

New generation of investment agreements in the regime of the European Union

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Abstract

The judgment of the Court of Justice of the European Union as of 6 March 2018 in Case C-284/16 changed the system and coordination of investment relations of the Member States of the European Union. The judgment set a fundamental precedent that changed the system of international investment law and placed the investment arbitration, conducted due to bilateral investment agreements between the EU and the Member States. The aim of the scientific study is to point to the new generation of the EU investment agreements which, in accordance with their importance, will influence the development of international investment relations between EU Member States and non-member countries of the world. The study was elaborated on the analysis of the rules of legal logic, systematics, accuracy and the generalization of conclusions. The analysis and interpretation of obtained results have proved that the traditional system of international investment agreements is being changed. A new model is emerging in the regime of investment agreement of the European Union.

Keywords: agreement, investments, common trade policy, international law, protection of investments.

JEL Classification: K12, K22, K33

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1. Introduction

The Treaty on the Functioning of the European Union ('TFEU'), which entered into force in 2009, provides in Article 207 that direct investment is part of the common trade policy and that the European Union (EU) has exclusive competence on the foreign direct investment. In accordance with Article 3 (1) (e) of the TFEU, the EU has exclusive competence with respect to the common trade policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. On 12 December 2012, the European Parliament and the Council adopted Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L

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351, 2012).³ For the purposes of the Regulation, the negotiation of investment protection and reciprocal support agreements may take place only with the prior consent of the European Commission. The negotiated agreement on protection and mutual support of investments is subsequently subject to authorization by the European Commission. On 29 August 2020, the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union came into force.⁴ The new comprehensive European investment policy may enable the EU to utilize its leverage to negotiate favourable terms with non-Member States and consistency in protection standards worldwide, leading to an even (as well as a superior) playing field for EU investors.⁵

2. Aim and methodology

The study selects the Socialist Republic of Vietnam as case in order to describe the EU investment protection system and the role assigned to the EU Member States. The aim is to find the optimal system of interaction of the EU and its Member States on the one hand and Vietnam on the other hand.

The study addresses the Investment Protection Agreement between the EU and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part. The contract in question can be described as a new generation investment protection contract.

The analysis of the contract is based on Slovak and international doctrine on foreign direct investment law. The doctrine assists in the interpretation of the relevant EU and other documents, as well as in the evaluation of the agreement at stake. The study aims at providing a complete picture of the functioning of the new EU investment policy and law.

3. Bilateral investment treaties

Globalisation is the dynamic complex of processes that has opened, linked and unified the globe since the end of the 19th century.⁶ Globalization is closely linked to the movement of capital and the development of investment relations. Globalization has changed the patterns of international investment relations. The subject of these relations are direct and indirect investments. Foreign direct investment is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made

³ European Commission: Official Journal L 351, 2012. *Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.*

⁴ Official Journal L 169, 2020. The Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. 29.5.2020.

⁵ Chaisse Julien. 2012. *Promises and Pitfalls of the European Union Policy on Foreign Investment.* "Journal of International Economic Law". Vol. 15, Issue 1/2012, pp. 51-84.

⁶ Jemala, Marek. 2008. *Globalization as complex of processes: Creating more advanced but risk world.* "Journal of Economics". Vol. 56 No.9/2008 pp. 925-942.

available in order to carry out an economic activity.⁷ Portfolio investments are short-term, such as securities. The globalization process requires market liberalization worldwide, the entrance restrictions for foreign investment were eliminated or restricted in a wide range of industries.

The Court of Justice of the European Union has described the notion of "portfolio investment" as "*the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking*" (Cases C-282/4 and C-283/04, ECR p. I-9141, para. 19).

Investment is a factor which has a major impact on the economy of each country. Economic policy is directly dependent on investment. The loosening of economies and the removal of barriers have created the preconditions for the inflow of foreign investment into host countries.

Foreign investors coming to Slovakia have the opportunity to apply for regional investment aid. One of the criteria for obtaining state aid is also the creation of new jobs.⁸ In developing investment relations, the European Union also places emphasis on environmental protection and green investment. Thus, the environmental policy of the European Union is based on a number of principles, including that of precaution, prevention, diminishment of pollution from its source, as well as that of the polluter's liability. The process of developing investment relations was also accompanied by the adoption of international instruments for the protection and promotion of investments, in other words the adoption of bilateral investment agreements. As bilateral investment treaties are investments agreements in the sense of the 1969 Vienna Convention of the Law of Treaties, their contractual nature requires clear definition on the scope of the agreement and the obligations it will entail.⁹ Bilateral investment agreements provide in particular for the protection and promotion of the development of investment relations, with emphasis on respect for the principle of fair treatment of investments in the host country, non-discrimination and the rule of law in case of expropriation.

Each bilateral investment agreement sets various standards for investor protection by the state (eg. against expropriation or nationalization without fair compensation, providing for the freedom to transfer funds profits, royalties, capital, warranty against the infringement of property rights, prohibiting the imposition of performance requirements, etc.). The state receiving investment is responsible for the fair treatment of investments. The European Union also seeks, within the framework of international contract law, to promote the values of the EU in the treaties to which it is a party. Some authors are of the opinion that *the expansion of EU primary and secondary legislation into third countries' legal orders is most often achieved as a result of the conclusion of international agreements whose provisions*

⁷ European Commission: Official Journal L 178, Foreign Direct Investment. 8.7.1988.

⁸ Šuplata, Marian, *Regional state aid granted in Slovakia*. "Hradec economic days", Hradec Králové. 2015. p. 234.

⁹ Gazzini, Tarcisio. *Bilateral Investment Treaties*, T. Gazzini, E. De Brabandere, eds. International investment law: the sources of rights and obligations. The Hague: Martinus Nijhoff, 2012, p. 106.

reproduce the prescriptions laid down in the treaties establishing the European Union and in acts adopted by institutions of the EU.¹⁰

The Slovak Republic has been entering into contractual relations since 1993. The Ministry of Finance of the Slovak Republic is responsible for coordination, concluding, amending, implementing and terminating international agreements, the subject of which is investments and finances. Within the institutional system for the support and influx of foreign investments, the Slovak Investment and Trade Development Agency (SARIO) operates, which also assists Slovak business entities in the implementation of their foreign-business activities.¹¹ As a result of the Case Achmea decision, the process of terminating bilateral investment agreements with EU Member States has begun. In connection with the European investment policy, which is also part of the Europe 2020 Strategy, the Slovak Republic supports all activities of the European Union.

4. Characteristics of international treaties within the EU legal order

International treaties belong to the sources of European Union's law and are considered as a legislative category *sui generis* from the perspective of EU law. International agreements are concluded between the EU on the one hand, and another entity of public international law, i.e. a state or an international organization, on the other (EUR-LEX, 2020). Their characteristic feature under EU law is that they have a direct effect and their legal force is superior to secondary legislation, which must therefore comply with them (Article 216 (2) TFE). International agreements concluded by the EU are subordinate to primary law. Pursuant to Article 216 (1) TFEU, the Union may, within its sphere of competence, conclude international agreements with third countries or international organizations. The obligation of the EU to comply with international law (as a subject of international law which is the addressee of the *pacta sunt servanda* and *consuetudo est servanda* rules) is transferred to the internal legal orders of the Member States. The obligation for Member States to observe EU international agreements of the EU is a further guarantee of compliance.¹²

The EU-Vietnam Agreement is to be signed by the Union pursuant to a decision of the Council based on Article 218(5) TFEU and concluded by the Union pursuant to a decision of the Council based on Article 218(6) TFEU, following the European Parliament's consent and ratification by the Member States in accordance with their respective internal procedures.

The objective of the Investment Protection Agreement between the EU and its Member States, of the one part, and the Socialist Republic of Vietnam, of the

¹⁰ Muraviov, Viktor, Mushak, Natalia and Tarakhonych, Tetiana. *International agreements of the European Union and acquis of the Union*. "Juridical Tribune – Tribuna Juridica", Vol 10, Special Issue, 2020, p. 49.

¹¹ Paškrtová, Lucia. *Institutional support of the Slovak Republic foreign market*. Hradec economic days 2015. Hradec Králové University, 2015, p. 397.

¹² Martines, Francesca. *Direct Effect of International Agreements of the European Union*. "European Journal of International Law", Vol. 25, Issue 1, 2014, pp. 129-147.

other part, is to enhance the investment relations between the Parties in accordance with the provisions of this Agreement (“EU-Vietnam Agreement”). From the date of its entry into force, the EU-Vietnam Agreement will replace and supersede the bilateral investment treaties between Vietnam and EU Member States (21 BITs). As for instance, the former Agreement between the Government of the Slovak Republic and the Government of the Socialist Republic of Vietnam concerning the Promotion and Reciprocal Protection of Investments, signed on 17 December 2009 is being superseded.

The EU-Vietnam Agreement aims at improving the 21 existing bilateral investment treaties of EU member States with Vietnam.¹³

The agreement is structured into articles. Chapter 1, Article 1.2. of EU-Vietnam Agreement describes the objectives and general definitions. The term „investment” is defined as *meaning any kind of asset which is owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and a certain duration.*

The legal regulation of investment relations at the international level applies only to those investments, which by their nature are an economic category, because investing can be understood as a financing process that will bring the owner a certain profit or other economic benefit. An investment company focuses mainly on the renewal and expansion of tangible and intangible fixed assets. Therefore, emphasis is quite often laid on the expected return on the investment, i. e. how the economic expectations of the investor will be met. Every investment is associated with investment risks. The economic efficiency of an investment is given by the relationship between the return on investment and the capital resources expended on the investment.

Bilateral investment agreements specify exactly which investment relations are covered by the agreement. The precise specification of the concept of investment will facilitate the resolution of disputes and discrepancies between the investor and the state. Thus, a more detailed definition, having been chosen by the EU-Vietnam Agreement compared to general investment law, certainly is an advantage.

Chapter 2 of the EU-Vietnam Agreement sets standards for the substantive protection of investments in the host countries. Pursuant to the agreement, Vietnam guarantees that investors from EU Member States and their investments in Vietnam will be treated fairly and equally and will not be discriminated against compared to investors and Vietnam investments in comparable situations. At the same time, this agreement protects the investments of EU Member States' investors and their investments in Vietnam from expropriation, unless it is in accordance with a fair trial for public purposes, on a non-discriminatory basis and for immediate, reasonable and effective compensation according to the market value of the expropriated investment.

¹³ European Union. *Proposal for a Council decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part* COM/2018/693 final, Brussels, 2018.

Chapter 3 of the agreement between the EU and Vietnam dealing with dispute settlement, the largest chapter is divided into sections, making altogether 59 articles. It provides for the establishment of an Investment Court System designed to meet the high expectations of citizens and industry for a fairer, more transparent and institutionalized system of settling investment disputes. The EU budget includes the respective expenses for setting up and the running costs of the Investment Court System (COM / 2018/693 final).¹⁴

This investment court system became already the model for re-negotiations of the respective provisions of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The investment court system departs substantially from general international arbitration, in particular, with regard to the appointment of judges.¹⁵ According to the Opinion of the ECJ in the case 1/17 of 30 April 2019, the mechanism for the resolution of disputes between investors and States provided for in the free trade agreement between the EU and Canada (CETA) is compatible with the EU law (ECLI: EU: C: 2018: 478). Thus, in principle, the ECJ has confirmed the EU's exclusive competence with regard to the mechanism for settling disputes between States in the field of investment protection.

The ICS ensures compliance with investment protection rules and seeks to strike a balance between the transparent protection of investors and the protection of the state's right to regulate in order to meet public policy objectives.

The cornerstones of the ICS include:

- a permanent investment tribunal of first instance and an appellate tribunal, which will ensure legal correctness and certainty in the interpretation of the agreement;
- all members of the courts are subject to strict rules of independence, integrity and ethical conduct, and must demonstrate their expertise in public international law;
- proceedings before the tribunals will be fully transparent.

The EU-Vietnam Agreement rules on all relevant details of the ICS in the Annexes 7: Rules of Procedure, 8: Code of Conduct for Arbitrators and Mediators, 9: Mediation Mechanism, 10: Mediation Mechanism for Disputes between Investors and Parties, 11: Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators.

Chapter 4 of the EU-Vietnam Agreement includes institutional, general and final provisions. The investment protection agreement will enter into force only after approval by the national parliaments of the EU Member States. It can be stated unequivocally that the agreement contains all the innovations of the EU's new approach to investment protection. In this context, we have to point out the well-established fact that the European Union's action has not only an economic

¹⁴ Ibid.

¹⁵ Puccio, Laura and Harte, Roderick. *From arbitration to the investment court system*. "The evolution of CETA rules", 2017.

dimension but also a social dimension.¹⁶ For this reason, it also emphasizes the socio-economic development and protection of workers' social rights in the context of the promotion and development of investment relations.

Following the above comparison of major difference between traditional investment agreement (BIT) and the EU agreement of new generation we have to state that

a) the EU agreement of new generation regulate for and pursue legitimate public policy objectives (public health; safety; and the environment),

b) the EU agreements of new generation (eg. EU - Vietnam) also offer investors the option of a modern and reformed investment dispute resolution mechanism - standing international and fully independent dispute resolution system (consisting of permanent First Instance and Appeal Tribunals). In addition to the arbitration, the agreement introduces a mechanism for resolving disputes through mediation.

According to the article 4.20 (4) of the EU- Vietnam Agreement from the date of its entry into force, the EU-Vietnam Agreement will replace and supersede the bilateral investment treaties between Vietnam and EU Member States that are listed in Annex 6 (List of Investment Agreements). In accordance with customary international law on treaties, it is not customary for international treaty practice to terminate bilateral international treaties on the basis of a multilateral international treaty. The Agreement between the Government of the Slovak Republic and the Government of the Socialist Republic of Vietnam for the Promotion and Reciprocal Protection of Investments, signed on 17 December 2009.

5. Investment protection

According to the EU-Vietnam Agreement, investment protection takes the following forms:

1. National treatment (2.3. Article EU-Vietnam Agreement)
2. Most-favoured-nation clause (2.4 Article EU-Vietnam Agreement)
3. Treatment of investments (2.5 Article EU-Vietnam Agreement)
4. Compensation for Losses (2.6 Article EU-Vietnam Agreement)
5. Expropriation (2.7 Article EU-Vietnam Agreement).

Ad 1. National treatment. The national treatment is a universal principle in international public law and applies to all types of investment agreements. National treatment is the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, no less favourably than domestic enterprises in like situation.¹⁷ Non-discrimination is one of the fundamental principles of the European economic integration within the EU. The national treatment is one of the provisions that translate the principle into concrete legal obligations. Most notably, national treatment and free transfer clauses were the key

¹⁶ Kovalančíková, Vlasta. *Social oriented market and social economy*. Hradec economic days 2014. Hradec Králové University, 2014, Vol. 4 (2) p. 59.

¹⁷ OECD. *National Treatment for Foreign-Controlled Enterprises*, 2017, <https://www.oecd.org/daf/inv/investment-policy/national-treatmentinstrument.htm> [cited 5.2.2021].

in early investment law, whereas fair and equitable treatment was regarded as relatively unimportant.¹⁸ The purpose of this standard is to promote equal treatment between foreign and domestic investors while avoiding arbitrary or discriminatory measures.¹⁹ Case law of international investment arbitration is rich on awards on national treatment or less favourable.

At the international level, the two types of governmental measures are applied in practice. Table 1 illustrates measures that are *de jure* discriminatory and measures that are *de facto* discriminatory.

Table 1. National Treatment Standard

Measures that are <i>de jure</i> discriminatory	Measures that are <i>de facto</i> discriminatory
for instance, a law promulgated by a government that explicitly grants benefits to domestic investors or investments; such a measure could be a law promulgated by a government that explicitly grants benefits or subsidies only to local investors or investments.	for instance, measures that are not discriminatory at first glance, but nevertheless discriminate against foreign investors or investments that qualify for BIT protection.

Source: Aceris Law LLC (2018). The National Treatment Standard – Investment Arbitration. Retrieved from: <https://www.acerislaw.com/the-national-treatment-standard-investment-arbitration/>

In order to develop investment relations, host countries have an obligation to ensure the protection of the investment of a foreign investor. Failure to comply with this obligation could lead to the investor's claim being brought before a court or arbitration tribunal. Following Article 2.2 of the EU-Vietnam Agreement, the Member States have agreed to their right to regulate in their territory, in order to achieve legitimate policy objectives, such obligations as the protection of public health, safety, the environment or public morality, social protection or consumer protection, or the promotion and protection of cultural diversity. This means that the Member States can apply restrictive measures in these areas.

It is customary in international practice that in trade agreements as well as in bilateral investment agreements a national treatment (Article 2.3) provision is included. The EU-Vietnam Agreement stipulates that “*Each Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than that it accords, in like situations, to its own investors and to their investments.*”

The content of the provision means that the parties ensure the same treatment of foreign investors as domestic investors. The principle can be considered as an

¹⁸ Hepburn, Jarrod et al. *Investment Law before Arbitration*. “Journal of International Economic Law”, Vol. 23, Issue 4, December 2020, pp. 929-947.

¹⁹ Shen, Wei. *Evolution of Non-discriminatory Standards in China's Bilateral Investment Treaties in the Context of EU-China BIT Negotiations*, “Chinese Journal of International Law”, Vol. 17, Issue 3/2018, p. 799.

economic tool that prevents the executive power from interfering in international investment relations. It has a high profile, it is a guarantee of safety and protection. It ensures straightforwardness and transparency in the development of international investment relations. Subsidies provided to eligible entities by the Parties, arms manufacturing, air transport services and repairs are excluded from the national and most-favoured-nation treatment regime. In this context, the notion of subsidy is understood as State aid as defined by EU law. Subsidies provided in Vietnam include investment incentives and investment aid.

Ad 2. Most-Favoured-Nation Treatment. The concept of the most-favoured-nation clause is one of the instruments of international trade law. The most-favoured-nation clause obliges a State to extend the commercial advantages which it has granted to another State to other States. The most-favoured-nation clause has several forms, including unconditional form and the form conditioned by reciprocity. The main task of the most-favoured-nation clause is to ensure international trade without discrimination. European states have applied it since the 17th century.

The most-favoured-nation clause in the investment agreement copies the essence of the clauses contained in international trade agreements, i.e. each Contracting Party shall accord to investors of the other Contracting Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than the treatment it accords to third country investors, in like situations, to investors of a third country and their investments.

Ad 3. Fair and equitable treatment. The concept of fair and equitable treatment is one of the standards found in most trade and investment contracts. Bilateral investment agreements contain a specific provision on fair and equitable treatment. Should the investor's investment be treated differently, it is entitled to compensation. The content of the principle is good faith, the right to a fair trial, the protection of legitimate expectations, the prohibition of any discrimination, transparency, legality.

Violation of the standard of impartial and fair treatment is possible only in cases where it is established that the investor has been treated in such an unfair, special or arbitrary manner that such treatment is unacceptable from an international legal perspective.

For instance, the wording in Article 4 (2) of the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments 459/1991 Coll. stipulates that „*Each contracting Party shall ensure fair and equitable treatment within its territory of the investors' investments of the other Contracting Party*”.

According to Article 2.5 of the EU-Vietnam Agreement entitled Treatment of Investment the wording is the following: “*Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments.*” The contracting parties also concluded an Understanding on the Treatment of Investments (ANNEX 3) (European standard) which is an integral part of the agreement.

With respect to the above, the European and international standard of fair and equitable treatment provides protection to an investor. International investment

law emphasizes the protection of investors' rights in a broader context. The European Investment Agreement, on the other hand, in clause 2, lists specific forms of breaches of the obligations of fair and equitable treatment:

- (a) a denial of justice in criminal, civil or administrative proceedings;
- (b) a fundamental breach of due process in judicial and administrative proceedings;
- (c) manifest arbitrariness;
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) abusive treatment such as coercion, abuse of power or similar bad faith conduct.

This set of rules establishes the investor's right of access to justice, which is a natural right originating in customary international law concerning the treatment of aliens. The denial of justice can be understood as a restriction of access to court proceedings in which the dispute was to be resolved by agreement between the state and the foreigner.

Paulsson²⁰ distinguishes, in particular, between (1) denial of justice as a result of external interference in the judiciary and (2) denial of justice on the basis of partisanship or (usually professional) misconduct within the judicial system itself. In practice, for economic operators from EU Member States and Vietnam, this means that the Investment Protection Agreement guarantees them the right to fair and equitable treatment.

Ad 4. Compensation for losses. Findings of international contractual practice suggest that most bilateral investment agreements contain a clause on compensation for losses. The EU-Vietnam Agreement includes in Article 2.6 a clause concerning compensation for losses. This is a standard provision for compensation for damage originating from an event not caused by the state. In the event of adverse political or economic developments (war or other armed conflict, a revolution, a state of national emergency, a revolt, an insurrection or a riot in the territory), the state in whose territory the investment plan is implemented is obliged to protect the investor's rights. If damage occurs to the investor's investment, the state is obliged to pay compensation. This provision regulates the treatment to be granted to foreign investors in case their investments suffer losses owing to war or other armed conflict, revolution, civil disturbance, state of national emergency, or other similar events.²¹

Ad 5. Expropriation. Expropriation is the most serious interference with an investor's property rights. The ban on expropriation is also an important tool for protecting investors' investments. Indirect expropriation occurs when a state takes effective control of, or otherwise interferes with the use, enjoyment or benefit of, an investment, strongly depreciating its economic value, even without a direct taking of property.²²

²⁰ Paulsson, Jan. *Denial of Justice in International Law*. Cambridge University Press, Cambridge, 2005, p. 61.

²¹ Pérez-Aznar, F. *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*. *ICSID Review*. "Foreign Investment Law Journal", Vol. 32, Issue 3/ 2017, pp. 696-720.

²² UNCTAD. *Exportation*. UN New York and Geneva. 2012.

The Investment Protection Agreement protects EU investors and their investments in Vietnam from expropriation, except in the case of public expropriation, in accordance with due process, on a non-discriminatory basis and with the payment of prompt, reasonable and effective compensation commensurate with fair market value. The rule provides for the transfer of ownership of a foreign investor to the host state, with emphasis on proper procedural procedure and financial compensation. In addition to international law, the national law, i.e. the Commercial Code of the Slovak Republic in article 25 protects a foreigner's property participation in business in the Slovak Republic and stipulates the conditions under which this property may be expropriated, i.e. only in the public interest.

Although the term expropriation is meant to be understood only as protection against physical confiscation of property, currently indirect expropriation occurs most often. In such a case there is no loss of ownership and its transfer to the state, the investor, however, is virtually deprived to exercise any right to property by state measures.²³

Compensation rules such as expropriation clauses in international treaties help solve post-investment moral hazard problems such as hold-ups, thereby helping to prevent inefficient over-regulation and encouraging foreign investment.²⁴

The conditions of expropriation are legal proceedings, non-discrimination and compensation provided to the investor for the expropriated property. An object that can be expropriated cannot be understood exclusively as tangible assets; for example, expropriation is often objected to in investment arbitrations in relation to permits or licenses granted. The only entity that is authorized to carry out the expropriation is the state and its authorities.

According to Annex 4 Understanding on Expropriation, which is integral part of the EU-Vietnam Agreement, expropriation can take two forms – direct expropriation and indirect expropriation.

Table 2. Forms of expropriation

Direct expropriation	Indirect expropriation
Direct expropriation occurs if an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. ICSID Case NO. ARB.05/06	Indirect expropriation occurs if a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. ICSID Case No. ARB/AF 97/1

Source: Annex 4: Understanding on Expropriation, Retrieved from: <https://eur-lex.europa.eu/legal-content/SK/ALL/?uri=CELEX:52018PC0693>

²³ UNCTAD. *Bilateral Investment Treaties in the Mid-1990-s*. New York – Geneva: United Nations Publication, 1998, p. 66.

²⁴ Aisbett, Emma, Carp, Larry & McAusland, Carol, *Compensation for Indirect Expropriation in International Investment Agreements: Implications of National Treatment and Rights to Invest*. "Journal of Globalization and Development". Vol.1 Issue 2/2010, p. 1.

In any expropriation, emphasis is laid on the nature of the state measure, to proportionality to the objective pursued, and to the extent of the interference with property rights. In Case No. ARB (AF)/97/1 (ICSID) *Metalclad v. Mexico*, for example, the tribunal has ruled that the concept of NAFTA expropriation includes "*covert or unplanned interference with the use of property that has the effect of depriving the owner, in whole or in part, of using or reasonably expected economic gain of the property, not necessarily to the apparent profit of the host state.*"

Table 3. Investment protection

Substantive standards	Procedural and legal standards
the host state's commitment to fair treatment, compliance with the national treatment regime, the most-favoured-nation clause, protection against discriminatory measures or illegal expropriation.	a modern and reformed investment dispute settlement mechanism.

Source: own processing

6. Findings

The current model of investment protection and promotion, formed on the basis of bilateral investment agreements concluded by independent and sovereign states, is being replaced by agreements on the protection of institutions, where the EU takes the initiative as a subject of international law. Bilateral investment agreements have set the standard for the treatment of investment by investors in the territory of the host countries. Bilateral investment agreements are a unique type of international agreement because they are *concluded by states but protect the rights of investors as individuals*.

The reasons for concluding investment protection agreements are various, one of which is that investment exporting countries enter into agreements to protect the property and property rights of investors in the host country. The second reason is to ensure international legal regulation and protection for investors, which influences their decision-making, but the inflow of any foreign investment has implications for the development of the economies of the state where the investment plan is implemented.

The International Investment Protection Treaty between the EU and Vietnam is a new type of investment protection treaty and represents a fundamental change for theories of international investment law, but also change in practice, especially in terms of the protection of investors' rights. It introduces specific provisions on the protection of investors' rights and lists precisely specific forms of fair and equitable treatment.

7. Conclusions

In a globalized world, international investment activity plays an important role. States are constantly improving regulatory measures to stimulate foreign

investment. However, the development of investment relations also depends on the protection of investments of foreign investors. Every investor's decision is accompanied by an analysis of economic, legal and political factors. Investors emphasize the legal framework for the protection of their investments.

In order to achieve its objectives and strategy, the EU, with the support of the Member States, has begun to implement a common investment policy, which has resulted in an agreement to terminate bilateral investment agreements between Member States and investment protection agreements.

The EU-Vietnam Investment Protection Agreement, negotiated by the Commission, in line with the negotiating directives, is a prototype of the next generation of investment protection agreements. This agreement marks a major breakthrough in international investment relations and is an instrument for deepening European economic integration.

As part of the analytical research, we clearly came to the conclusion that the protection of investments by foreign investors meets universal standards, which are also included in bilateral investment agreements.

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4. Chaisse, Julien. *Promises and Pitfalls of the European Union Policy on Foreign Investment*. Journal of International Economic Law, Volume 15, Issue 1, March 2012, pp. 51–84. Retrieved from: <https://doi.org/10.1093/jiel/jgs001>
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