Chapter 1.4
The History of Investment Protection Treaties – From 1st Generation BITs to 21st Century Models

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A. EARLY EXAMPLES OF TREATIES WITH INVESTMENT PROVISIONS

I. Medieval Antecedents

Even though treaties concluded between two states with investment provisions are rather a development of the 18th – 20th centuries, there are some early antecedents to be found in the Middle Ages. From the early Middle Ages onwards, merchants began to organize in associations – so-called convoys or caravans – which negotiated directly with foreign governments to obtain extensive commercial privileges when trading in the latter's territory.[1]

There are numerous examples of these early privileges granted to foreign merchants. Already in the 10th century, the merchants of Venice obtained trade concessions to enter the Byzantine ports without paying duties.[2] In the 13th century, similar privileges were negotiated between the Genoese merchants and the Byzantine Empire.[3] Also a number of English kings made use of these type of concessions. One example is a grant issued by King Henry II of England in 1557 to guarantee protection to German merchants from Cologne, who had established a trading-post (the so-called "Steelyard") in London.[4] These German merchants later formed a powerful organization – the Hanseatic League – which frequently provided economic privileges to traders investing in commercial transactions within the League.[5]

These early forms of investment protection were not negotiated between two states but directly between the merchants and the foreign sovereign. Therefore, they are rather comparable with modern international concession contracts than with investment treaties.[6] Still, since these early concessions were equally aimed at the enunciation of certain standards of treatment for the alien merchant, they could be regarded as the most distant ancestor of modern investment law.[7]

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1 Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 7; Salacuse, *The Law of Investment Treaties* (2015), p. 89.

2 Fischer, *Some Recent Trends and Developments in the Law of Foreign Investments,* in Böckstiegel et al (eds), *Law of Nations. Law of International Organizations. World's Economic Law* (1988), pp. 95–108 (97).

3 Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 7.

4 Fischer, *Some Recent Trends and Developments in the Law of Foreign Investments,* in Böckstiegel et al (eds), *Law of Nations. Law of International Organizations. World's Economic Law* (1988), pp. 95–108 (97).

5 Tietje and Sipiorski, *The Evolution of Investment Protection Based on Public International Law Treaties,* in Bjorklund and Reinisch (eds), *International Investment Law and Soft Law* (2012), pp. 192–237 (194 f.).

6 Salacuse, *The Law of Investment Treaties* (2015), p. 89.

7 Ibid.

This network of concessions eventually evolved into the so-called “capitulation system”, whereby the merchant’s home country – instead of the merchant himself – negotiated similar privileges with the host country.[8] In 1536, the King of France and the Ottoman Sultan concluded a treaty providing for reciprocal rights of trade and navigation for the two monarchs’ subjects.[9] This treaty became the basis for similar agreements that were concluded between western and non-western powers in the Middle East and Asia.[10] They became known as “capitulations”, because the different privileges granted therein were divided into chapters – *capitula* in Latin.[11]

The merchants benefitting from the capitulations were in a similar position as investors under modern treaties today. The agreement itself was concluded by their home country and the merchants were third-party beneficiaries of the rights provided therein. Those rights constituted substantive commercial privileges, including *inter alia* (i) the exemption from customs duties and port dues (ii) the right to freedom of religion and (iii) the right to live under the alien merchant’s own legal regime. In addition, the merchant’s legal disputes often fell under the jurisdiction of special consular courts instead of the host country’s regular courts.[12] The consuls were usually appointed by the merchant’s home country and were given judicial powers to hear the claims raised against the nationals of the consul.[13]

In contrast to modern investment agreements, the privileges provided through the capitulary system came in the form of unilateral (and revocable) franchises that one sovereign granted to the other sovereign’s subjects.[14] Over time, the system became resented by many non-western powers, which held the view that the aliens occupied unjustified positions of economic and legal privilege.[15] Even though the capitulations were even-handed on their face, they generally worked in favor of the European powers, without according the same rights to the subjects of the non-European party.[16] As will be elaborated below, similar discussions arose in the second half of the 20th century with regard to modern investment agreements.

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8 Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 7.

9 Ibid, p. 18.

10 Brochard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 432.

11 Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 7.

12 Salacuse, *The Law of Investment Treaties* (2015), p. 91; Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 19.

13 Nussbaum, *A Concise History of the Law of Nations* (1954), p. 56.

14 Ibid, p. 55.

15 The capitulation system was finally dismantled at the beginning of the 20th century. It was formally abolished in Turkey in 1923 with the conclusion of the Treaty of Lausanne. In China, it was phased out over a course of years in individual agreements negotiated by the Kuomintang government with the various capitulatory powers. See Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), p. 19.

16 Ibid., p. 18.

With the emergence of the modern nation state, European powers began to conclude commercial treaties among themselves to regulate trans-border economic activity.[17] These treaties were broad in their scope and generally aimed at establishing economic relations between the contracting state parties. Amongst other matters, those treaties included provisions for the protection of foreign investment. They provided, for instance, (i) for the protection and security of aliens and their property, (ii) special means of protection for monetary transfers, (iii) most-favored-nation treatment (equality of treatment with other foreigners),[18] (iv) national treatment (the prohibition of unfavorable discrimination in favor of the host country's own nationals) and (v) access to justice.[19] One example is the Peace Treaty between Spain and the Netherlands of 1648, which provided that the assets of the merchants could not be seized, except by judicial process, to satisfy debts, contracts, or other obligations.[20]

In contrast to the one-sided capitulary system, the commercial treaties concluded among Western powers from the 17th century onwards, were characterised by greater equality among its contracting parties.[21] Particularly the United States of America (U.S.) became prominent for the conclusion of numerous commercial treaties with other Western powers.[22] These so-called treaties of friendship, commerce and navigation (FCN treaties[23]) can be regarded as the most direct antecedent of the modern bilateral investment agreement.

II. Treaties of Friendship, Commerce and Navigation

1. Late 18th and 19th Century

In 1776, the Continental Congress of the U.S. authorized the preparation of a model FCN treaty to be used in the negotiations with the major European powers.[24] Shortly after its Declaration of Independence, the U.S. was a predominantly agricultural nation that needed to export foodstuffs and raw materials to obtain necessary industrial goods.[25] To that purpose, the U.S. concluded

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17 Salacuse, *The Law of Investment Treaties* (2015), p. 90.

18 As reported by *Neufeld*, one of the first treaties to employ this term was the Treaty of Nijmwegen of 1679 between Sweden and Holland. See Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (1971), p. 110.

19 Salacuse, *The Law of Investment Treaties* (2015), p. 89.

20 Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (1971), p. 98.

21 Lilich, *The Human Rights of Aliens in Contemporary International Law* (1984), pp. 18–21.

22 Salacuse, *The Law of Investment Treaties* (2015), p. 92.

23 There has been considerable variation as to the precise title of those treaties. To avoid confusion, this chapter will generally refer to FCN treaties.

24 Vandevelde, *The First Bilateral Investment Treaties* (2017), p. 57.

25 Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy* (1967), 2 Stud. L. & ECON. DEV., pp. 72–90 (73).

its first FCN treaty in 1778 with France[26]. More treaties with other European powers followed soon, an FCN treaty with the Netherlands in 1782,[27] and another one with Sweden in 1783.[28] Since then, the U.S. has concluded more than 130 treaties of this kind.

In the first years of the new Republic, these bilateral commercial treaties served as a symbol of peace and protection of vital commercial interests.[29] In the early 19th century – the golden age of the American merchant fleet – U.S. FCN treaties played an important role in protecting American shipping.[30] By allowing the nationals of one contracting party to come with ships and cargoes to the other's ports, the FCN treaties enabled "reciprocal liberty of commerce"[31] between the contracting states.

In general terms, FCN treaties pursue the objective of establishing a framework, within which mutually beneficial economic relations can take place.[32] To that purpose, they include provisions aimed at reducing national obstacles to transnational trade and at granting market access rights to foreign products and commercial actors.[33] At the same time, already early FCN treaties included incidental provisions on the protection of the alien's property and other principles often found in modern bilateral investment treaties (BITs).

Market access was provided through provisions guaranteeing to nationals of the one party the right to reside and trade in the territory of the other party.[34] Once established in the other party's territory, FCN treaties typically afforded "the most complete protection and security for their commerce" or similarly worded protections for the alien's property.[35] In addition, they frequently contained provisions demanding the payment of "equitable and sufficient indemnification"[36] in case of seizures of the alien's property.

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26 Treaty of Amity and Commerce with France, signed 6 February 1778.

27 Treaty of Amity and Commerce with the Netherlands, signed 8 October 1782.

28 Treaty of Amity and Commerce with Sweden, signed 3 April 1783.

29 Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy* (1967), 2 Stud. L. & ECON. DEV., pp. 72–90 (76).

30 Ibid.; Wilson, *United States Commercial Treaties and International Law* (1960), p. 2.

31 *See* Commercial Treaty with England, signed 24 November 1815, Art. I.

32 Oesch, *Commercial Treaties* (2015), mn. 3.

33 Ibid.

34 *See* Treaty of Commerce and Navigation with Portugal, signed 19 February 1810, Art. II. For more examples, *see* Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 21 fn. 16.

35 *See* Commercial Treaty with England, signed 24 November 1815, Art. I.

36 *See* Treaty of Peace, Amity, Navigation, and Commerce with New Granada, signed 12 December 1846, Art. 8.

Moreover, specific standards for the treatment of property rights could be found in many FCN treaties of the late 18th or the 19th century. In particular, most-favored-nation treatment (MFN)[37] and/or national treatment[38] was often agreed to be applied to the alien's property and person. Finally, these early FCN treaties guaranteed the nationals of the other party the right of "free and open access" to local courts on the basis of national treatment.[39] Hence, the BIT principles of access, non-discrimination, property protection, and due process could already be found in the early FCN treaty practice.[40]

2. Inter-War Period

As elaborated in the previous subsection, the FCN treaties of the late 18th and the 19th century already included broad provisions on the protection of foreign property. In the time between the First and Second World War, more detailed and explicit provisions on the protection of foreign property were included in the FCN treaties of that period.[41] These new provisions resemble the ones that are still today included in modern BITs. One example is the U.S. FCN treaty with Germany of 1923, which provided that

> *[T]he nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.*[42]

In addition, in the inter war-period, the practice of including more specific references to the protection of property owned by *companies* began.[43] Until the FCN treaty with Japan of 1911,[44] the persons entitled to commercial treaty rights were merely referred to as "citizens", "subjects", "inhabitants" or "nationals".[45] In the treaty with Japan of 1911, companies were already granted

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37 *See* Treaty of Peace, Commerce and Navigation with France, signed 30 September 1800, which applied most-favored-nation treatment to the alien's "property and persons" in Article XI thereof.

38 *See* Treaty of Commerce and Navigation with Italy, signed 26 February 1871, which provided for "the most constant protection and security," specifying that the alien „shall enjoy in this respect the same rights and privileged as are or shall be granted to the natives".

39 *See* Treaty of Amity, Commerce and Navigation between Great Britain and Mexico, signed 26 December 1826, Art. VIII.

40 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 21.

41 Wilson, *United States Commercial Treaties and International Law* (1960), p. 113.

42 Treaty of Friendship, Commerce and Consular Rights with Germany, signed 8 December 1923.

43 Wilson, *United States Commercial Treaties and International Law* (1960), p. 115.

44 Treaty of Commerce and Navigations between the United States and Japan, signed 21 February 1911.

45 Walker, *Provisions on Companies in United States Commercial Treaties* (1956), 50 The American Journal of International Law, pp. 373-393 (375).

a few rights, such as the right to appear before the host country's domestic courts.[46] The FCN treaties concluded in the inter-war period expanded this coverage. For instance, the treaty with Germany of 1923 included a provision stating that

> *[L]imited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.*[47]

A further development of the inter-war period was a shift in the U.S. FCN treaty program from a conditional to an unconditional MFN policy.[48] Until 1923, the concessions granted to one country were only extended to a third country if the latter made a return concession. Since the treaty with Germany of 1923, no reciprocity was required to be granted MFN treatment.[49]

3. Post-War FCN Treaties

After World War II, the U.S. decided once more to revise its FCN treaty program.[50] This revision was partly motivated by the decision of the victorious allies to construct a new post-war international economic order.[51] As part of this new order inspired by the ideas postulated by economic liberalism, the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (IBRD) were established in 1945. In addition, international trade became the center of multilateral regulation within the framework of the 1947 General Agreement on Tariffs and Trade (GATT).[52]

The transfer of international trade to the multilateral level had consequences for the content of post-war FCN treaties concluded by the U.S. Whereas earlier FCN treaties put great emphasis on trade and shipping, post-war treaties particularly focused on the right of establishment and the promotion of private foreign investment.[53] The FCN treaties concluded in the inter-war

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46 Treaty of Commerce and Navigations between the United States and Japan, signed 21 February 1911, Art. VII.

47 Treaty of Friendship, Commerce and Consular Rights signed 8 December 1923, Art. XII.

48 Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy* (1967), 2 Stud. L. & ECON. DEV., pp. 72–90 (80).

49 Ibid.

50 Ibid., p. 81.

51 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 39.

52 Oesch, *Commercial Treaties* (2015), mn. 16.

53 Vandevelde, *A Brief History of International Investment Agreements* (2005), 12 U. C. Davis J. INT'l L. & POL'y, pp. 157–194 (162); Salacuse, *The Law of Investment Treaties* (2015), p. 97; Youngquist, *United*

period often contained a single article concerning the establishment, conduct and protection of enterprises. By contrast, more than half of the provisions of post-war FCN treaties related to the protection of foreign investment.[54]

As to their content, the post-war FCN treaties negotiated by the U.S. contained similar provisions on the protection of property like earlier treaties. Still, their focus shifted much more towards the protection of foreign investment. While the 1923 FCN treaty with Germany did not use the term “investment”, the 1951 FCN treaty with Greece[55] referred in its preamble to the advantages of “the flow of investment, capital and of technology” for the promotion of economic development and the general welfare of the contracting parties’ nationals.

In addition, the FCN treaty with Greece guaranteed not only “most constant protection and security” but also “equitable treatment” to the person and property of foreign nationals and enterprises.[56] Moreover, post-war FCN treaties accorded investors national and MFN treatment with regard to the establishment of their investment,[57] and provided for the first time protection against exchange controls.[58] Finally, post-war FCN treaties were characterized by including state-to-state dispute settlement over disputes on the interpretation or application of the agreement by consenting to the jurisdiction of the International Court of Justice (ICJ).[59]

However, while the U.S. continued to successfully conclude new FCN treaties with developed countries, it became more difficult to negotiate such agreements with developing countries.[60] Even though the new FCN treaties were more focused on investment protection, they remained complex agreements covering a broad range of complex topics, such as trade, navigation, intellectual property and even nascent human rights.[61] Moreover, they were characterized by symmetry in terms of economic and political power, providing for more or less reciprocal treaty

States Commercial Treaties: Their Role in Foreign Economic Policy (1967), 2 Stud. L. & ECON. DEV., pp. 72–90 (82).

54 Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. (1958), pp. 805–924 (806).

55 Treaty of Friendship, Commerce and Navigation with Greece, signed 3 August 1951.

56 Ibid., Art. I.

57 *See* Treaty of Friendship, Commerce and Navigation with Japan, signed 2 April 1953.

58 Ibid., Art. XII.

59 Vandevelde, *A Brief History of International Investment Agreements* (2005), 12 U. C. Davis J. INT’l L. & POL’y, pp. 157–194 (165).

60 Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* (1990), 24 Int’l Law, pp. 655–675 (657); Dolzer & Stevens, *Bilateral Investment Treaties* (1995), pp. 3 et seq.

61 Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 Göttingen Journal of International Law, pp. 455–486 (458).

rights and obligations.[62] The conclusion of complex agreements touching upon sensitive issues subject to national sovereignty was not attractive for developing countries. Therefore, after concluding its last FCN treaty in 1966,[63] the U.S. eventually shifted towards the negotiation of modern BITs inspired by the post-war European approach.

B. MODERN BILATERAL INVESTMENT TREATIES

After World War II, the Western developed countries desired to establish clear rules for the protection of foreign investment. They hoped that treaty-based rules would remedy the short-comings of vague customary international law rules governing the protection of foreign investment thus far.[64] To that purpose, there were early attempts to establish multilateral rules on investment under the so-called Havana Charter, which was negotiated between 1947 and 1948. The Havana Charter foresaw the creation of an International Trade Organization (ITO) with the power to promulgate rules for both international trade and investment.[65]

However, the Havana Charter never entered into force; it was not ratified by a sufficient number of states. Numerous capital-exporting countries did not perceive it as an effective instrument to protect foreign investment. Therefore, the intention of the U.S. to liberalize both trade and foreign investment did not find a consensus.[66] Yet, new proposals for a multilateral convention on the protection of foreign property were made during the 1950s. The most famous initiative in this regard was the so-called Abs-Shawcross Draft,[67] which was launched in 1959 by a group of European business people under the leadership of Herrmann Abs and Lord Shawcross.[68]

While awaiting the results of these multilateral attempts (which finally failed), Germany – who had lost all its foreign investment as a result of its defeat in World War II – decided to launch its own BIT program in 1959. With the conclusion of the first ever BIT between Germany and Pakistan in 1959,[69] the European BIT model was born.

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62 Ibid.

63 Treaty of Amity and Economic Relations between the US and Togo, signed 8 February 1966.

64 Schill, *The Multilateralization of International Investment Law* (2009), p. 32.

65 Salacuse, *The Law of Investment Treaties* (2015), p. 96.

66 Schill, *The Multilateralization of International Investment Law* (2009), pp. 32 f.; Diebold, *Reflections on the International Trade Organization* (1994), 14 N. ILL. U. L. REV., pp. 335–346 (340).

67 Draft Convention on Investments Abroad (Abs-Shawcross Convention), reprinted in UNCTAD, *International Investment Instruments: A Compendium* (2000), p. 395. See also Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 3-5.

68 The Abs-Shawcross Draft served as preparatory work for another multilateral attempt by the OECD in 1967 (OECD Draft Convention). Finally, all these multilateral initiatives failed.

69 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed on 25 November 1959. See Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 86-90.

I. The European BIT Model

The European BIT model differed from post-war FCN treaties in that they addressed investment-related issues *only*.[70] Their brevity and simplicity made them especially attractive for developing countries,[71] which started to conclude BITs with different European states. The absence of non-investment issues in the European BITs made them easier to negotiate with developing countries.[72] In 1961 alone, Germany concluded five BITs with Greece,[73] Togo,[74] Morocco,[75] Liberia,[76] and Thailand.[77] Soon, other European powers started their own BIT programs, such as Switzerland,[78] France,[79] Italy,[80] and the Belgium-Luxembourg Economic Union (BLEU).[81]

These first BITs were typically concluded between a capital-exporting and a capital-importing country.[82] Capital-exporting countries wished to build an international regime to protect the foreign investments of their own nationals abroad.[83] Due to a number of concerning incidents during the 1950s, such as the nationalization of British oil assets by Iran in 1951, the

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70 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 55.

71 Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards* (1986), 4 INT'l TAX & Bus. Law, pp. 105–135 (110).

72 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 57.

73 Treaty between the Federal Republic of Germany and the Kingdom of Greece for the Promotion and Reciprocal Protection of Investment, signed 27 March 1961.

74 Treaty between the Federal Republic of Germany and the Republic of Togo for the Promotion of Investment, signed 16 May 1961.

75 Treaty between the Federal Republic of Germany and the Kingdom of Morocco for the Promotion of Investment, signed 21 January 1961.

76 Treaty between the Federal Republic of Germany and the Republic of Liberia for the Promotion and Reciprocal Protection of Investments, signed 12 December 1961.

77 Treaty between Thailand and the Federal Republic of Germany Concerning the Promotion and Reciprocal Protection of Investments, signed 13 December 1961.

78 Treaty between the Confederation of Switzerland and the Republic of Tunisia Concerning the Protection and Promotion of Investments, signed 2 December 1961.

79 Treaty between the Republic of France and the Republic of Tunisia on the Economic Relations and the Protection of Investments, signed 15 September 1965.

80 Treaty between the Republic of Italy and the Republic of Guinea for Favouring Investments, signed 20 February 1964.

81 Convention between the Belgo-Luxembourg Economic Union and Morocco Concerning the Encouragement of Capital Investment and the Protection of Property, signed 28 April 1965.

82 Brown, *International Investment Agreements – History, Approaches, Schools*, in Bungenberg et al (eds.), *International Investment Law. A Handbook* (2015), pp. 153–185 (180).

83 Salacuse, *The Emerging Global Regime for Investment* (2010), 51 Harv. Int.'l L.J., pp. 427–474 (437).

expropriation of Liamco's concessions in Libya in 1955, or the nationalization of the Suez Canal by Egypt a year later, the security of international investment appeared to be threatened.[84]

In light of these developments, numerous capital-exporting countries considered that customary international law did not provide sufficient protection for their nationals' investments abroad. Under customary international law, foreign investors had, for instance, no right to make monetary transfers from the host to their home state.[85] It is assumed that capital-importing countries, on the other hand, had an interest in promoting foreign investment and the flow of capital and associated technology into their own territories.[86] Hence, in contrast to modern FCN treaties, the European BITs were reciprocal on their surface only. In practice, they benefitted investors from capital-exporting countries and imposed obligations on capital-importing countries receiving the formers' investments.

The Germany-Pakistan BIT of 1959 was composed of 14 articles. Its scope was broad, protecting investments "in various forms in the shape of assets" without providing for an exclusive list.[87] The investments made by the other contracting party's nationals were protected through non-discrimination clauses,[88] a "protection and security" clause,[89] a "free transfer of funds" clause,[90] as well as a prohibition against expropriations without compensation.[91] Notably, the first European BIT did not provide for an obligation to accord "fair and equitable treatment" to foreign investors and investments. In addition, it did not contain an investor-state but merely a state-to-state dispute settlement clause, submitting disputes on the interpretation and application of the treaty to the ICJ or, in case of lacking consent, to an arbitral tribunal.

The BITs concluded during the 1960s and 1970s were all similar in content to the Germany-Pakistan BIT, following more or less the same structure.[92] This structure was normally provided through a "model BIT" prepared by capital-exporting country for their respective negotiations with a capital-importing country.[93] Most European model BITs reflected the contents of the 1962

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84 Elkins, Guzman & Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, in Waibel, Kaushal et al (eds.), *The Backlash Against Investment Arbitration* (2010), pp. 369–405 (372).

85 Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* (2005), 46 Harv. Int'l L.J., pp. 67–130 (68).

86 Ibid., p. 77.

87 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of investments, signed 25 November 1959, Article 8(1)(a).

88 Ibid., Article 1(2), Article 2 and Article 3(3).

89 Ibid., Article 3(1).

90 Ibid., Article 4.

91 Ibid., Article 3(2).

92 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 57.

93 Brown, *International Investment Agreements – History, Approaches, Schools*, in Bungenberg et al (eds.),

OECD Draft Convention, which in turn was based on the preparatory work by *Abs* and *Shawcross* in the 1950s. This approach resulted in great uniformity between the BITs negotiated during the 1960s and 1970 and confirms the dynamics of the negotiations at that time: the capital-exporting countries shaped the main terms of the relevant treaty and the capital-importing countries had limited powers to change those terms in the negotiation.

The European BITs generally stated their (alleged) purpose in the title: the encouragement and reciprocal protection of foreign investments. At the beginning of the treaty text, one finds a preamble expressing the treaty's objectives, such as (i) intensifying the economic cooperation between the contracting parties, (ii) creating favorable conditions for investments, (iii) stimulating private business activities, and (iv) increasing the prosperity of both nations. This was typically followed by a non-exhaustive list of the types of investments that were covered, the required link of nationality of protected investors and the substantive standards of investment protection.[94]

The first BIT to include an investor-state dispute settlement (ISDS) clause was the Indonesia-Netherlands BIT of 1968,[95] even though it did so in qualified terms.[96] The Chad-Italy BIT of 1969[97] appears to be the first BIT that provided for ISDS with unqualified consent.[98] Already the Abs-Shawcross Draft (and later the OECD Convention) proposed that investors should have direct procedural standing.[99] Still, an ISDS clause was not included in the first European BITs. This changed with the creation of the International Centre for Settlement of Investment Disputes (ICSID) in 1965, which contributed to the proliferation of ISDS clauses in BITs. In fact, ICSID published a series of model BIT arbitration clauses in 1969,[100] which started to be included in newly negotiated agreements.

International Investment Law. A Handbook (2015), pp. 153–185 (180).

94 Sornarajah, M, *The International Law on Foreign Investment* (2021), p. 189.

95 Agreement on Economic Cooperation between the Government of the Republic of Indonesia and the Government of the Kingdom of the Netherlands, signed 7 July 1968.

96 Art. 11 provided that "[t]he Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment."

97 Treaty between the Republic of Italy and the Republic of Chad on the Protection and Promotion of Foreign Investment, signed 11 June 1969.

98 Newcombe & Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 45.

99 St. John, *Enriching Law with Political History: a Case Study on the Creation of the ICSID Convention*, in Schill, Tams & Hofmann (eds.), *International Investment Law and History* (2018), pp. 286–320 (300 f.).

100 Newcombe & Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 45.

In the 1970s, the number of expropriations of foreign-owned investments in developing countries rose rapidly.[101] The wave of expropriations included a number of unilateral repudiations of concession agreements (often involving oil exploration and production) between foreign investors and the host country of their investment, leading to a number of high profile international arbitrations.[102] In addition, the 1970s were characterized by the disagreement between capital-exporting and capital-importing countries about the standards of investment protection under customary international law, as evidenced by the Declaration of the New International Economic Order (NIEO)[103] adopted by the United Nations (UN) General Assembly in 1974.[104] Through the NIEO Declaration, developing countries (who held a numerical majority in the UN General Assembly) expressed their view that state sovereignty included the right to nationalize without specifying any obligation to pay compensation.[105] This right was equally mentioned in the 1974 Charter of Economic Rights and Duties of States (CERDS),[106] with the difference that a duty to pay "appropriate compensation" was included this time. The amount of the "appropriate compensation" to be paid in each case was to be determined by national law. This meant that no compensation had to be paid, if it was not foreseen under national law.[107]

The majority of capital-exporting countries voted against the adoption of the CERDS,[108] expressing their discontent over a lacking standard of compensation under customary international law. As a response to the threat of uncompensated expropriations, numerous capital-exporting countries, such as the United Kingdom in 1975,[109] or Japan in 1977,[110]

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101 Jones, *Multinationals and Global Capitalism* (2005), p. 213 f.

102 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 46.

103 Declaration on the Establishment of a New International Economic Order, UN GA Resolution A/RES/S-6/3201, adopted on 1 May 1974. See Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 29-31.

104 Newcombe & Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 46.

105 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 47.

106 Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), adopted 12 December 1974. See Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 32-40.

107 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 48.

108 The countries that voted against the CERDS were Austria, Belgium, Canada, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Japan, the Netherlands, Norway, Spain, Sweden, the United Kingdom, and the United States.

109 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, signed 11 June 1975.

110 Agreement between Japan and the Arab Republic of Egypt concerning the Encouragement and Reciprocal Protection of Investment, signed 28 January 1977.

developed new BIT programs in the 1970s.[111] As a result, the modern BIT was increasingly used as a reactive instrument to past expropriations.

II. The US BIT Program

In the late 1970s, the US business community had become increasingly dissatisfied with the negotiation of FCN treaties for the protection of foreign investment, endorsing a shift towards the European BIT model.[112] Noting the success of the investment-focused European BITs, the *Reagan* administration decided to adopt that model instead of the more complex and comprehensive FCN treaties for the protection of foreign investment.[113] As a result, the US started to develop its own model BIT in 1982 to serve as a prototype for future negotiations.[114] Shortly thereafter, the first U.S. BITs with Egypt,[115] Panama,[116] Haiti,[117] and Senegal,[118] were concluded.

Overall, the first US BITs did not substantially differ from its post-war FCN treaties with regard to the standards provided for the protection of foreign investment.[119] At the same time, they included more detailed provisions on investment protection as well as a number of new elements that can neither be found in the U.S. postwar FCN treaties, nor in the European BIT model of that time.

One example is the inclusion of pre-establishment rights. From the beginning, U.S. (and later also Canadian) BITs impose an obligation on the contracting parties not to discriminate against foreign investors at the time of the investment's admission into the host state.[120] Therefore, already the first U.S. Model BIT (adopted in 1984) extended the national and MFN treatment obligations to the pre-establishment phase to prevent host state from discriminating against

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111 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 48.

112 Ruttenberg, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 J. of Int. Bus. L. (1987), pp. 121–143 (122).

113 Ibid.

114 Nam, *Model Bit: An Ideal Prototype or a Tool for Efficient Breach* (2017), 48 Geo. J. int'l L.' (2017), pp. 1275–1308 (1282).

115 Treaty between the United States of America and the Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, signed 29 September 1982.

116 Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments, signed 27 October 1982.

117 Treaty between the United States of America and the Republic of Haiti concerning the Reciprocal Encouragement and Protection of Investments, signed 13 December 1983.

118 Treaty between the United States of America and the Republic of Senegal concerning the Reciprocal Encouragement and Protection of Investments, signed 22 February 1984.

119 Sachs, *The New U.S. Bilateral Investment Treaties*, 2 Int. Tax and Bus. L. (1984), pp. 192–224 (193).

120 Lévesque & Newcombe, *The Evolution of IIA Practice in Canada and the United States*, in de Mestral & Lévesque (eds), *Improving International Investment Agreements* (2013), pp. 25–58 (27).

protected investors on the basis of their nationality.[121] The provisions on pre-establishment rights were more detailed than their equivalents in the former FCN treaties. The European BIT prototype, in contrast, did not prescribe non-discriminatory treatment for the pre-establishment phase, mostly focusing on the protection of investments once they were established in the host state.[122]

The broad pre-establishment rights provided in U.S. BITs were balanced by a number of reservations (so-called “non-conforming measures”), which carve out certain policy areas from the national and MFN treatment obligations.[123] Already the postwar FCN treaties restricted the foreign acquisition of businesses in the field of communications, air or water transport, and the exploitation of land or other natural resources. The U.S. BITs continued this practice but moved the list of non-conforming measures to the annexes.[124]

Another distinctive feature of U.S. BITs was a reference to international law in the provision imposing an obligation to accord “fair and equitable treatment” (FET) as well as “full protection and security” (FPS) to nationals of the other contracting party. The postwar FCN treaties tied the obligation to guarantee “constant protection and security” to the international minimum standard. The U.S. BITs joined both the FET and FPS standards in one provision, retaining the reference to international law.[125] Such a reference was absent in the European prototype based on the Abs-Shawcross and OECD Drafts, leading to a debate whether these standards were solely treaty-based or somehow linked to customary international law.[126]

Besides these and a few other distinctive elements, the U.S. BITs follow in many aspects the European prototype. For instance, both types of investment agreements reflect the belief that expropriations may be undertaken by the host country, insofar as certain conditions are fulfilled.[127] The typical standard – subject to certain variations in the wording – provided that contracting parties were not to directly or indirectly expropriate or nationalize unless it is (i) for a public purpose; (ii) accomplished under due process of law; (iii) not discriminatory; (iv) not in

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121 See US Model BIT 1984, Art. II(1): “Each party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country (…)”.

122 Lévesque & Newcombe, *The Evolution of IIA Practice in Canada and the United States*, in de Mestral & Lévesque (eds), *Improving International Investment Agreements* (2013), pp. 25–58 (27).

123 Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 Göttingen Journal of International Law (2013), pp. 455–486 (470).

124 Ibid.

125 Ibid., p. 71.

126 Ibid. See also below, Chapters 2.3.2 and 2.3.3.

127 Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty* (1983), 16 N.Y.U. J. Int’l L. & Pol., pp. 1–44 (32).

violation of any specific agreement between a national of one party and the expropriating party; and (v) accompanied by prompt, adequate and effective compensation.[128]

Finally, the U.S. prototype followed the European BITs by providing for investor-state arbitration in case of a dispute between a protected investor and the host state of their investment. U.S. BITs generally provided for consultations and negotiations as procedural requirements before a dispute could be submitted to international arbitration.[129] What both European and U.S. BITs generally had in common was a reference to ICSID as the appropriate forum for the resolution of investor-states disputes.[130]

III. Other BIT Programs

Latin American countries, for a long time, were resistant to signing BITs. Already, at the end of the 19th century, many of them took the position that international law requires states to accord aliens the same treatment as nationals – but no more than that.[131] Due to this reserved approach towards autonomous international law standards, only two Latin American countries concluded BITs in the 1960s.[132] This changed towards the late 1980s, when Latin American countries began liberalizing their foreign investment policies, slowly starting to actively pursue BIT negotiations to attract foreign capital into their territories.[133]

China launched its first BIT program in 1982. Before that, foreign investment was largely excluded from China after the Communist Party came to power in 1949.[134] Since self-reliance failed to bring stability and prosperity to China, the country started to open up to foreign capital as from 1978.[135] As a result of its new policy, China negotiated its first BIT with Sweden in 1982.[136] In the following years, it concluded more BITs with numerous capital-exporting countries, such as Germany, France, Belgium-Luxembourg, Finland and Norway. As of 1985, it

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128 *See* 1983 US Model BIT, Art. II.

129 *See* Treaty between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments, signed 22 July 1985, Article VI(2).

130 *See* Article 8, "1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (…)".

131 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998), p. 2. This view has become known as the "Calvo doctrine", named after the Argentine jurist *Carlos Calvo*, who elaborated the doctrine in his treatise published in 1968.

132 In comparison, 26 African countries as well as 10 Asian countries concluded BITs in the 1960s. *See* ibid, p. 8.

133 Newcombe & Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 50.

134 Liu, *The Evolution of Chinese Approaches to IIAs*, in de Mestral & Lévesque (eds), *Improving International Investment Agreements* (2013), pp. 59–75 (60).

135 Ibid.

136 Agreement between the People's Republic of China and the Kingdom of Sweden on the Mutual Protection of Investments, signed 27 September 2004.

also started negotiating BITs with developing countries, such as Thailand, Pakistan or Ghana. Its treaties with developing countries tended to emphasize state sovereignty and national jurisdiction, allowing more flexibility for the contracting parties than those treaties previously concluded with developed countries.[137]

India joined the BIT movement even later, concluding its first BIT with the United Kingdom in 1994.[138] Similar to China, India started negotiating BITs with developed countries first and then moved to developing and least developed countries from 2000 onwards.[139] With that, India was part of the world-wide global BIT boom, which started with the end of the Cold War around 1990, and initiated the global BIT era.

C. THE EVOLUTION OF BITS IN THE ERA OF GLOBALIZATION

I. The Proliferation of BITs

In the era of globalization, investment policy lost the ideological division that characterized the Cold War.[140] Before the 1990s, BITs were often seen as unequal treaties, which developing countries signed with reluctance in order to attract foreign investment. In the globalization era, by contrast, a high number of states with different ideological backgrounds adhered to the doctrine of economic liberalism, believing that foreign investment would be beneficial for their domestic economy and lead to increased prosperity.[141]

Therefore, the emerging economies in Eastern and Central Europe, Latin America, Africa and Asia actively started to negotiate BITs to attract foreign investment into their territories.[142] As a result, the number of BITs increased dramatically during the 1990s – from 322 such treaties at the end of the 1980s to 1332 BITs by the end of 1996.[143] By 2008, the number had grown even further to more than 2600 BITs.[144] Most recently, the total number of BITs stood at 2837 such treaties, of which 2269 are currently in force.[145]

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137 Li, *Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China*, in de Waart, Peters & Denters (eds.), *International Law and Development* (1988), p. 177 ff..

138 Agreement between the Government of the United Kingdom of Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, signed 14 March 1994.

139 Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29 ICSID Review (2014), pp. 419–450 (420).

140 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 67.

141 Ibid.

142 Salacuse, *The Law of Investment Treaties* (2015), p. 104.

143 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998), p. 8.

144 UNCTAD, *World Investment Report 2008* (2008), p. 14.

145 See **https://investmentpolicy.unctad.org/international-investment-agreements** (3 November 2021).

The new investment policy by developing countries did not only increase the overall number of BITs but also led to more symmetrical treaties. BITs were no longer primarily negotiated between a developed and a developing country. The number of so-called “south-south” BITs began to grow steadily up to 644 such treaties by the end of 2005, representing 26 per cent of BITs overall.[146] But this new trend of negotiations between countries with similar economic development was not only followed by developing countries. Capital-exporting countries increasingly concluded “north-north” BITs among themselves. One famous example of this development is the North American Free Trade Agreement (NAFTA)[147] concluded between two developed (United States and Canada) and one developing country (Mexico).

The NAFTA did not only deal with investment (Chapter Eleven) but also with numerous trade-related matters, such as access for goods (Chapter Three), rules of origin (Chapter Four), government procurement (Chapter Ten) and competition policy (Chapter Sixteen). This inter-mingling of trade and investment is another distinctive feature of the globalization era. Trade and investment were no longer seen as alternatives but as complements.[148] In fact, many establishments by foreign investors were linked to large chains of production. This deeper economic integration required that the barriers to *both* trade and investment were further lowered.[149] To that purpose, states began to negotiate more comprehensive agreements with both trade and investment provisions.

As observed by *Alschner*, the new U.S. investment policy followed in the NAFTA to a certain extent resembles the old FCN treaty approach.[150] NAFTA was more balanced than the European Model that had been predominantly used in the BIT negotiations since the 1960s. This new balance between the interests of foreign investors and host states was achieved by including provisions aimed at the preservation of more policy space in sensitive areas, such as the environment (Article 1114 NAFTA). This new approach differed from the European Model, which focused on strong investment protection without considering non-investment concerns.

A similar development could be observed in Europe, where a total of 49 countries, including the new governments formed in Eastern Europe after the breakup of the Soviet Union, signed the Energy Charter Treaty (ECT).[151] Similar to the NAFTA, the ECT was concluded by (a much

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146 Salacuse, *The Law of Investment Treaties* (2015), p. 105.

147 North American Free Trade Agreement, signed 17 December 1992, entered into force on 1 January 1994. In July 2020 it was replaced by the new United States-Mexico-Canada Agreement (USMCA).

148 Vandevelde, *A Brief History of International Investment Agreements* (2005), 12 U. C. Davis J. INT’l L. & POL’y, pp. 157–194 (181).

149 Ibid.

150 Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 Göttingen Journal of International Law (2013), pp. 455–486 (480).

151 The Energy Charter Treaty was signed in December 1994 and entered into force in April 1998. Today it has 54 contracting parties: Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia and

higher number of) both industrialized countries and emerging economies (in Eastern Europe) and contained not only provisions on investment but on a broad range of topics, such as competition, transit, transfer of technology, access to capital, transparency and taxation. In addition, the ECT recognizes the importance of non-investment concerns: Article 10 contains a detailed provision on environmental aspects, and Article 24 provides for a general exception clause modelled after Article XX GATT.

However, even though there were already a few examples of treaties aiming for more balanced investment protection standards, most of the BITs concluded during the 1990s kept the old drafting style, i.e. without addressing non-investment concerns. Moreover, with more treaty protection available for foreign investors, the number of disputes brought to arbitration began to grow towards the end of the 1990s. As noted by *Franck*, "[w]ith the proliferation of investment treaties, investors have more treaties that they can use to sue Sovereigns".[152] The increased use of ISDS ultimately led to the so-called "backlash"[153] against investment arbitration.

II. The "Backlash" Against Investment Arbitration

The term "backlash" against investment arbitration refers to the disenchantment by states (and other actors) with the investor-state dispute settlement system. Even though ICSID was created already in 1965 and the first BIT providing for investor-state arbitration was concluded four years later (1969), it was not until 1990 that the first ICSID award was rendered.[154] Once the number of disputes began to grow during the 1990s and more and more states started to face investment proceedings as respondents, the system was subjected to increased public scrutiny.

Van Harten famously compared investment arbitration with a public law system, arguing that the former essentially replicates the structure of judicial review in domestic law.[155] In fact, most of

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Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, EU, Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, Netherlands, North Macedonia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan. Currently, the modernisation of the ECT is being negotiated between its contracting parties. An overview of the negotiations round is available at: **https://www.energy-chartertreaty.org/modernisation-of-the-treaty/** (last accessed 4 November 2021). The Charter can be found at Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 211–239.

152 Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions* (2005), 73 Fordham L. Rev., pp. 1521–1626 (1535).

153 This term is borrowed from Waibel, Kaushal, Chung & Balchin (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (2010).

154 The first ICSID award was rendered pursuant to the Sri Lanka-UK BIT in *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award on Merits and Damages (1990). See Polanco, *The Return of the Home State to Investor-State Disputes* (2019), p. 33.

155 Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in Waibel, Kaushal, Chung & Balchin (eds), The Backlash Against Investment Arbitration. Perceptions and Reality (2010), pp. 433–453 (434). In more detail, Van Harten, *Investment Treaty Arbitration and Public Law* (2007).

the investment disputes of the globalization era no longer arise out of direct expropriations as it was the case after World War II. The new disputes often concerned states' exercise of general regulatory powers for legitimate policy purposes. The necessity of treaty-based arbitration for the review of sovereign acts began to be questioned. Moreover, it was argued that investors would get special treatment in disregard of the judicial function embedded in public law.[156]

In addition to these substantive criticisms, a number of procedural aspects of investor-state dispute settlement got questioned.[157] The main procedural concerns can be summarized as follows:[158]

- The lack of transparency in decision-making, considering that disputing parties often request a fully confidential proceeding.
- The manipulation of the system by investors who engage in the practice of treaty shopping by corporate restructuring with the purpose of gaining treaty protection for a specific dispute.[159]
- The lack of consistency of arbitral awards providing for divergent interpretations of identical or similar treaty provisions.
- The limited availability of remedies to correct erroneous decisions and in particular the lack of an appellate mechanism.
- The perceived bias of arbitrators lacking sufficient independence and impartiality due to their financial interest in maintaining the system as it is.

As a result of all these criticisms, the global era initiated a process whereby many BITs were terminated or renegotiated. This process of reforming older BITs continues until today.

III. The Reform of BITs

Already in the 1990s, countries like Germany, Japan, and Finland started to renegotiate many of their existing BITs.[160] However, while in 1995 only 5 treaties were terminated and replaced, the number rose to a total of 20 BITs in 2003, and 105 in 2013.[161] Some countries also decided to unilaterally terminate BITs without concluding new ones. One example is Ecuador, which in

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156 Van Harten, *Investment Treaty Arbitration and Public Law* (2008), p. 4.

157 Polanco, *The Return of the Home State to Investor-State Disputes* (2019), p. 46.

158 UNCTAD, *Improving Investment Dispute Settlement: UNCTAD's Policy Tools* (2017), IIA Issues Note, p. 6.

159 For more details on treaty shopping and what states are currently doing to prevent this practice from ocurring, *see* Böhme, *Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They?* (2021), 38 JOIA, pp. 511–532.

160 Nowrot, *Termination and Renegotiation of International Inv estment Agreements*, in Hindelang & Krajewski (eds.), *Shifting Paradigms in International Investment Law* (2016), pp. 227–265 (229).

161 Ibid.

2008 informed 9 countries, including Cuba, Honduras and Romania, of its denunciation of the BITs concluded with them.[162] As an expression of their disenchantment with the system, some states did not only terminate their BITs but also withdrew from the ICSID Convention. Examples are Bolivia and Ecuador, which sent their notice of denunciation of the ICSID Convention in 2007 and 2009, respectively.[163]

Most states, however, opted for staying in the investment protection regime and for renegotiating – instead of terminating – their BITs. Those states began to develop new BIT programs and Model BITs providing for a number of procedural innovations, more inter-governmental control, and increased policy space for host states. The latter was one of the main concerns in the negotiations of new treaties. States wanted to avoid liability for measures taken in pursuit of legitimate policy objectives. As noted by *Tietje*, the desire to recover more "*autonomy in national policy-making without constraints by international law (…) is one of the most significant consequences of the proliferation of investment law (…)*".[164]

Early examples of this new approach to treaty-making were the 2004 U.S. and Canada Model BITs. The U.S. and Canada have seen themselves as respondents in a number of highly politicized and publicized cases after the entry into force of the NAFTA.[165] As mentioned above, the NAFTA differed from European BITs by addressing non-investment concerns, as well. In their new Model BITS, the U.S. and Canada decided to go a step further down that road. To take the U.S. as an example, it halted its BIT negotiations in 1999 and began to re-evaluate its Model BIT – a process that culminated in 2004.[166] In the preamble of the new Model BIT, the U.S. expressed the desire to provide for a stable investment framework "in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights". More innovations could be found in the main text, including

- a provision (Article 14) introducing new exceptions for the obligation to provide national and most-favored-nation treatment;
- the exclusion of any umbrella clause;[167]
- the reference to the international minimum standard of treatment for the obligations to provide fair and equitable treatment and full protection and security;

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162 Ibid.

163 Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in Waibel, Kaushal, Chung & Balchin (eds.), *The Backlash Against Investment Arbitration* (2010), pp. 353–368 (354).

164 Tietje, *The Future of International Investment Protection: Stress in the System?* (2009), ICSID Rev, pp. 457–463 (461).

165 van Aaken, *International Investment Law between Commitment and Flexibility: a Contract Theory Analysis* (2009), 12 J. Int'l Econ. Law, pp. 507–538 (538).

166 Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation* (2010), p. 73.

167 For further analysis see below, Chapter 2.3.5.

- the limited scope of the obligation to pay compensation for indirect expropriation (Annex B);
- additional transparency obligations (Articles 10 and 11);
- new procedural requirements for ISDS (e.g. the obligation to give a 90-day advance notice of the legal and factual basis of each claim; and
- the possibility to receive *amicus curiae* briefs from non-disputing parties (Article 28(3)).

Overall, the 2004 US Model BIT[168] (and similarly the 2004 Canada Model BIT) continued a trend that was initiated with the NAFTA and that soon would be followed by numerous major economies all over the world. As summarized by *Lavranos*, the NAFTA model that proliferated in the global era stands for: (i) complex, long treaties with lots of carve-outs and exceptions; (ii) a narrow obligation to provide fair and equitable treatment; (iii) regulatory expropriation without compensation; (iv) limited access to ISDS; (v) no umbrella clause; (vi) full access of NGOs; (vii) increased policy space for host states; and (viii) more state-to-state dispute settlement.[169] Soon, this model was followed by other countries. Singapore and India adopted a similar approach in their 2005 Free Trade Agreements,[170] and two years later Norway adopted a draft Model BIT with an explicit mention of the contracting parties' right to regulate "*to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns*".[171]

Next to these states following the trend of more balanced investment protection standards, were those that continued with the "old" European model. In particular Western European states adopted new Model BITs that were a bit of the same. They were short and simple, investment-focused only, had broad definitions of investors and investments, unqualified investment protection standards, broad umbrella clauses, no exceptions, no filter mechanisms, and a broad choice of ISDS mechanisms.[172] Examples for this approach in the post-2000 treaty practice are

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168 In 2012, the US updated the 2004 Model BIT. The 2012 US Model BIT introduces additional transparency obligations, expands obligations in the areas of labor and environment and contains new tools to address the foreign investment activities by state-owned enterprises. *See* Office of the United States Trade Representative, *Fact Sheet: Model Bilateral Investment Treaty*, available at: **https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/april/model-bilateral-inv estment-treaty** (last accessed 17 November 2021). The 2012 U.S. Model BIT is also available in Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 109-133.

169 Lavranos, *The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text?* (2013), available at: **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455** (last accessed 17 November 2021), p. 3.

170 Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. of Int'l Econ. Law, pp. 1037–1075 (1051).

171 2007 Norway Model BIT, Draft version 191297, available at: https://investmentpolicy. unctad.org/international-investment-agreements/treaty-files/2873/download (last accessed 17 November 2021), Article 12. See also Emmert (ed.), *World Trade and Investment Law – Documents* (2018), pp. 97-108.

172 Lavranos, *The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New*

the 2003 Italy Model BIT, the 2004 Netherlands Model BIT, the 2006 France Model BIT, and the 2008 Germany Model BIT.[173]

This changed, however, with the entry into force of the Treaty of Lisbon in 2009, which transferred the exclusive competence to conclude investment agreements upon the European Union (EU). As a result of this conferral of competences, the EU replaced its Member States in most BIT negotiations with third countries. Today, EU Member States retain only limited competences to conclude investment agreements on their own after being authorized by the European Commission.[174] Still, even the new BITs by EU Member States have to follow the common EU investment policy adopted during the last decade.

The Council, one of the main EU institutions, stated in 2011 that the EU is seeking "*the highest possible level of legal protection and certainty for European investors*".[175] At the same time, numerous EU institutions have acknowledged the need to guarantee appropriate regulatory space in future EU investment agreements to allow the EU and its Member States to pursue legitimate policy objectives.[176] Accordingly, the EU Commission has called for "*a better balance between the rights of states to regulate and the need to protect investors*."[177]

As a result of this new EU investment policy, one can observe a departure from the so-called "gold standard" traditionally followed by EU Member States in their own BIT negotiations. The EU agreements concluded with Canada[178], Vietnam[179] and Singapore[180] follow a similarly

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Plurilateral Model BIT Text? (2013), available at: **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455** (last accessed 17 November 2021), p. 1.

173 See Paparinskis, *International Investment Law and the European Union: A Reply to Catharine Titi* (2015), 26 EJIL, pp. 663–670 (668).

174 See Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Agreements Between Member States and Third Countries, OJ 2012 L 351, pp. 40–46.

175 EU Negotiating Mandates on Investment (2011, EU – Canada, India, Singapore FTA's), available at: **https://www.bilaterals.org/?eu-negotiating-mandates-on&lang-en&lang=en** (las accessed 17 November 2021).

176 Reinisch, *The EU on the Investment Path, Quo Vadis Europe – The Future of EU BITs and Other Investment Agreements* (2013), 12 Santa Clara J. Int'l L., pp. 111–158 (124).

177 European Commission, *Fact Sheet, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements,* 2013, available at: https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf (last accessed 17 November 2021).

178 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one Part, and the European Union (and its Member States), signed 30 October 2016 (not in force, provisionally applied as of 21 September 2017.

179 EU-Vietnam Investment Protection Agreement, signed 30 June 2019 (not in force).

180 EU-Singapore Investment Protection Agreement, signed 15 October 2018 (not in force). In addition, the EU has negotiated an agreement in principle with Mexico and is currently negotiating investment treaties with

balanced approach as NAFTA-inspired BITs. At the same time, EU investment agreements include a few new features that are already replicated in other BITs and which are likely to influence future treaties, as well. By combining elements of the old European Model, the NAFTA-inspired BITs and a few new features, the EU agreements can be regarded as the most recent BIT model. To highlight a few of the features of EU investment agreements, the EU-Canada Comprehensive Economic Partnership Agreement (CETA) can be taken as an example. In fact, the CETA has been described as the "*unofficial blueprint of future EU investment agreements*" or a "*paradigm change*" towards a new generation of BITs.[181]

In contrast to traditional European BITs, the CETA follows the Canadian approach by extending the national treatment obligation to both the pre- and the post-establishment phase.[182] EU Member States' BITs used to provide for unqualified national treatment and MFN obligations applicable to the post-establishment phase only.[183] With regard to the obligation to provide fair and equitable treatment, the CETA opted for increased legal certainty for investors and host states by listing the situations that amount to a breach of the standard. This new approach deviates from both the vague general FET clauses traditionally included in European BITs as well as the customary law minimum standard to which the U.S. 2012 Model BIT still refers in connection with the FET standard. Moreover, the CETA provides for more regulatory flexibility (e.g. through the non-lowering of environmental standards), adhering to the same principles that have guided the negotiations of EU Free Trade Agreements before.[184]

Probably the biggest innovation of the new EU investment policy is its new approach to investor-state dispute settlement. Instead of traditional *ad hoc* arbitration, the EU agreements concluded so far establish a bilateral permanent Investment Court System (ICS). The ICS is a two-tier mechanism for investor-state dispute settlement that combines elements of traditional *ad hoc* arbitration with judicial features.[185] For the EU, the ICS constitutes a step towards its medium-term goal of establishing a Multilateral Investment Court (MIC). Through the establishment of such a multilateral court, the EU seeks to provide for a universal solution for the many procedural criticisms that have been raised in the last two decades.

China and Myanmar as well as investment chapters as parts of larger FTAs with India, Libya, Egypt, Jordan, Morocco and Tunisia, Malaysia and Thailand. For an overview, *see* https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (17 November 2021).

181 *See* Bungenberg/Reinisch, *A Paradigm Change: The CETA Investment Chapter* (2021), 24 ZEuS, pp. 437–484 (438 ff.).

182 See Article 8.6 CETA.

183 Hoffmeister & Alexandru, *A First Glimpse of Light on the Emerging Invisible EU Model BIT* (2014), 15 J. World Investment & Trade, pp. 379–401 (385).

184 Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements* (2015), 26 EYIL, pp. 539–661 (643 f.).

185 Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration* (2016), 19 J. of Int'l Econ. L., pp. 761–786 (761).

D. CONCLUSION AND OUTLOOK

International agreements with investment provisions have existed long before the first modern BIT was signed. Particularly the U.S. FCN treaty practice over several decades has contributed to the development of genuine investment protection standards. The European BIT model took these antecedents a step further by providing an investment-only agreement for the first time. The main inspirations for these first BITs were the numerous attempts of establishing a multilateral framework for the protection of foreign investment after World War II.

When the U.S. decided to join the BIT movement, it retained a few features from the previous FCN treaty practice. Its demarcation from European BITs became increasingly visible in the globalization era. While the European BIT model was booming in the 1990s, the U.S., Canada and Mexico started a new chapter in the history of investment agreements with the entry into force of the NAFTA. When the number of investment disputes started to grow in the late 1990s and the first criticisms arose, the NAFTA served as an inspiration for many BITs that sought to provide for more balanced investment protection standards and increased policy space for host states.

Until 2009, most European states stayed away from this new movement and continued concluding BITs based on the “old” model. However, when the EU entered the global investment stage in 2009, the time was ripe for a new “European BIT model”. What we can observe since then is a confluence of the different tendencies into more harmonized global investment standards. The new EU investment agreements retain a few features of the “old” European model, take over numerous provisions inspired by the NAFTA-movement, and add a few new EU elements. Arguably, this new model will serve as inspiration for many investment agreements concluded not only in Europe but in different regions of the world.

Of course, the BITs that have been concluded in recent years do not all look the same. Universal investment standards are still a long way off. This contribution merely outlines the main trends that can be observed in the BIT practice of numerous global actors. At the same time, there are important national and regional differences that deviate from those trends. Naturally, not all of these differences could be taken into account in this short recount of the history of BITs.

As to the next chapter in the history of BITs, one should closely follow the ongoing reform process within the framework of the United Nations Commission on International Trade Law (UNCITRAL). In 2020, the UNCITRAL Secretariat published a note dealing with the implementation of the (procedural) reform options discussed in UNCITRAL Working Group III.[186] One possible way of implementation, which the note addresses, is the adoption of a multilateral instrument that introduces the agreed reform options into existing investment treaties. In that

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[186] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS) – Multilateral Instrument on ISDS Reform, Working Group III, A/CN.9/WG.III/WP.194, 16 January 2020, available at: **https://undocs.org/en/A/CN.9/WG.III/WP.194** (last accessed 19 November 2021).

case, a single instrument would reform a large number of BITs without renegotiating each one of them. Arguably, the adoption of such a multilateral instrument would give rise to more harmonization, and thus, to a new chapter in this history.