	**3.0**	**3.0**	**0.0**	**1.0**	**1.0**	**5.0**	

국문초록

세계적으로 최근 10 년동안 각 국가들이 무역 기회 확대를 위해 지역무역협정, 자유무역협정 및다자무역협정을 확산시켰다.

유럽 연합과 미국과 같은 강대국들은 무역의 길을 닦기 위해 그들의 관심 분야와 기준, 그리고 무역 규범을 꾸준히 장려해왔다. 같이 영향력 있는 기관들과 나라들은 무역에 있어서 각 국가의 관심사 그리고 규범 등 법적인 규칙 위주로 미래를 위한 길을 닦는다는 원칙으로 근면한 활동을 해왔다.

본 논문은 1980 년대부터 2016 년도까지의 유럽 연합과 미국의 국제투자협정의 발전 과정을 비교 분석을 함으로써 국제투자협정의 고유한 특징을 검토하고자 한다.

Lesher and Miroudot (OECD, 2005) 와 Chornyi et al. (WTO, 2016) 를 합성시켜 국제투자협정의 분석을 위한 구성과 투자 규정 조항의 깊이와 범위에 대한 연구를 위해 계량적 평가를 참고하였다.

분석한 결과, 유럽연합과 미국의 국제투자협정 모두 전반적으로 투자 친화 환경으로 점진적으로 성취하는 변화를 보였다

특히, 유럽연합과 미국은 각 국의 정치, 경제, 무역의 양상에 따라 국제투자협정의 발전 과정에 두드러진 차이를 보였다.

하지만 최근 유럽연합과 미국에서 국제투자협정의 투자 조항에 대한 규제 융합의 추세를 보이고 있고, 특히 2016 년도에 서명된 최신 협정에서는 점차 투자자유화를 향한 정상화의 움직임을 나타내고 있음을 알 수 있다.