1997 Dutch Model BIT Art. 3.2

2. More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

1997 Dutch Model BIT Art. 4

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

a) under an agreement for the avoidance of double taxation; or

b) by virtue of its participation in a customs union, economic union or similar institution; or

c) on the basis of reciprocity with a third State.

1997 Dutch Model BIT Art. 7

Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.

2012 US Model BIT Art. 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

2012 US Model BIT Art. 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
		An express provision that precludes application of the treaty to acts that ceased to exist before the treaty's entry into force would enhance legal certainty, especially with regard to the period between the date of the treaty's signature and its entry into force. This approach would nevertheless keep open to challenge those prior laws and regulations that come into contradiction with the new treaty once it enters into force. An alternative is to apply the treaty only to those measures that are adopted after the treaty's entry into force: this would automatically preclude all of the State's earlier non-conforming measures from being challenged (e.g., preferential treatment to domestic investors in a particular industry in violation of the National Treatment obligation), eliminating the need to identify and schedule such measures individually.
3 Admission … govern entry investments into the host State (see also "Part B: Pre-establisment")	3.1.0 Provide that investments are admitted in accordance with domestic laws of the host State. 3.1.1 No clause.	Most IIAs provide for admission of investments in accordance with the host State's national laws. Thus, unlike in the treaties that belong to the "pre-establishment" type, in this case States do not give any international guarantees of admission and can change relevant domestic laws as they deem appropriate. However, the premise to admit investments in accordance with domestic law still has a certain value as it affords protection to investors in case a host State refuses admission in contradiction or by disregarding its internal laws.
4 Standards of treatment and protection		
4.1 National treatment (NT) … protects foreign investors/ investments against discrimination vis-à-vis domestic investors	4.1.0 Prohibit less favourable treatment of covered foreign investors/investments vis-à-vis comparable domestic investors/investments, without restrictions or qualifications.	NT guarantees foreign investors a level-playing field vis-à-vis comparable domestic investors and is generally considered conducive to good governance.
	4.1.1 Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: - subordinates the right of NT to a host country's domestic laws - reserves the right of each Party to derogate from NT - does not apply to certain policy areas (e.g. subsidies, government procurement).	Yet under some circumstances, and in accordance with their SD strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for SD goals.
	4.1.2 Include country-specific reservations to NT, e.g. carve-out: - certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) - specific sectors/industries where the host countries wish to preserve the right to favour domestic investors - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs).	For example, countries with a nascent/emerging regulatory framework that are reluctant to rescind the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Even more so, omitting the NT clause from the treaty may significantly undermine its protective value.
	4.1.3 Omit NT clause.	There can be a middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.2 Most-favoured nation (MFN) treatment … protects foreign investors/ investments against discrimination vis-à-vis other foreign investors	4.2.0 Prohibit less favourable treatment of covered investors/investments vis-à-vis comparable investors/investments of any third country. 4.2.1 Limit the application of the MFN clause, noting that MFN does not apply to more favourable treatment granted to third-country investors under, e.g.: - Economic integration agreements - Double taxation treaties - IIAs concluded prior to (and/or after) the conclusion of the IIA in question (e.g. if the latter contains rules that are less favourable to investors, as compared to earlier IIAs) - ISDS clauses / procedural rights. 4.2.2 Limit the application of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and de facto treatment. 4.2.3 Include country-specific reservations to MFN, e.g. carve out: - certain policies/measures (e.g. subsidies, etc.) - specific sectors/industries - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities)	The MFN provision ensures a level-playing field between investors from the IIA home country and comparable investors from any third country. However, competing objectives and implications may come into play when designing an MFN clause. While an MFN clause may be used to ensure upward harmonization of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate conscious treaty design. This is particularly the case if the MFN clause extends to pre-establishment issues or when the treaty includes carefully balanced provisions that could be rendered ineffective by an overly broad MFN clause. An example of the latter are recent arbitral decisions that have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties, e.g. to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent procedural (ISDS-related) requirements in the base treaty. Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of instruments from the scope of the MFN clause (see section 4.2.1) or, in a broader manner, by restricting the scope of the MFN clause to domestic treatment (see section 4.2.2). Carving out certain sectors/industries or policy measures through country-specific reservations, catering for both current and future regulatory needs, is an additional tool that allows managing the scope of the MFN clause in a manner targeted to the specific needs of individual IIA Parties.
4.3 Fair and equitable treatment (FET) … protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment	4.3.0 Give an unqualified commitment to treat foreign investors/investments "fairly and equitably". 4.3.1 Qualify the FET standard by reference to: - minimum standard of treatment of aliens under customary international law (MST/CIL) - international law or principles of international law. 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to - deny justice in judicial or administrative proceedings - treat investors in a manifestly arbitrary manner - flagrantly violate due process - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment - infringe investors' legitimate expectations based on investment-inducing representations or measures. 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that: - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives - the investor's conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached - the country's level of development is relevant in determining whether the FET standard has been breached - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause. 4.3.4 Omit FET clause.	FET is a critical standard of treatment: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection. Through an *unqualified* promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its policy space, raising its exposure to foreign investors' claims and resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that - while pursuing SD objectives - may have a negative impact on foreign investors. Several options exist to address the deficiencies of *unqualified* FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct that amounts to egregious mistreatment of foreign investors), but the exact contours of MST/CIL remain elusive. An omission of the FET clause would reduce States' exposure to investor claims, but foreign investors may perceive the country as not offering a sound and reliable investment climate. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals.

Sections	Policy options for international investment agreements (IIAs)		Sustainable development (SD) implications
4.4 Full protection and security (FPS) …requires host States to exercise due diligence in protecting foreign investments	4.4.0	Include a guarantee to provide investors/investments full protection and security.	Most IIAs include a guarantee of full protection and security (FPS), which is generally regarded as codifying customary international law obligations to grant a certain level of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection: if FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives, including for SD objectives. Policymakers may follow a recent trend to qualify the FPS standard by explicitly linking it to customary international law or including a definition of the standard clarifying that it is limited to "physical" security. This would provide predictability and prevent expansive interpretations that would constrain regulatory prerogatives.
	4.4.1	Clarify the FPS clause by: - specifying that the standard refers to "physical" security and protection - linking it to customary international law (e.g. specifying that this obligation does not go beyond what is required by CIL) - providing that the expected level of police protection should be commensurate with the level of development of the country's police and security forces.	
	4.4.2	Omit FPS clause.	
4.5 Expropriation … protects foreign investors in case of dispossession of their investments by the host country	4.5.0	Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation.	An expropriation provision is a fundamental element of an IIA. IIAs with expropriation clauses do not take away States' right to expropriate property, but protect investors against arbitrary or uncompensated expropriations, contributing to a stable and predictable legal framework, conducive to foreign investment. IIA provisions typically cover "indirect" expropriation, which refers to regulatory takings, creeping expropriation and acts "tantamount to" or "equivalent to" expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policy making (e.g. environmental, social or health regulations). To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests. The standard of compensation for lawful expropriation is another important aspect. The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate compensation and clarify what factors should be taken into account.
	4.5.1	Limit protection in case of indirect expropriation (regulatory taking) by - establishing criteria that need to be met for indirect expropriation to be found - defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.) - clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules).	
	4.5.2	Specify the compensation to be paid in case of lawful expropriation: - appropriate, just or equitable compensation - prompt, adequate and effective compensation, i.e. full market value of the investment ("Hull formula").	
	4.5.3	Clarify that only expropriations violating any of the three substantive conditions (public purpose, non-discrimination, due process), entail full reparation.	
4.6 Protection from strife … protects investors in case of losses incurred as a result of armed conflict or civil strife	4.6.0	Grant non-discriminatory (i.e. NT, MFN) treatment with respect to restitution/compensation in case of armed conflict or civil strife.	IIAs often contain a clause on compensation for losses incurred under specific circumstances, such as armed conflict or civil strife. Some countries have expanded the coverage of such a clause by including compensation in case of natural disasters or *force majeure* situations. Such a broad approach increases the risk for a State to face financial liabilities arising out of ISDS claims for events outside of the State's control. Most IIAs only confer a relative right to compensation on foreign investors, meaning that a host country undertakes to compensate covered investors in a manner at least equivalent to comparable host State nationals or investors from third countries. Some IIAs provide an absolute right to compensation obliging a State to restitute or pay for certain types of losses (e.g. those caused by the requisitioning of their property by government forces or authorities). The latter approach is more burdensome for host States but provides a higher level of protection to investors.
	4.6.1	Guarantee – under certain circumstances – compensation in case of losses incurred as a result of armed conflict or civil strife as an absolute right (e.g. by requiring reasonable compensation).	
	4.6.2	Define civil strife as not including "acts of God", natural disasters or force majeure.	
	4.6.3	Omit protection-from-strife clause.	

Question 2: Non-discriminatory treatment for investors

Explanation of the issue

Under the standards of non-discriminatory treatment of investors, a state Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (national treatment), as well in the same way in which it treats investors from other countries (most-favoured nation treatment). This ensures a **level playing field** between foreign investors and local investors or investors from other countries. For instance, if a certain chemical substance were to be proven to be toxic to health, and the state took a decision that it should be prohibited, the state should not impose this prohibition only on foreign companies, while allowing domestic ones to continue to produce and sell that substance.

Non-discrimination obligations may apply after the foreign investor has made the investment in accordance with the applicable law (**post-establishment**), but they may also apply to the conditions of access of that investor to the market of the host country (**pre-establishment**).

Approach in most existing investment agreements

The standards of national treatment and most-favoured nation (MFN) treatment are considered to be **key provisions** of investment agreements and therefore they have been consistently included in such agreements, although with some variation in substance.

Regarding **national treatment**, many investment agreements do not allow states to discriminate between a domestic and a foreign investor once the latter is **already established** in a Party's territory. Other agreements, however, allow such discrimination to take place in a limited number of sectors.

Regarding **MFN**, most investment agreements do not clarify whether foreign investors are entitled to take advantage of procedural or substantive provisions contained in other past or future agreements concluded by the host country. Thus, investors may be able to claim that they are entitled to benefit from any provision of another agreement that they consider to be more favourable, which may even permit the application of an entirely new standard of protection that was not found in the original agreement. In practice, this is commonly referred to as "**importation of standards**".

The EU's objectives and approach

The EU considers that, as a matter of principle, **established investors should not be discriminated** against after they have established in the territory of the host country, while at the same recognises that in certain rare cases and in some very specific sectors, discrimination against already established investors **may need to be envisaged**. The situation is different with regard to the right of **establishment**, where the Parties **may choose whether or not to open certain markets or sectors**, as they see fit.

On the "**importation of standards**" issue, the EU seeks to clarify that MFN **does not allow procedural or substantive provisions to be imported from other agreements**.

The EU also includes **exceptions** allowing the Parties to take measures relating to the protection of health, the environment, consumers, etc. Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. These are typically included in EU FTAs and also apply to the non-discrimination obligations relating to investment. Such exceptions allow differences in treatment between investors and investments where necessary to **achieve public policy objectives**.

Question:
Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non –discrimination in relation to the TTIP? Please explain.
(click here to see the reference text in the original English version: Table 2*)*

Question 3: Fair and equitable treatment

Explanation of the issue

The obligation to grant foreign investors fair and equitable treatment (FET) is **one of the key investment protection standards**. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is **arbitrary, unfair, abusive**, etc.

Approach in most investment agreements

The FET standard is **present in most international investment agreements**. However, in many cases the standard is **not defined**, and it is usually **not limited or clarified**. Inevitably, this **has given arbitral tribunals significant room for interpretation,** and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.

Certain investment agreements have narrowed down the content of the FET standard by linking it to concepts that are considered to be part of **customary international law**, such as the minimum standard of treatment that countries must respect in relation to the treatment accorded to foreigners. However, this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.

An issue sometimes linked to the FET standard is the respect by the host country of its legal obligations towards the foreign investors and their investments (sometimes referred to as an "umbrella clause"), e.g. when the host country has entered into a contract with the foreign investor. Investment agreements may have specific provisions to this effect, which have sometimes been interpreted broadly as implying that every breach of e.g. a contractual obligation could constitute a breach of the investment agreement.