

Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law

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Abstract

Friendship, Commerce and Navigation (FCN) treaties are more than a historical precursor to international investment agreements (IIA) and continue to influence and inspire modern investment treaty design. Until the 1960s, FCN treaties were the American conceptual alternative to the European BIT Model. FCN treaties were comprehensive and complex agreements covering trade, intellectual property, and even human rights in addition to investment disciplines. BITs, in contrast, were short, simple, and focused on investment protection only. Furthermore, while FCN treaties were designed to govern symmetrical investment relations between like-minded developed countries, BITs targeted an asymmetrical relationship between developed capital exporting States and developing capital importers. Even after the U.S. shifted from FCN to BITs in the early 1980s, FCN treaties continued to impact investment policy-making. First, key FCN features such as pre-establishment commitments, non-conforming measures, and investor rights survived the U.S. policy-shift and have since found their way into IIAs around the world. Second, as a conceptual alternative to simple and specialized European BITs, FCN treaties have inspired a new generation of IIAs that are complex and comprehensive in nature, containing a fine-tuned mix of rights and obligations, and treating investment alongside other policy concerns. Third, the spread of FCN-inspired treaties coincides with the demise of European-style BITs. As policy-makers turn to the United States instead of Europe for investment policy innovation, we observe an Americanization of the IIA universe.

A. Introduction

The year 1959 is often referred to as the date of birth of the modern international investment agreement (IIA) with the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan.¹ This reference, and the underlying emphasis on BITs, tends to neglect another rich body of investment treaties – the so-called Friendship, Commerce and Navigation (FCN) treaties.²

¹ *1959 Germany–Pakistan BIT*, 25 November 1959, 457 UNTS 23. R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), 6. United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1959-1999* (2000), 1 [UNCTAD, *Bilateral Investment Treaties 1959-1999*].

² For recent work on FCN treaties and its relevance for investment law, see J. F. Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era', 51 *Columbia*

Predating BIT practice and primarily concluded by the United States of America (United States, U.S.), FCN treaties were originally concerned mainly with commercial matters, but developed a significant investment protection component after the Second World War.

FCN treaties can tell us much about the past, present, and arguably even the future of international investment treaty law. On the historical front, FCN treaties inspired the terms of the *Abs-Shawcross Draft Convention*, upon which the first BITs were modeled. Thereby, FCN treaties coined some of the core standards like ‘fair and equitable treatment’ (FET) that are omnipresent in today’s investment law.³ But FCN treaties also remain relevant on their own. Over forty FCN treaties are still in force today and exist in parallel to the BIT universe.⁴ The *ELSI* case, one of the few investment disputes brought before the International Court of Justice, concerned the breach of an FCN treaty.⁵ Moreover, creative lawyers have contemplated the use of FCN treaties to advance arguments impossible to justify under BITs.⁶ In the most comprehensive recent study on the modern relevance of FCN treaties, Coyle even argues that these treaties can inform future policy-making.⁷ While he concedes that FCN treaties are less important today when it comes to protecting rights of foreigners in domestic litigation, since host State’ statutes and more specialized international treaties have largely supplanted FCN provisions, he points out that the FCN model can

Journal of Transnational Law (2013) 2, 302; J. W. Yackee, ‘Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital’, *USC Center in Law, Economics and Organization Research Paper No. C06-15* (2006); O. T. Johnson Jr. & J. Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’, 3 *Yearbook on International Investment Law & Policy* (2010-2011) (2012), 649; K. J. Vandavelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010), 19-24 (in particular) [Vandavelde, BITs: History, Policy, and Interpretation].

³ H. Abs & H. Shawcross, ‘The Proposed Convention to Protect Private Foreign Investment: Introduction’, 9 *Journal of Public Law* (1960) 1, 115, 119-120; F. A. Mann, ‘British Treaties for the Promotion and Protection of Investments’, 52 *British Yearbook of International Law* (1981), 241, 241. For the influence of the *Draft Convention* on BITs, see S. W. Schill, *The Multilateralization of International Investment Law* (2009), 35-36.

⁴ For an overview of U.S. FCN treaties in force, see the website of the U.S. Trade Compliance Center, available at http://tcc.export.gov/Trade_Agreements/index.asp (last visited 31 January 2014).

⁵ It concerned an alleged breach of the *U.S.–Italy FCN Treaty*. See *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, 15.

⁶ See Schill, *supra* note 3, 147-150. He points out that the *Germany–U.S. FCN Treaty*, unlike most BITs, does not exclude benefits from the ambit of its MFN clause that arise by virtue of a contracting party’s membership in a regional integration organization.

⁷ Coyle, *supra* note 2.

address two pressing contemporary challenges in international law. First, FCN treaties show how diverse areas of law can be managed under a single treaty umbrella, providing a practical solution to international law's fragmentation. Second, in the debate over re-balancing investment treaties, FCN treaties offer a unique but overlooked example on how non-investment considerations such as human rights can be inserted into investment protection treaties.⁸

The most important contributions of FCN treaties to our understanding of the modern investment treaty universe, however, lie elsewhere. A fact that is seldom acknowledged is that until the 1960s, FCN treaties remained the American *alternative* to the BIT program of European States. Whereas BITs were short, simple, and focused on investment protection, FCN treaties were comprehensive and complex agreements covering trade, navigation, intellectual property, and even human rights in addition to investment disciplines. Furthermore, FCN treaties were primarily signed between developed countries and reflected the spirit of *symmetrical* political and economic relations. In the context of reciprocity, each contracting party would only demand what it was willing to give in return, resulting in carefully balanced treaties. BITs, in contrast, emerged in the context of *asymmetrical* political and economic relations. The balance underlying BITs was not a reciprocal trade-off between rights and obligations, but a 'grand bargain' of Northern capital in exchange for Southern countries tying their hands to investment protection standards.⁹ So, FCN treaties and BITs were alternative approaches to investment policy-making, pursuing the same end through very different treaty design means.

The co-existence of the two models of investment protection agreements did not last long. In the midst of the Cold War and decolonization, it became increasingly difficult for the United States to sign FCN treaties. American business groups grew increasingly weary of negotiations with potential markets for foreign direct investment being stalled over human rights issues, while their European competitors benefited from the competitive advantage of an increasingly wide web of investment protection agreements. After a number of failed negotiations, the United States finally decided to abandon its century-old

⁸ *Ibid.*

⁹ J. W. Salacuse & N. P. Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 46 *Harvard International Law Journal* (2005) 1, 67 [Salacuse & Sullivan, Do BITs Really Work].

policy of concluding FCN treaties in the late 1970s and, instead, endorsed the European BIT approach.

The U.S. debate surrounding the shift from FCN to BITs is not only of historical interest. In fact, as this article will show, it exposes fault lines that still run through the investment treaty universe today and can tell us much about investment law's evolution. Firstly, even after they were formally abandoned, the FCN treaty heritage had a marked influence on the U.S. investment treaty program. Even though the U.S. largely followed the European BIT Model, American BITs retained a number of key FCN treaty design features absent in European BITs. These treaty features included 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. After being first incorporated into the U.S. BIT program, these FCN features inspired NAFTA and ultimately spread into the entire investment treaty universe. Today, these FCN elements continue to evolve and are systematically used in IIAs concluded by Australia, Canada, Chile, Japan, South Korea, Peru, Singapore, and Taiwan amongst others.

Secondly, as a conceptual alternative to the BIT approach, FCN treaties had a lasting *ideational* impact beyond the American BIT program, inspiring the recent emergence of a second generation of investment treaties markedly different from first generation European treaties. At its core, the 1980s U.S. debate concerned the question of what treaty design is best suited to govern investment relations. Should inter-state investment relations be regulated by short, simple, and specialized agreements focusing on investment protection only, or, should they be governed by more complex and comprehensive instruments that treat investment in its wider context? In the U.S. policy debate of the 1980s, the contest was won by the BIT approach. With the advent of more symmetrical investment flows, a more intertwined global economy, and developed countries entering in investment treaties among themselves, however, we observe a full reversal of the U.S. debate. More and more countries revert from simple BITs to more complex and comprehensive BITs and preferential trade and investment agreements (PTIAs) that are better suited to govern 21st century investment relations. While this emerging second generation of IIAs has little in common with FCN treaties in terms of subject matters covered, it reflects the FCN approach to investment policy-making: protecting investment abroad while safeguarding policy space at home and treating investment in its wider policy context. Hence, the FCN treaty approach to investment

treaties, its demise in the 1980s and its recent return are a prism through which we can better understand the evolution of investment treaty law.¹⁰

Finally, the return of the FCN treaty approach and its design elements also point to an Americanization of the global investment treaty universe which had long been dominated by European-style BITs. As more and more countries dissatisfied with the performance of existing BITs look to Washington instead of Europe for policy innovation, the new gold-standard for investment treaties is made in the U.S. This global policy shift is currently at a critical juncture as the European Union, which recently acquired competency over investment policy-making through the *Lisbon Treaty*, is negotiating IIAs with Canada and the U.S. If the EU rejects the long-standing traditional BIT approach of its most influential Member States and turns to more complex and comprehensive agreements, these negotiations will mark the late victory of the FCN approach over the short, simple, and specialized BIT model.

As an alternative approach to investment protection, the FCN model has thus informed investment treaty-making, has inspired concrete treaty design features absent in traditional BITs, and is likely to become the globally dominating approach to investment policy-making. This article traces this impact of FCN treaties on modern investment treaty law, offering new insights into the evolution of investment treaty-making. First, it presents FCN as an alternative approach to investment policy-making. Second, it recapitulates the U.S. debate in the early 1980s that surrounded the transition from FCN to BITs. Third, by identifying FCN design features that survived the transition, the article shows how FCN treaties inspired the provisions of the U.S. BIT program. Fourth, moving from concrete treaty features to underlying ideas, the contribution describes and explains the re-emergence of the FCN approach in recent IIAs and highlights the increasing Americanization of the global IIA

¹⁰ This contribution is a study of comparative treaty design. Aside from conducting a traditional comparative legal analysis of BITs and FCN at a micro-level (specific legal provisions) and a macro-level (surrounding legal context), this study introduces a meso-level treaty design analysis. Occupying a middle ground, a treaty design analysis looks beyond content and context and instead focuses on the functional architecture and underlying structures of a treaty. For traditional comparative law, see K. Zweigert & H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed. (1996), 4-5.

universe. The paper concludes by evaluating the impact of the return of FCN treaty design on international investment treaty law.

B. FCN Treaties as Investment Protection Agreements

As their name suggests, friendship, commerce and navigation treaties were not initially conceived as investment protection agreements. Originally, these treaties sought to establish friendly political and commercial relations between the newly independent American colonies and the Old Continent.¹¹ The first FCN treaty was concluded in 1778, in the midst of the American War of Independence, between the United States and France and was signed together with a treaty of alliance between the two countries.¹² After independence, similar agreements between the U.S. and other European and South American countries followed suit.¹³ These early FCN treaties primarily dealt with commercial matters, guaranteeing most-favoured nation (MFN) treatment in trade,¹⁴ but also addressed the status of American citizens abroad covering consular relations, immigration, as well as religious and personal rights.¹⁵ The protection of alien property rights was present, but initially constituted a mere incidental feature of early FCN treaties.¹⁶ This began to change after the First World War, as the U.S. turned from a capital importer to a capital exporter.¹⁷ From the 1923 *U.S.–Germany FCN Treaty* onwards, the United States began to systematically expand the treaties' scope, from

¹¹ Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21-23.

¹² *Ibid.*, 19; H. Walker Jr., 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice', 5 *American Journal of Comparative Law* (1956) 2, 229, 231 [Walker, Protection of Foreign Investment].

¹³ Walker, 'Protection of Foreign Investment', *supra* note 12, 231; H. Walker Jr., 'Modern Treaties of Friendship, Commerce and Navigation', 42 *Minnesota Law Review* (1958) 5, 805, 805 (in particular) [Walker, Modern Treaties of Friendship, Commerce and Navigation]; Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21-26.

¹⁴ Schill, *supra* note 3, 29-30.

¹⁵ K. S. Gudgeon, 'United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards', 4 *International Tax & Business Lawyer* (1986) 1, 105, 108. On the common origins of trade, investment, and human rights law, see also N. DiMascio & J. Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 102 *American Journal of International Law* (2008) 1, 48.

¹⁶ Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21.

¹⁷ R. R. Wilson, 'A Decade of New Commercial Treaties', 50 *American Journal of International Law* (1956) 4, 927, 928 [Wilson, Commercial Treaties].

covering primarily natural persons to also protecting the rights of companies abroad,¹⁸ and also set out to strengthen the protection of private property.¹⁹

The major change in the focus of FCN treaties occurred in the years following the Second World War. With international trade becoming subject to multilateral rules through the inception of the GATT in 1947, the content of FCN treaties gradually shifted towards the protection of investment abroad. In post-war FCN treaties, investment-related provisions then made up almost half of the treaty body.²⁰ In the words of one commentator, these instruments had effectively been turned into “Treaties for the Encouragement and Protection of Foreign Investment”.²¹ Hence, contrary to what is sometimes asserted,²² FCN treaties, at least in the post-war era, were not primarily about trade, but already contained extensive investment protection standards.²³ Sachs thus concludes that “the [U.S.] transition from FCN to BIT occurred not in the early 1980s but some thirty years earlier”.²⁴ Between 1946 and 1966, the U.S. concluded 21 such agreements.²⁵ Other countries such as Japan and, to a more limited extent, Germany and the UK concluded similar FCN type treaties in the same period.²⁶

These FCN treaties contained investment protection standards very similar to those offered by early BITs albeit with minor differences in language, with the FCN treaty referring to ‘nationals’, ‘companies’ or, ‘property’ whereas BITs talked about ‘investors’, ‘investment’ and ‘assets’.²⁷ This is best illustrated by the *U.S.–Pakistan FCN Treaty* concluded in the same year (1959) as the first BIT between Germany and Pakistan. The two agreements contained the same core investment protection standards, such as non-discrimination, full

¹⁸ H. Walker Jr., ‘Provisions on Companies in United States Commercial Treaties’, 50 *American Journal of International Law* (1956) 2, 373; W. Sachs, ‘The New U.S. Bilateral Investment Treaties’, 2 *International Tax & Business Lawyer* (1984) 1, 192, 196.

¹⁹ R. R. Wilson, ‘Property-Protection Provisions in United States Commercial Treaties’, 45 *American Journal of International Law* (1951) 1, 83.

²⁰ Walker, ‘Protection of Foreign Investment’, *supra* note 12, 234.

²¹ *Ibid.*, 229.

²² Schill, *supra* note 3, 29.

²³ K. J. Vandeveld, ‘A Brief History of International Investment Agreements’, 12 *UC Davis Journal of International Law & Policy* (2005) 1, 157, 162-166 [Vandeveld, A Brief History of IIAs].

²⁴ Sachs, *supra* note 18, 197.

²⁵ K. J. Vandeveld, ‘The Bilateral Investment Treaty Program of the United States’, 21 *Cornell International Law Journal* (1988) 2, 201, 209 [Vandeveld, The BIT Program of the United States].

²⁶ Johnson Jr. & Gimblett, *supra* note 2, 677; Yackee, *supra* note 2, 19.

²⁷ See Coyle, *supra* note 2, 350-351.

protection and security, expropriation and transfer of funds.²⁸ Neither of the two agreements provided for investor-State arbitration (ISA), since BITs began to include ISA provisions, “what has turned out to be their primary—indeed, their only truly important—difference from modern FCN treaties”,²⁹ only in the 1960s.³⁰ So, in summary, in the early 1960s, FCN treaties and BITs coexisted as investment protection treaties.

C. The 1980s U.S. Debate and the Shift From FCN to BITs

In spite of their similarities, FCN treaties and BIT differed notably in their underlying approach to investment policy-making. These differences crystallized most clearly in the U.S. debate in the late 1970s and early 1980s on whether the U.S. should adopt the European-style BITs or continue to conclude FCN treaties. At that time, the American business community had become increasingly dissatisfied with FCN treaties as a policy tool for investment protection, and had begun to pressurise the government to endorse a treaty model more akin to European BITs.³¹ The principal criticism was targeted at the design of FCN treaties. Even in its post-war form, FCN treaties remained comprehensive and complex agreements covering a wide array of potentially controversial subject matters such as human rights, immigration policy, or religious practices.³² As Bergmann notes: “the attempt to address very complex issues in the context of such a broad spectrum of relations detracted from the utility of the FCN as an investment protection device”³³ and made the negotiation of these treaties highly cumbersome and politicized, often resulting in failure. The United States

²⁸ Johnson Jr. & Gimblett, *supra* note 2, 678; Yackee, *supra* note 2, 89 (note 43).

²⁹ Johnson Jr. & Gimblett, *supra* note 2, 679.

³⁰ On the similarities and differences between BITs and FCN, see Vandavelde, ‘A Brief History of IIAs’, *supra* note 23, 168-175.

³¹ V. H. Ruttenberg, ‘The United States Bilateral Investment Treaty Program: Variations on the Model’, 9 *Journal of International Business Law* (1987) 1, 121, 122; Sachs, *supra* note 18, 21; C. A. Hamilton & P. I. Rochwerger, ‘Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties’, 18 *New York International Law Review* (2005) 1, 1, 4-5; Vandavelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 25.

³² Hamilton & Rochwerger, *supra* note 31, 44; Gudgeon, *supra* note 15, 108.

³³ M. S. Bergman, ‘Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty’, 16 *New York University Journal of International Law & Politics* (1983) 1, 1, 7.

concluded its last FCN treaty with Thailand in 1966.³⁴ A subsequent negotiation with the Philippines was abandoned in the early 1970s.³⁵

At the same time, European countries were highly successful in negotiating BITs. Until the late 1970s over 170 of such agreements had been concluded.³⁶ The comparative advantage of European BITs lay in their “brevity and simplicity”.³⁷ In contrast to FCN treaties, BITs were short, intuitive, and focused on investment protection only. As the primary advocate of BITs in the U.S., the American business community hoped that 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 them from their European competitors.³⁸ This appeared particularly acute in light of frequent investment restrictions and expropriations in developing countries at the time.³⁹ In response, the Reagan Administration decided to shift from the traditional FCN treaty to the European BIT Model.⁴⁰ The first U.S BIT was concluded with Egypt in 1982, and nine more agreements followed in the same decade.⁴¹

The shift from FCN to BITs marked a significant conceptual departure in the U.S. investment treaty policy in two ways. First, U.S. FCN treaties had not been limited or even primarily targeted at developing countries.⁴² Rather the opposite was true. As ‘treaties of general relations’ they were originally designed to form political and economic ties with other developed countries.⁴³ Also in the post-war period, negotiations by the U.S. included major developed States such as France, Italy, Belgium, or Germany. FCN treaties were thus firmly grounded in the principle of symmetry, reciprocity, and mutuality – premises which did not vary significantly even when applied to a developing country treaty partner, since FCN, like later BITs, were negotiated using model agreements.⁴⁴ This

³⁴ Ruttenberg, *supra* note 31, 124.

³⁵ Gudgeon, *supra* note 15, 108.

³⁶ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties 1959-1991* (1992), 3.

³⁷ Gudgeon, *supra* note 15, 110.

³⁸ Ruttenberg, *supra* note 31, 122.

³⁹ Vandeveld, ‘A Brief History of IIAs’, *supra* note 23, 166-171.

⁴⁰ Ruttenberg, *supra* note 31, 121.

⁴¹ Sachs, *supra* note 18, 193 (note 10).

⁴² Vandeveld, ‘The BIT Program of the United States’, *supra* note 25, 209: “Unlike the modern FCNs, which were directed primarily at developed countries, the BITs, were targeted at developing countries.”

⁴³ Coyle, *supra* note 2, 306-307.

⁴⁴ Vandeveld, *BITs: History, Policy, and Interpretation*, *supra* note 2, 19; Sachs, *supra* note 18, 197; Wilson, ‘Commercial Treaties’, *supra* note 17, 928.

symmetry coupled with the fact that FCN treaties were considered directly enforceable before U.S. courts⁴⁵ and could spark actual litigation on issues highly intrusive to national sovereignty such as employment regulations⁴⁶ had important repercussions on treaty design. As Walker observed, “the limits of [a] [FCN type] investment treaty are set by the degree to which the United States is willing to bind its own domestic policy”.⁴⁷ In other words, reciprocity in law and in fact imposed a natural restraint on investment protection in FCN treaties. As a result, these treaties reflected a finely tuned balance of investment protection obligations and flexibility clauses preserving the right to regulate in sensitive policy areas⁴⁸ which rendered FCN treaties “essentially moderate in their content and purport”.⁴⁹ The same is not true for BITs. BITs were designed to cover an asymmetrical relationship between developed, capital exporting countries and developing, capital importing countries.⁵⁰ Although BITs formally apply equally to both parties, with investment flows being unidirectional, “reciprocity is to a large extent a matter of prestige rather than reality”.⁵¹ The former U.S. negotiator Alvarez concurs: “[t]he regulatory burdens of [early U.S. BITs] fell almost entirely on our (LDC) BIT partners.”⁵² Even

⁴⁵ Coyle, *supra* note 2, 335 (note 142).

⁴⁶ J. A. Miller, ‘Title VII and the FCN Treaty: The Exemption of Japanese Branch Operations from Employment Discrimination Laws’, 7 *Boston College International and Comparative Law Review* (1984) 1, 67.

⁴⁷ Walker, ‘Protection of Foreign Investment’, *supra* note 12, 246. Similarly, Walker, ‘Modern Treaties of Friendship, Commerce and Navigation’, *supra* note 13, 810.

⁴⁸ Walker, ‘Protection of Foreign Investment’, *supra* note 12, 247. For examples of such investment-related flexibility clauses, see, for instance, the 1959 *U.S.–Pakistan FCN Treaty*, Arts II (3), VII (2), IX (3), XII (2) & XX (12 U.S.T. 110, 112, 114-117 & 121-122).

⁴⁹ Walker, ‘Protection of Foreign Investment’, *supra* note 12, 247. Walker goes on to confirm that “moderation is not synonymous with ineffectiveness. These treaties focus, in fundamental terms of enduring value over the long range, upon the line between policy favorable and policy unfavorable to foreign investment.” *Ibid.*

⁵⁰ J. W. Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’, 24 *The International Lawyer* (1990) 3, 655, 663: “A BIT purports to create a symmetrical legal relationship between the two States, for it provides that either party may invest under the same conditions in the territory of the other. In reality, an asymmetry exists between the parties to most BITs since one State will be the source and the other the recipient of virtually any investment flows between the two countries. This asymmetry conditions the dynamics of the BIT negotiation.”

⁵¹ Mann, *supra* note 3, 241.

⁵² J. E. Alvarez, ‘The Evolving BIT’, 7 *Transnational Dispute Management* (2010) 1, 1, 3.

if reciprocal investment flows had existed, the possibility of litigation against developed countries was dismissed by commentators. As Gann put it in 1985,

“[f]rom the United States’ standpoint, the rights and duties under the BITs are redundant because investments in the United States already receive substantial and non-discriminatory protection. The practical effect of the BIT, then, is to secure from the signatory developing country some assurance of encouragement and protection of outbound U.S. investment.”⁵³

Since reciprocity coupled with the threat of litigation at home, which had imposed a natural restraint on FCN treaties, was thus absent in BITs, the treaty design of the latter became skewed in favor of investment protection obligations, giving little consideration to the host State’s regulatory autonomy. The *quid pro quo* of BITs was thus fundamentally different from the trade-off of rights and obligations in FCN treaties.⁵⁴ Developing countries signed BITs ‘that hurt them’ to benefit from a different bargain: they hoped to reap development benefits arising from increased foreign investment, in exchange for limiting their right to regulate and expropriate.⁵⁵ In sum, FCN treaties and BITs were signed in very different spirits, and reflected a very different mix of investment protection obligations and regulatory flexibility.

Second, the U.S.’ endorsement of the BIT model meant an investment policy shift away from a holistic treatment of investment, trade, and foreign relations together to a compartmentalization of legal regimes. Proponents of BITs considered this investment-only approach to be beneficial as it allowed for stronger and more tailored investment protection and avoided politically contentious

⁵³ P. B. Gann, ‘The U.S. Bilateral Investment Treaty Program’, 21 *Stanford Journal International Law* (1985) 2, 373, 374.

⁵⁴ See Salacuse & Sullivan, ‘Do BITs Really Work’, *supra* note 9, 77: “An investment treaty between two developed States, both of whose nationals expect to invest in the territory of the other, would be based on the notion of reciprocity and mutual protection. However, this bargain would not seem applicable in the context of a treaty between a developed, capital-exporting State and a poor, developing country whose nationals are unlikely to invest abroad.”

⁵⁵ A. T. Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’, 38 *Virginia Journal of International Law* (1998) 4, 639, 658-665; Salacuse & Sullivan, ‘Do BITs Really Work’, *supra* note 9, 77.

issue areas, speeding up negotiation.⁵⁶ Divorcing investment protection from its wider policy context, however, also has important drawbacks. As Walker noted:

“The building and operation of a motor factory by a big corporation clearly is ‘investment’ in its major ‘economic development’ connotation; but how can, and why should, treaty protection be written that does not cover also, at the other end of the business scale, the individual entrepreneur engaged in a sales activity?”⁵⁷

In practice, investment transactions are often intrinsically linked to trade and intellectual property rights but also touch upon environmental, cultural, and human rights issues. That is why, as Walker put it:

“[The FCN treaty] regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total ‘climate’ in which it is to exist. A specialized ‘investment agreement’ [i.e. a BIT] based on a narrower premise would be to that extent unrealistic and inadequate.”⁵⁸

So whereas the BIT as a special-purpose vehicle may have been more apt to advance some of the protective interests of investors, it lacked the benefits associated with a comprehensive treatment of investment ‘in context’ which FCN treaties displayed.

In sum, FCN treaties and BITs were both agreements to protect foreign investment, but they reflected two opposing philosophies on how this was best to be achieved. BITs were short, simple, and highly specialized agreements tailored to govern an asymmetrical economic relationship, whereas FCN treaties were complex and comprehensive agreements placing investment protection in its wider context and designed to cover symmetrical economic exchanges. In spite of these differences, it is not entirely true that the “FCN treaty has few bases for comparison with the more focused investment treaties of modern times”.⁵⁹ As

⁵⁶ Gudgeon, *supra* note 15, 108-109; Ruttenberg, *supra* note 31, 124.

⁵⁷ Walker, ‘Protection of Foreign Investment’, *supra* note 12, 244.

⁵⁸ *Ibid.*

⁵⁹ M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (2010), 182. For Sornarajah, FCN treaties may, however, offer an insight into how instruments initially designed to spread the influence of powerful countries can be turned against their initial masters. Not unlike NAFTA, which was unexpectedly used to challenge not only Mexican,

will be further explored in the following sections, as an alternative approach to investment treaty design FCN treaties continue to inspire actual policy-making.

D. The Impact of FCN Treaties on the U.S. BIT Program

While the U.S. policy shift reflected a change in the underlying approach to investment policy-making, the U.S. did not fully abandon its FCN heritage. In fact, several FCN treaty design elements survived the policy shift and were integrated and reformulated in the U.S. BIT program and, from there, inspired NAFTA and, indeed, global investment treaty-making.

Although commentators differ in their assessment of the FCN impact on U.S. BITs,⁶⁰ it can be safely said that FCN treaties provided a crucial reference point for early U.S. BIT negotiators. On the one hand, the FCN experience provided motivation to remedy perceived deficiencies of earlier treaties in the new BITs. For instance, improvements were perceived necessary with respect to expropriation and arbitration provisions of FCN treaties.⁶¹ On the other hand, the U.S. program clearly built on the FCN experience. Rather than blindly copying from European-style treaties, U.S. drafters strove to combine the best of both worlds.⁶² Sometimes this meant improving on both FCN treaties and European BITs. For instance, both FCN treaties and BITs were criticized for the vagueness of their treaty provisions.⁶³ According to Gudgeon “there was concern that the European model lacked sufficient

but also Canadian and the American measures, FCN treaties had been used by Japanese nationals or the governments of Nicaragua and Iran to bring a case against U.S.

⁶⁰ Some authors consider the U.S. BIT program as the clear successor of the FCN program, albeit stripped of its non-investment components. See Gudgeon, *supra* note 15, 108-110; Sachs, *supra* note 18, 193-198; Vandeveld, *BITs: History, Policy, and Interpretation*, *supra* note 2, 1. Other authors clearly see a break between them. See Ruttenberg, *supra* note 31, 125-126; Bergman, *supra* note 33, 6 & 10; P. McKinstry Robin, ‘The Bit Won’t Bite: The American Bilateral Investment Treaty Program’, 33 *American University Law Review* (1984) 4, 931, 941-942.

⁶¹ Bergman, *supra* note 33, 8.

⁶² For detailed comparison see Gann, *supra* note 53.

⁶³ Bergman, *supra* note 33, 8; Ruttenberg, *supra* note 31, 125; McKinstry Robin, *supra* note 60, 941.

specific guidance in the enforcement context”.⁶⁴ As a result, the language of the 1982 *U.S. Model BIT* became particularly (or even overly) complex.⁶⁵

Also, performance requirements absent in earlier FCN treaties or European BITs were considered necessary innovations and thus made their way into the IIA universe through the first U.S. BIT.⁶⁶ Most interesting for our purposes, however, are the instances where the U.S. program constituted the continuation of the FCN legacy. Largely absent in European-style BITs, five FCN design elements in particular survived the U.S. policy shift in the 1980s and have started to thrive in the modern investment treaties across the globe. They include 1) pre-establishment clauses, 2) non-conforming measures, 3) international law minimum standard references, 4) personal investor protection, and 5) positive integration-type clauses.⁶⁷ Aside from the United States, Australia, Canada, Chile, Japan, South Korea, Mexico, Singapore, and Taiwan, also, amongst others, today systematically include some or all of these FCN design features into their treaties.

I. Pre-Establishment Provisions

Whereas European BITs were typically limited to investment protection post-establishment, American BITs from the very start also contained pre-establishment commitments that had traditionally been found in FCN treaties.⁶⁸ The common purpose of American FCN treaties and BITs was not only the protection of investment stock but also the liberalization of investment

⁶⁴ Gudgeon, *supra* note 15, 110. Conflicting interpretations by arbitral tribunals of similar treaty provisions (e.g. the necessity defense) are cases in point.

⁶⁵ The language was simplified in subsequent U.S. BITs. See Gann, *supra* note 53, 374. For criticism of the rigidity of the early U.S. BIT Model, see Ruttenberg, *supra* note 31, 134-137.

⁶⁶ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), 422; McKinstry Robin, *supra* note 60, 949-950; Bergman, *supra* note 33, 18; Ruttenberg, *supra* note 31, 126.

⁶⁷ This list is not meant to exhaust the number of FCN features that were retained in U.S. BITs. As stated in the introduction, the impact of FCN language on BITs (both U.S. and non-U.S.) is much more pervasive. The purpose of this section is to identify conceptually significant treaty designed features that survived the shift from BITs to FCN.

⁶⁸ UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009), 20: “[...] looking from the perspective of developing countries, there are two BIT models: (a) ‘protection only’ BITs mostly with European countries and other developing countries; and (b) liberalizing BITs concluded mainly with the United States and Canada, and more recently, with Japan.”

flows.⁶⁹ The typical American IIA thus offers national treatment and most-favored nation treatment to foreign investors for the phases of acquisition and establishment also. The inclusion of a pre-establishment component has since become increasingly common in IIAs around the world.⁷⁰

II. Non-Conforming Measures

Historically linked, but not limited to the pre-establishment component of FCN treaties are reservations, also called non-conforming measures, which carve out certain policy areas from the national treatment and MFN obligations. The U.S. typically maintained restrictions regarding, for instance, the foreign acquisition of businesses in the field of communications, air or water transport, the exploitation of land, or other natural resources in their FCN treaties.⁷¹ The early U.S. BITs continued this practice, but moved the listing of non-conforming measures to the annexes.⁷² Modern investment treaties have followed NAFTA in refining this practice by setting up a complex multiple annex structure of non-conforming measures that include 1) existing non-conforming laws sometimes distinguishing between national and sub-national levels and 2) future non-conforming measures that may be taken in identified sectors or sub-sectors. Aside from grandfathering existing restrictions, the purpose of these annexes is to establish a ceiling of reservations, while allowing sufficient flexibility to regulate sensitive policy areas. These reservations are no longer limited to national treatment and MFN, but typically also cover performance

⁶⁹ Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 413-418. See also UNCTAD, *Admission and Establishment* (2002), 17 & 26.

⁷⁰ See, for instance, *ASEAN-Australia-New Zealand Free Trade Agreement* (2009), Art. 4 of Ch. 11, available at <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf> (last visited 31 January 2014), 148; 2002 *Japan-South Korea BIT*, Art. 2; 2004 *Singapore-Jordan BIT*, Art. 5; 2005 *Belgium-Luxembourg-Dem. Rep. of the Congo BIT*, Art. 4 (2). China, in contrast, which has endorsed many of the other FCN features discussed below, has limited its pre-establishment commitments to MFN only. See 2012 *Canada-China FIPA*, Art. 5. All named BITs and the FIPA can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

⁷¹ See, for instance, 1954 *Germany-U.S. FCN Treaty*, Art. VII (2) (7 U.S.T. 1839, 1847).

⁷² See, for instance, 1994 *U.S. Model BIT*, Art. II (2) (a) (*Treaty Between the Government of the United States of America and the Government of [...] Concerning the Encouragement and Reciprocal Protection of Investment*, reprinted in UNCTAD, *International Investment Instruments: A Compendium*, Vol. III (1996), 195, 197).

requirements and sojourn of personnel provisions.⁷³ Additional policy space is accounted for in recent IIAs that provide the contracting States with the right to issue interpretations of annexes in the course of investor-State arbitration that are binding on the tribunal.⁷⁴ Importantly, the inclusion of non-conforming measures does not necessarily translate into a lower level of investment protection, as compared to European BITs where such reservations are generally absent. As highlighted by several commentators, American treaties reach even higher levels of protection, since non-conforming measures are accompanied by more extensive or new protective obligations (e.g. performance requirements) generally not found in European BITs.⁷⁵

III. International Law Minimum Standard

One of the goals of the American FCN and then the BIT program consisted of the reinforcement and recognition of an international customary law minimum standard of treatment (MST) in light of its contestation by countries of the South.⁷⁶ While the ‘fair and equitable treatment’ (FET) clause was typically self-standing in FCN treaties, the obligation to afford ‘constant protection and security’ to nationals was tied to the international law minimum standard.⁷⁷ When the new *U.S. Model BIT* joined the two clauses, the reference to international law was retained in Article II (4) of the 1982 *U.S. Model BIT*.⁷⁸ Such a direct textual reference was absent both in the *Abs-Shawcroft Draft* and the 1967 *OECD Draft Convention on the Protection of Foreign Property* which inspired European BITs, leading to a debate on whether these standards are free standing, or linked to customary international law.⁷⁹ While the inclusion of the

⁷³ See, for instance, 2011 *Colombia–Japan BIT*, Art. 1 of Annex I or 2008 *Rwanda–U.S. BIT*, Explanatory Notes of Annex I. Both BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

⁷⁴ See, e.g., 2008 *Rwanda–U.S. BIT*, Art. 31. The BIT can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

⁷⁵ Bergman, *supra* note 33, 24; Gann, *supra* note 53, 439.

⁷⁶ Bergman, *supra* note 33, 34–35. See generally S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009).

⁷⁷ See, for instance, 1959 *U.S.–Pakistan FCN Treaty*, Arts I & III (1) (*supra* note 48, 110 & 112); 1961 *U.S.–Belgium FCN Treaty*, Arts 1 & 3 (1) (14 U.S.T. 1284, 1286 & 1288); 1966 *U.S.–Thailand FCN Treaty*, Arts I (2) & III (2) (19 U.S.T. 5843, 5845 5847).

⁷⁸ See also Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 76.

⁷⁹ The 1967 Commentary to the *OECD Draft Convention*, however, links “fair and equitable treatment” and “constant protection and security” to the international law minimum standard. OECD (ed.), *Draft Convention on the Protection of Foreign Property: Texts with Notes and Comments* (1962), 9 (paras 4 & 5).

international law reference is an important element of continuity from FCN to BITs, one must admit that its underlying function has changed dramatically since the U.S. policy shift. From being a floor (i.e. encouraging protection beyond the MST) it has been turned into a ceiling in investment protection (i.e. confining FET to MST) in post-NAFTA treaties, as States seek to strengthen the defensive elements of their treaties in light of growing investment claims.⁸⁰

IV. Protection of Personal Investor Rights

Whereas European BITs focused on the protection of investment, FCN treaties placed the investing national or company center-stage.⁸¹ The additional protection afforded to the person of the investor has remained a pillar of the U.S. BIT program although in a more confined manner. The U.S. has consistently included provisions governing the entry and sojourn of personnel and senior management in its treaties, continuing its long-standing FCN practice in this regard.⁸² Moreover, modern U.S. treaties are not only concerned with host State measures relating to investment, but extend their coverage to measures affecting investors of the other party.⁸³ In particular, national and MFN standards of

⁸⁰ Consider, in particular, the intervention by the NAFTA parties through an authoritative interpretation. See NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited 31 January 2014). See also UNCTAD, 'Interpretation of IIAs: What States Can Do', *IIA Issues Note No. 3* (11 January 2012), available at http://www.unctad.org/en/Docs/webdiaeia2011d10_en.pdf (last visited 31 January 2014) [UNCTAD, Interpretation of IIAs].

⁸¹ Coyle, *supra* note 2, 350, stating that "[t]he transition from the FCN treaty to the BIT, moreover, represents a transition from a treaty regime concerned with protecting *individuals* to one concerned with protecting *investment*".

⁸² 1982 *U.S. Model BIT*, Art. 5 (b) (*Treaty Between the United States of America and [Country] Concerning the Reciprocal Encouragement and Protection of Investment*, reprinted in 15 *Law and Policy in International Business* (1983) 1, 273, A-1, A-7); *North American Free Trade Agreement*, 8-17 December 1992, Art. 1107, 32 ILM 289 & 32 ILM 605, 640 [NAFTA]; 2012 *U.S. Model BIT*, Art. 9 (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.state.gov/documents/organization/188371.pdf> (last visited 31 January 2014), 13).

⁸³ See NAFTA, Art. 1101 (1), *supra* note 82, 640; 2004 *U.S. Model BIT*, Art. 2 (1) (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.state.gov/documents/organization/117601.pdf> (last visited 31 January 2014), 6) and 2012 *U.S. Model BIT*, Art. 2 (1), *supra* note 82, 6.

treatment are typically given not only to investments but also to investors.⁸⁴ As a result, treaties containing such language cannot, and should not, be reduced to *property* protection treaties. Rather, like FCN treaties, they also contain a significant *personal* protection component.⁸⁵ The granting of independent investor rights has potentially important repercussions. In *RosInvest v. Russia*, involving a similarly worded treaty between the Soviet Union and the United Kingdom (1989), the tribunal stressed the fact that the treaty extended MFN coverage not only to investment, but also to investors, which meant that the latter could invoke it to rely on the more favorable dispute settlement provision of a third treaty.⁸⁶ The existence of personal investor rights may prove significant also on other fronts, e.g., on the question whether tribunals can award moral damages. In sum, the personal protection granted to the investor is an important continuation of the FCN experience.

V. Transparency and Other Positive Integration-Type Obligations

A final treaty design heritage of the FCN treaty is the reliance on positive integration-type obligations. European BITs were negative integration-type treaties that prohibit or constrain certain governmental conduct.⁸⁷ Positive integration-type obligations, in contrast, require a specific positive administrative or legislative action on part of the contracting States. FCN treaties contained extensive positive integration obligations relating, for instance, to the protection of human or consular rights, or the recognition procedure of arbitral awards. These concerns have since been addressed on the multilateral level through the *Human Rights Covenants*, the *Vienna Convention on Consular Relations* and the *New York Convention*. What survived the transfer to the American BIT program,

⁸⁴ See 2004 *U.S. Model BIT*, Art. 3 (1), *supra* note 83, 6 and 2012 *U.S. Model BIT*, Art. 3 (1), *supra* note 82, 7.

⁸⁵ Z. Douglas, *The International Law of Investment Claims* (2009), 136-141, paras 276-290. Contrary to Douglas' assertion that treaties granting investor rights are an exception, they have been proliferating rapidly and are today systematically included in the BIT program of Australia, Canada, Japan, U.S., Singapore, and Taiwan amongst others.

⁸⁶ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of 1 October 2007, 77-80, paras 126-133.

⁸⁷ Negative integration type clauses may still require positive action, for instance, if benefits withheld to foreign investment but accorded to domestic investment have to be extended to all investment by virtue of the National Treatment obligation. J. Robbins, 'The Emergence of Positive Obligations in Bilateral Investment Treaties', 13 *University of Miami International & Comparative Law Review* (2006) 2, 403. This, however, is just an incidental effect of negative integration type clauses and does not reflect the distinction drawn here.

however, were the obligations to publish laws in advance and to guarantee access to institutions and proceedings of domestic justice.⁸⁸ While the importance of the latter is today somewhat reduced due to the widespread recourse to arbitration, transparency clauses remain meaningful and have since evolved to include means for participation in law-making for the other contracting party or affected stakeholders.⁸⁹ The 2012 *U.S. Model BIT* goes particularly far by extending the reach of this obligation to domestic standard setting.⁹⁰

In sum, important FCN treaty design elements survived the U.S. shift from FCN to BITs and gave the American BIT program a unique design, distinguishing it from European BITs. These FCN design features have since found their way into NAFTA and were subsequently included in the investment treaty programs of other major economies, where they continue to evolve.

E. There and Back Again: The Return of the FCN Approach to Investment Treaties

In addition to shaping the American BIT program, FCN treaties have influenced modern investment treaty law in a more subtle way, by providing the ideational roots for the emergence of a second generation of investment treaties. Although BITs and FCN treaties are no longer competing in actual investment treaty making as in the 1960s, they remain conceptual alternatives that continue to inspire different approaches to investment policy-making.

The American policy shift suggests that the economic and political context to a large extent determines whether a FCN or a BIT approach is chosen. In the immediate post-war era, FCN treaties were the instruments of choice to put the economic and political relations between like-minded developed countries on a new foundation. Then, the intensifying Cold War confrontation and

⁸⁸ See 1959 *U.S.–Pakistan FCN Treaty*, Art. XV (*supra* note 48, 119) (the article's scope, however, was limited to trade matters); 1984 *U.S. Model BIT*, Art. II (8) & Art. IX (*U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, reprinted in 4 *International Tax & Business Lawyer* (1986) 1, 136, 138 & 142). See also R. R. Wilson, 'Access-to-Courts Provisions in United States Commercial Treaties', 47 *American Journal of International Law* (1953) 1, 20.

⁸⁹ See, for instance, 2011 *Japan–Papua New Guinea BIT*, Art. 7 & 8; 2007 *Peru–Colombia BIT*, Art. 15; 2005 *U.S.–Uruguay BIT*, Art. 11. All named BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch_____779.aspx (last visited 31 January 2014).

⁹⁰ 2012 *U.S. Model BIT*, Art. 11 (8) (a), *supra* note 82, 16, stipulates that “[e]ach Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies”.

decolonization changed the political climate, making it less conducive to treaties of general relations. At the same time, the need for investment protection became most acute in developing countries which had no outward investment of their own, making asymmetrical rather than symmetrical treaties a more natural choice. In that setting, the more specialized and seemingly more technical BITs presented an attractive alternative to the FCN treaty. Just as the political and economic climate favored the rise of the BITs approach, changes in the world economy have since led to its decline and to a re-emergence of the FCN approach to investment policy making.

I. The Rise and Decline of First Generation BITs

After the fall of the Berlin Wall, BITs proliferated quickly across the globe. In the 1990s alone, almost 1600 such treaties were concluded.⁹¹ The brevity and simplicity of BITs made them easy to negotiate.⁹² At its peak in 1996, UNCTAD reported the conclusion of 211 BITs – meaning that on average, a new BIT was signed every one and a half days.⁹³

The enthusiasm towards European-style BITs, however, started to wane in the early 21st century. Until the late 1990s, investor-State arbitration, provided for in most BITs, had largely lain dormant. Since then, however, a total of over 500 cases have been filed.⁹⁴ In light of the flood of investment claims, States began to discover that the early BIT approach of brevity and simplicity coupled with a focus on investment protection not only had certain benefits but also entailed significant risks.⁹⁵ BITs' simplicity made them prone to unpredictable

⁹¹ UNCTAD, *Bilateral Investment Treaties 1959-1999*, *supra* note 1, 1.

⁹² In addition, until recently, the majority of these treaties were closely modeled on the *OECD Draft Convention on the Protection of Foreign Property* of 1967 producing largely homogenous treaties. Hence many countries shared a common reference point which also facilitated negotiations. See Schill, *supra* note 3, 35-36.

⁹³ UNCTAD, 'Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties', available at [http://www.unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx](http://www.unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx) (last visited 31 January 2014).

⁹⁴ UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', *IIA Issues Note No. 1* (10 April 2013), available at http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (last visited 31 January 2014), 3.

⁹⁵ L. N. Skovgaard Poulsen & E. Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', 65 *World Politics* (2013) 2, 273; L. N. Skovgaard Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality* (2011) [Skovgaard Poulsen, *Sacrificing Sovereignty by Chance*].

and, at times even, inconsistent interpretation.⁹⁶ Their brevity created an apparent justification for judicial activism in order to clarify vague treaty language and to close gaps left open by the drafters.⁹⁷ Finally, their focus on investment protection sparked debates on their compatibility with other public policy objectives such as human rights or environmental protection especially as investors began challenging general legislation in the public interest.⁹⁸

As a result of these concerns, States began to re-consider their approach to investment treaties. Some countries started to denounce their BITs.⁹⁹ Bolivia, Ecuador, and Venezuela even exited the *ICSID Convention*.¹⁰⁰ In general, States became more hesitant to negotiate BITs. With only 20 new BITs signed in 2012, the number of agreements concluded yearly has reached pre-1990 levels.¹⁰¹ This

⁹⁶ Consider for example the conflicting awards involving Argentina's necessity defense: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, 44 ILM 1205; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007; *LG&E Energy Corp. and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, 46 ILM 40; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award of 29 June 2010, 49 ILM 1445; *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of 30 July 2010.

⁹⁷ W. Alschner, 'Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory' (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241652 (last visited 31 January 2014).

⁹⁸ See generally M. Waibel *et al.* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010); S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Review* (2005) 4, 1521.

⁹⁹ South Africa, for instance, denounced or declined to renew several BITs with EU countries. See Webber Wentzel, 'SA Declines to Renew Bilateral Investment Treaties With European Union Member States' (1 October 2012), available at <http://www.polity.org.za/article/sa-declines-to-renew-bilateral-investment-treaties-with-eu-member-states-2012-10-01> (last visited 31 January 2014). See also M. Allix, 'EU Steps up Fight to Have Treaties With SA Retained', *Business Day* (12 November 2013), available at <http://www.bdlive.co.za/business/trade/2013/11/12/eu-steps-up-fight-to-have-treaties-with-sa-retained> (last visited 31 January 2014).

¹⁰⁰ UNCTAD, 'Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims', *IIA Issues Note No. 2* (10 December 2010), available at http://www.unctad.org/en/docs/webdiaeia20106_en.pdf (last visited 31 January 2014), 1.

¹⁰¹ UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), 101.

decline in numbers cannot be explained by a saturation of the field alone.¹⁰² Rather, more and more countries have put their BIT program on hold in order to re-evaluate their approach to investment policy-making.¹⁰³

II. The Changing Economics of Investment

International arbitration, which exposed the risks and liabilities of BITs, was not the only factor triggering a reconsideration of the underlying approach towards investment treaty-making. Importantly, the economic patterns of investment have also undergone a significant change, making a policy adjustment necessary.

First, with the dawn of the 21st century, the traditional investment treaty paradigm of Northern countries being capital exporters, and Southern States being capital importers, began to wane. Instead, emerging economies have turned into sources of outward investment and developed countries have become the recipients of investment from the South. Investment flows are increasingly becoming bi-directional.¹⁰⁴ The change of global investment patterns coupled with the availability of investor-State arbitration has reshuffled benefits and costs in investment treaties. The regulatory burden of BITs does not fall any longer on the developing country BIT partners alone, but is also borne by developed countries. Hence, today reciprocity is not a matter of formal prestige any more, but of reality. As a result of bi-directional investment flows, no country can feel safe from investment claims. With the return of reciprocity, many developed

¹⁰² Skovgaard Poulsen, *Sacrificing Sovereignty by Chance*, *supra* note 95, 210. See also UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (2011), 102-103 [UNCTAD, World Investment Report].

¹⁰³ For India, see N.N., 'India Places All BIT Talks on Hold, Pending Review of Own Model Deal', *Inside U.S. Trade* (1 February 2013), available at <http://www.wtonewsstand.com/Inside-US-Trade/Inside-U.S.-Trade-02/01/2013/menu-id-445.html> (last visited 31 January 2014). For Pakistan, see M. Haider, 'Bilateral Investment Treaties Need Reexamination', *The International News* (3 July 2013), available at <http://www.thenews.com.pk/Todays-News-3-187324-Bilateral-investment-treaties-need-reexamination> (last visited 31 January 2014). For South Africa, see South African Department of Trade and Industry, 'Bilateral Investment Treaty Policy Framework Review: Executive Summary of Government Position Paper', *Government Gazette/Staatskoerant No. 32386* (7 July 2009), available at <http://www.northernlaw.co.za/images/stories/files/actsbills/BILATERAL%20INVESTMENTS%20TREATY%20POLIVY.pdf> (last visited 31 January 2014). For Australia, see Australian Government Productivity Commission, 'Bilateral and Regional Trade Agreements' (November 2010), available at <http://www.pc.gov.au/projects/study/trade-agreements> (last visited 31 January 2014).

¹⁰⁴ See UNCTAD, *World Investment Report 2011*, *supra* note 102, 2-4, which shows that developing countries are becoming important sources of outward investment.

country negotiators thus have again seen the need to scale down their investment protection demands to levels that they are willing to grant foreign investors in return. Just as Walker had observed in the context of FCN treaties, reciprocity and symmetry tend to balance and moderate the content of investment treaties.

Second, aside from differences between developed and emerging economies being evened out, investment agreements themselves have moved into new territories. These agreements are not concluded anymore only by developed-developing country pairs, but also increasingly govern investment relations between developing-developing and, more recently, developed-developed States at bilateral and regional levels.¹⁰⁵ In South-East Asia especially, a tight net of investment agreements has emerged that connects highly linked economies of a similar level of development. On-going negotiations over a transpacific partnership and a transatlantic trade and investment partnership between the EU and the U.S. have given negotiations among high-income countries a global dimension. The changed context of investment treaties involving countries that share a similar level of development creates further pressure for more symmetrical and reciprocal rule-making.

Finally, the notions of ‘investment’ and ‘investors’ have changed considerably in economic terms since the advent of the first BITs. Over the last twenty years, we have observed the emergence of global value chains in what Baldwin called the “unbundling of productions stages previously clustered in factories and offices”.¹⁰⁶ Products like iPods are invented and developed in the U.S., their parts manufactured in South East Asia, and the final product assembled in China. Hence, different forms of investment transactions increasingly interact both among themselves and with other types of economic activities resulting in what Baldwin termed 21st century commerce or the “trade-investment-service nexus”.¹⁰⁷ Furthermore, disputes have begun to span across legal regimes, such as the plain cigarette packages litigation against Australia before the WTO and an investment tribunal,¹⁰⁸ giving rise to a risk of inconsistent awards. The realization

¹⁰⁵ See UNCTAD, ‘The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?’, *IIA Issues Note No. 3* (13 June 2013), available at http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d8_en.pdf (last visited 31 January 2014).

¹⁰⁶ R. E. Baldwin, ‘21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules’ (April 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1869845 (last visited 31 January 2014), 5.

¹⁰⁷ *Ibid.*

¹⁰⁸ A. D. Mitchell, ‘Australia’s Move to the Plain Packaging of Cigarettes and its WTO Compatibility’, 5 *Asian Journal of WTO and International Health Law and Policy* (2010)

that different economic transactions as well as legal regimes become increasingly intertwined puts into question the compartmentalization underlying traditional BITs, in which investment protection is treated in isolation.

The need to take the wider context of investment protection into account is also highlighted by the changing forms of investors. Formerly, the interests of home States were largely aligned with that of their investors who formed part of a national business community. The BIT was an “institutional means of protecting the private foreign investments of Western capital-exporting nations”.¹⁰⁹ Today, with the rise of multinational companies (MNCs) the bondage of nationality is beginning to break down. Due to the highly fungible nature of international capital,¹¹⁰ the protection of shareholders and the myriad of means for corporate restructuring and treaty shopping,¹¹¹ every BIT may potentially benefit capital originating from a variety of States. As a result, the means of control by home States are diminishing and treaty protection may be accorded to types of investors which the home State does not actually want to protect.¹¹² This is all the more disconcerting as MNCs are often engaged in activities that involve the provision of essential services such as water, sewage-disposal, or electricity and directly impact human rights, public health, or environmental issues. Where the developing host State does not have the capacity to effectively regulate MNCs and no home State exists, international norms such as corporate social responsibility standards need to step in to regulate investment in context.¹¹³ Hence, with investment trans-nationalizing and investors multi-nationalizing,

2, 405; T. Voon & A. Mitchell, ‘Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia’, 14 *Journal of International Economic Law* (2011) 3, 515 [Voon & Mitchell, Plain Tobacco Packaging in Australia]. See generally T. Voon & A. Mitchell, ‘Implications of International Investment Law for Tobacco Flavouring Regulation’, 12 *Journal of World Investment & Trade* (2011) 1, 65.

¹⁰⁹ Abs & Shawcross, *supra* note 3, 115.

¹¹⁰ B. Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’, 22 *Arbitration International* (2006) 4, 521.

¹¹¹ Schill, *supra* note 3, 197-240.

¹¹² For instance, while Philip Morris Hong Kong launched an investment claim against Australia’s Plain Cigarette Packaging legislation, its home State Hong Kong received a WHO award on the ‘World No Tobacco Day 2011’ for being at the forefront of tobacco control policies. So, in some instances, the policy goals of a home State and its investor may be very much opposed. See Voon & Mitchell, ‘Tobacco Packaging in Australia’, *supra* note 108, 523.

¹¹³ W. Alschner & E. Tuerk, ‘The Role of International Investment Agreements in Fostering Sustainable Development’, in F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (2013), 217.

the FCN logic of treating “investment as a process inextricably woven into the fabric of human affairs generally”¹¹⁴ regulating and coordinating a wider range of policy issues has become more pertinent than ever.

III. The Rise of a New Generation of Investment Treaties

The emergence of bi-directional investment flows coupled with the proliferation of investor-State arbitration and the changing economic realities of investment transactions have led States to re-consider the early BIT approach to investment treaty design. Realizing that Walker might have been right that “[a] specialized ‘investment agreement’ [...] would be [...] unrealistic and inadequate”¹¹⁵, States began to turn their backs on the traditional brevity and simplicity of first generation BITs and embraced more complex and comprehensive agreements more akin in design to FCN treaties, giving rise to what we will call a second generation of investment agreements.

The first step towards this second generation was the emergence of preferential trade and investment agreements beginning with the conclusion of NAFTA in 1992.¹¹⁶ It is no coincidence that NAFTA marked the re-entry of the FCN approach to investment policy-making. Since the United States shifted relatively late from FCN to BITs and even then retained many FCN components in its treaties, it was well situated to revive the FCN approach to investment policy-making, as the European BIT Model became ill-equipped to deal with a new economic context. This moment came when, for the first time in post-FCN treaty-making, the United States was negotiating not only with a developing but also with a developed country partner. The symmetry of levels of development coupled with the prospect of bi-directional investment flows made a new approach to investment policy-making necessary. Like FCN treaties, but unlike the BITs of its time, NAFTA is a complex, delicately balanced agreement that regulates investment ‘in context’. In addition to its non-investment chapters and environmental and labour side agreements, Chapter 11 itself contains references to a number of non-investment concerns most notably in a special clause on environmental measures in Article 1114. Moreover, Articles 1106 on performance requirements and 1108 on reservations are remarkably fine-tuned clauses reflecting an intricate balance of investment protection and policy space preservation. NAFTA thus became the first specimen of a second generation

¹¹⁴ Walker, ‘Protection of Foreign Investment’, *supra* note 13, 244.

¹¹⁵ *Ibid.*

¹¹⁶ The earlier 1988 *Free Trade Agreement* between Canada and the United States (CUFTA) only contained a limited investment chapter without investor-State arbitration.

of IIAs. Since then, PTIAs modelled on NAFTA have proliferated and are today concluded by Australia, ASEAN, Canada, Chile, Japan, Mexico, Peru, Singapore, and Taiwan to name but a few. Structured in detailed chapters, these PTIAs re-unite trade and investment governance alongside other economic policy concerns such as intellectual property rights, competition policy, or business facilitation.

Crucially, the return of the FCN approach is not limited to PTIAs but also extends to a new generation of BITs. Hence, following NAFTA, an increasing number of countries have also fundamentally changed the design of their BITs. Whereas the 1959 *Germany–Pakistan BIT* contained only 14 articles, the 2008 *U.S.–Rwanda BIT* has 37, the 2011 *Colombia–Japan BIT* 44 and the 2006 *Canada–Peru BIT* even 52 articles.¹¹⁷ Part of the increase in length is devoted to more detailed arbitration procedures, but other elements point to an FCN-like approach also in BITs. This is not to say that this emerging second generation of IIAs is substantively similar to FCN treaties. Subject matters such as consular relations, navigation, or human rights are today regulated by a multitude of other specialized bilateral and multilateral treaties. Rather, the similarities lie in their common underlying approach to treaty design based on symmetrical and complex rules and investment protection ‘in context’.

First, in light of reciprocal investment relations, second generation IIAs, like their FCN predecessors, are highly complex with carefully worded provisions and an intricate interplay of obligations and exceptions reflecting the need to balance investment protection abroad with policy space at home.¹¹⁸ On the one hand, this is done through exception clauses. A number of countries have inserted general exceptions in their BITs.¹¹⁹ The 2011 *Colombia–Japan BIT*, for instance, has no less than 14 exception clauses.¹²⁰ As already mentioned above, exclusions in the form of non-conforming measure clauses increasingly find their way also into treaties across the globe. On the other hand, States have added

¹¹⁷ These BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

¹¹⁸ For fine-tuning of rights and obligations in recent BITs, see A. van Aaken, ‘International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis’, 12 *Journal of International Economic Law* (2009) 2, 507; S. A. Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’, 13 *Journal of International Economic Law* (2010) 4, 1037.

¹¹⁹ See, for instance, the model BITs of Botswana, Canada, Colombia, Egypt, Latvia, Mauritius, Norway, and Turkey.

¹²⁰ Counted are clauses that begin with “nothing in this agreement [or article] shall prevent” or “notwithstanding [...] a Contracting Party may”.

precision confining the reach of the primary investment protection obligations. One frequently found example is an explanatory clause clarifying that “non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation”.¹²¹ Hence, second generation IIAs contain a fine-tuned balance of rights and obligations.

Second, the new generation of IIAs considers investment in its wider policy context. While they do not go as far as FCN treaties to comprehensively cover civil or religious rights, they have expanded their coverage to a wider range of investment-related concerns. Many of the recently concluded IIAs refer to trade law, intellectual property rights, or even non-economic concerns such as environmental protection or labour rights. A 2011 OECD Working Paper showed, for example, that over 100 treaties out of a sample of 1,593 BITs contain references to environmental concerns.¹²² These references, virtually absent before the mid-1990s, have sky rocketed to being part of 89 percent of newly concluded treaties in 2008.¹²³ In addition, all PTIAs in the sample contained environmental language. Other novel concerns are also tackled in IIAs. Japan, for instance, has consistently included anti-corruption standards in its modern BITs.¹²⁴ Canada and the U.S. have begun to address corporate social responsibility in some of their PTIA investment chapters.¹²⁵ A number of Belgian

¹²¹ 2004 *Canada Model BIT*, Annex B.13(1) (*Agreement Between Canada and ... for the Promotion and Protection of Investments*, available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited 31 January 2014), 21). See also, e.g., 2005 *U.S.–Uruguay BIT*, Annex B; 2008 *Japan–Peru BIT*, Annex IV. The BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

¹²² K. Gordon & J. Pohl, ‘Environmental Concerns in International Investment Agreements: A Survey’, *OECD Working Papers on International Investment No. 2011/1* (2011), available at <http://www.oecd-ilibrary.org/content/workingpaper/5kg9mq7scrjh-en> (last visited 31 January 2014), 5.

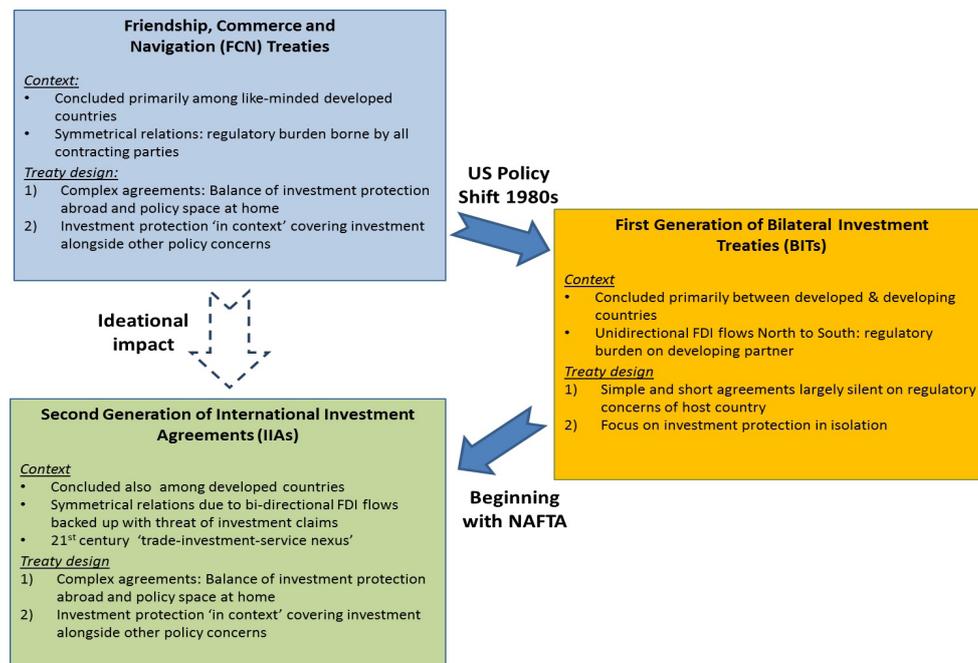
¹²³ They are particularly frequent in recent agreements by Canada, New Zealand, the U.S., Japan, Mexico, Finland, and Peru. Other countries like Germany and the UK still refrain from including such concerns into their treaties on a systematic basis.

¹²⁴ 2011 *Japan–Papua New Guinea BIT*, Art. 9; 2008 *Japan–Laos BIT*, Art. 10, 2008 *Japan–Uzbekistan BIT*, Art. 9, 2008 *Japan–Peru BIT*, Art. 10, 2011 *Japan–Colombia BIT*, Art. 8. All named BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014). See also J. Pauwelyn, ‘Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy’, in S. Rose-Ackerman & P. D. Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (2013), 247, 257-261.

¹²⁵ UNCTAD, *World Investment Report 2011*, *supra* note 102, 120.

BITs require that the contracting parties’ “legislation provides for high levels of environmental protection”.¹²⁶ By considering issues such as environmental protection, a regulatory race to the bottom or corporate social responsibility, the new generation of IIAs has extended its scope beyond having bilateral investment protection as its sole policy concern and tackled wider regulatory objectives.

In conclusion, FCN treaties may have covered different issue areas than recently concluded IIAs, but their underlying approach still inspires modern investment treaty-making. In a time of reciprocal investment flows and an increasing need to consider investment in its wider policy context, the FCN philosophy of investment protection agreements has proven more apt to address 21st century policy challenges than the short, simple, and specialized BIT model.¹²⁷



¹²⁶ 2009 *Belgium–Barbados BIT*, Art. 11 (1); 2009 *Belgium–Panama BIT*, Art. 5 (1); 2009 *Belgium–Tadjikistan BIT*, Art. 5 (1); 2009 *Belgium–Togo BIT*, Art. 5 (1). All named BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

¹²⁷ The following figure ‘The Gobar Policy Shift From FCN to BIT and the Rise of a Second Generation of IIAs’ summarizes the findings of this section.

F. The Americanization of the IIA Universe

Since the conclusion of NAFTA, we are witnessing a global policy shift towards a second generation of investment treaties that has its ideational roots in the American FCN program. Today, countries look to Washington and not to Europe to seek inspiration for their investment policy-making. Put differently, like in the 1960s, again two competing approaches to investment policy-making are available to policy-makers, but this time the FCN-inspired treaties are gaining the upper hand. Hence, tracing the impact of FCN treaties on modern investment treaty law reveals one final insight: the Americanization of the investment treaty universe which for a long time had been dominated by the European BIT approach. As specific FCN treaty design features and its general approach to investment policy-making spread into the IIA universe, they have given it a distinctly American touch.

The Americanization of the formerly European-style BIT universe is equivalent to a change in the dominant approach to investment treaty-making. As more and more countries experience frustration with European style BITs, the comprehensive and complex FCN approach ‘made in the U.S.’ presents a natural alternative to reform investment policy without engaging in costly institutional innovation from scratch. Especially in America and Asia, the *U.S. Model BIT* is visibly used as a template for treaty negotiations.¹²⁸ Part of the appeal of the *U.S. Model BIT* is undoubtedly due to the status of the U.S. as major political and economic power. In addition, the U.S. was among the first developed countries to be challenged before investment treaty arbitration. It is thus not surprising that other countries want to learn from the U.S. experience as a litigator as well as treaty-maker to improve the arbitration procedure and to enhance defensive elements in their treaties. Importantly, however, these more recent adjustments to better accommodate the increase in investment litigation constitute a mere *tactical* change in investment treaty design compared to the more fundamental *strategic* transition in global investment policy-making from

¹²⁸ See, for instance, M. Kinnear & R. Hansen, ‘The Influence of NAFTA Chapter 11 in the BIT Landscape’, 12 *UC Davis Journal of International Law & Policy* (2005) 1, 101; A. Berger, ‘Investment Rules in Chinese PTIAs – A Partial “NAFTA-ization”’, in R. Hofmann, S. W. Schill & C. J. Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013), 297.

first generation BITs to FCN-inspired second generation treaties which began with NAFTA.

The rise of a FCN-inspired second generation of investment treaties has today become a global phenomenon. FCN elements are not limited to IIAs of the United States, Canada, or Mexico, but have spread to South America (e.g. Colombia, Chile, Peru), Asia (e.g. Japan, South Korea, Singapore, Taiwan), and even Europe (e.g. Belgium Luxembourg, Finland, Latvia) with more countries following suit. Although some countries such as Germany, the Netherlands, or the United Kingdom, as intellectual fathers of the original BIT approach, are still firmly committed to brevity and simplicity in their BITs, the pendulum is swinging towards more complex and comprehensive treaties that consider investment protection in context. With the investment competency shift towards the EU through the *Lisbon Treaty* and the on-going PTIA negotiations with the NAFTA countries, Canada and the U.S.—both firmly rooted in the FCN approach—, Europe is also likely to shift towards an FCN-inspired investment treaty approach.¹²⁹

G. Conclusion: What to Make of the Return of the FCN Approach?

The IIA universe is changing. From short, simple, and specialized agreements we observe a shift towards complex and comprehensive IIAs that treat investment ‘in context’ having more in common with the approach underlying FCN treaties than with first generation European BITs. On a general level, typical FCN-inspired second generation treaties are characterized by a more elaborate mix of rights and obligations and provisions covering investment-related issues such as intellectual property rights, trade, labour, or environmental issues. On a more concrete level, these treaties often contain liberalization provisions, non-conforming measure clauses, references to the customary international law minimum standard, personal protection provisions of the investor, and a range of positive integration-type clauses.

The return of the FCN approach to investment policy-making has three important repercussions on investment law. First, with respect to dispute settlement, more exceptions and a stronger alignment of interests between host and home State are likely to make it more difficult for investors to succeed in traditional investment claims. Already today, a State is almost twice as likely to

¹²⁹ N. Lavranos, ‘The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text?’ (29 March 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455 (last visited 31 January 2014).

win a NAFTA dispute as compared to a non-NAFTA dispute.¹³⁰ At the same time, second generation treaties also offer protection clauses absent in European BITs making it more difficult to determine, on balance, whether we see a reduction, augmentation, or simply restructuring of investment protection levels. In any case, more precise language is likely to generate more predictable outcomes – a development which is going to benefit both States and investors and which may also lead to more amicable settlements. Second, within but also beyond dispute settlement, the new symmetry and equality between the contracting parties is likely to strengthen cooperative elements in investment treaties. Many treaties modelled on NAFTA delegate certain questions of interpretation to the contracting States or set up treaty-based committees in which party representatives jointly monitor the agreement's application.¹³¹ We are likely to see more concerted and unilateral State interventions into the arbitral process in the future.¹³² Finally, second generation IIAs, like FCN treaties, are likely to fulfil broader governance functions that go beyond investment protection. They regulate investment in its wider context, e.g., by imposing negative integration-type clauses in IIAs on new subject matters such as environmental protection, but also venture into positive integration-type clauses on diverse issue areas. In sum, the global policy shift from first generation BITs to second generation IIAs marks a fundamental transformation of the IIA universe, the impact of which we are just beginning to understand.

¹³⁰ The calculation is based on UNCTAD's ISDS database which lists treaty-based arbitrations decided until 2010. The database is available at <http://www.unctad.org/iia-dbcases/> (last visited 31 January 2014).

¹³¹ UNCTAD, 'Interpretation of IIAs', *supra* note 80.

¹³² For an elaboration of this point, see W. Alschner, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration', in S. Lalani & R. Polanco (eds), *The Role of the State in Investor-State Arbitration* (2014) (forthcoming).