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*Between Regional Harmonization and  
Global Fragmentation? The Variable  
Geometry and Geography of Investment  
Treaty Law Through the Prism of  
Regulatory Flexibility Provisions*

*Mavluda Sattorova\**

1. INTRODUCTION

Originally embraced as a means of tackling the historical disagreement about the meaning and scope of international rules on the protection of foreign investment, international investment agreements (IIAs) have often been analysed through the competing prisms of universality and diversity. It has been argued, for instance, that the widespread endorsement of similarly-worded provisions in IIAs—such as the expropriation, non-discrimination, and fair and equitable treatment standards—is nothing but evidence of the universal acceptance of underlying legal principles and of the commonality of interests between states which use IIAs in their foreign investment policies.<sup>1</sup> To quote Schill, ‘international investment treaties have, to a significant extent, developed a surprisingly uniform structure, often converging in their wording and endorsing uniform principles of investment protection.’<sup>2</sup> Likewise, Lowenfeld suggested that the growth of IIAs has reached the ‘point where one can speak of consensus.’<sup>3</sup> Investment treaty law has thus

\* Lecturer in International Economic Law, University of Liverpool, m.sattorova@liverpool.ac.uk.

<sup>1</sup> See S Schill, *The Multilateralization of International Investment Law* (CUP, 2009).

<sup>2</sup> Ibid, 65.

<sup>3</sup> AF Lowenfeld, ‘Investment Agreements and International Law’ (2003–2004) 42 *Colum J Transnatl L* 123; also SM Schwebel, ‘The Reshaping of the International Law of Foreign

been conceptualised as a fairly homogenous and internally coordinated global regime. A lack of uniformity and the ensuing fragmentation have been predominantly viewed as problems that beset the practice of investment arbitration and the interaction between international investment law and other areas of international law.<sup>4</sup> Many scholars have contributed to an ongoing debate over inconsistency in the interpretation and application of investment treaty rules by arbitral tribunals.<sup>5</sup> Much ink has also been spilled on the conflicts between IIAs and general international law as well as between IIAs and WTO agreements, international environmental instruments, and human rights conventions.<sup>6</sup> By contrast, an increasingly fragmented nature of investment treaty practice, which for the purposes of this paper includes the process of formation of IIAs, remains largely unexplored.

This contribution aims to fill this gap in existing scholarship by offering a critical evaluation of a growing disparity and diversification of IIAs and questioning the causes of this disparity. In particular, it will focus on the variable geometry of international investment law with regard to the so-called regulatory flexibility provisions. Through uncovering disparity in investment treaty practice, the paper will elucidate evolving perceptions of the function of IIAs and the extent to which these instruments could and should make room for the pursuit of competing social policy objectives on a national and international level. While a new breed of IIAs mirrors these evolving perceptions, other treaties continue to steadfastly adhere to the minimalist texts and maximalist focus on investment protection that defined the drafting of the first generation IIAs. Does this variance in drafting approaches to regulatory flexibility provisions signify an emergence of a new ideological divide or a mere inertia in adapting treaties to changing realities of the global investment environment? What lies beneath an increasingly fragmented investment treaty practice? In its analysis of theoretical underpinnings and practical implications of the variation and intra-regime fragmentation in investment treaty

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Investment by Concordant Bilateral Investment Treaties' in S Charnovitz, DP Steger and P Van Den Bossche (eds) *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP, 2005) 241.

<sup>4</sup> SD Amarasingha and J Kokott, 'Multilateral Investment Rules Revisited' in P Muchlinski, F Ortino, C Schreuer, *The Oxford Handbook of International Investment Law* (OUP 2008) 122; P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, F Francioni & E-U Petersmann (eds) *Human Rights in International Investment Law and Arbitration* (OUP 2009) 45–62.

<sup>5</sup> See eg OK Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' (2008) 19 *EJIL* 301.

<sup>6</sup> See A van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' *University of St. Gallen Law School Law and Economics Research Paper Series*, Working Paper No. 2008-1.

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law, the Chapter will highlight the role of internal political processes in the formation of IIAs, whilst also revisiting the hegemonic critique of investment treaty law and questioning the role of universality and regional diversity in an increasingly multidimensional global economic environment. The overarching aim of this contribution is to elucidate the role played by local and regional preferences, capacities, and idiosyncrasies in the shaping of a multi-lateral response to the clash between economic liberalisation and the pursuit of socially desirable policies.

## 2. REGULATORY FLEXIBILITY PROVISIONS AND THE RISE OF INTER-TREATY VARIANCE: BETWEEN THE FIRST GENERATION IIAS AND NEW MODELS

### 2.1. *Making room for public policy: interpretive statements*

Despite exhibiting a certain degree of variance in their substantive and procedural terms, the first generation IIAs could indeed be regarded as offering ‘a surprisingly uniform protection against political risk.’<sup>7</sup> These instruments displayed a considerable measure of homogeneity in terms of their structure, content, and objectives,<sup>8</sup> which is not surprising given their largely shared historical origins in the Abs-Shawcross Convention and the OECD Draft Convention on the Protection of Foreign Property.<sup>9</sup> The arrival of a new generation of IIAs—which departed from the traditional models and introduced variance into a hitherto fairly homogenous body of treaties—was a reaction to the first wave of investor-state arbitrations at the end of the 1990s and the dawn of the new millennium. The awards in these proceedings revealed the impact of broad and open-ended investment protection guarantees (construed in an investor-friendly manner in many arbitral awards) on the exercise of regulatory powers by host governments and ignited an ongoing debate about the design, function and place of IIAs. While questioning the wisdom of delegating so much power to investment tribunals,<sup>10</sup> host states endeavoured to regain some control over the functioning of the regime

<sup>7</sup> Schill (n 1) 65.

<sup>8</sup> Schill (n 1) 364.

<sup>9</sup> See HJ Abs, *Proposals for Improving the Protection of Private Foreign Investments* (Rotterdam, 1958) 35. For a general discussion of the Draft, see G Schwarzenberger, *Foreign Investments and International Law* (Steven & Sons, 1969) 109–134. The Abs-Shawcross Draft can be found in UNCTAD, *International Investment Instruments: A Compendium* (United Nations, 2000) vol. V, 395). For the text of the OECD Convention, see <<http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf>>.

<sup>10</sup> A Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *AJIL* 45, 79. See also SA Spears, ‘Quest for Policy Space in New-Generation International Investment Agreements’ (2010) 13 *JIEL* 1037.

by drafting a new breed of IIAs which clarified the limits of State commitments to foreign investors. This clarification has been achieved through the incorporation of the so-called regulatory flexibility provisions, ranging from interpretive statements to fully-fledged exceptions clauses.

Unlike the new breed, the first generation of IIAs—the early bilateral investment treaties (BITs)—did not provide much room for regulatory flexibility. A selection of early UK IIAs, for instance, features a limited exception clause precluding the application of the national treatment and MFN provisions in the areas covered by customs union, taxation, and similar international agreements.<sup>11</sup> An analogous exception to otherwise non-derogable investment protection guarantees was consistently adopted in US IIAs post-1987.<sup>12</sup> The early generation of IIAs was thus driven predominantly by considerations relating to the protection of investment, providing little to no guidance as to how investment protection was to be balanced against and reconciled with other competing socio-economic policy objectives. It was the subsequent rise of the regulatory state and, perhaps more importantly, the surge in the number of investment arbitration cases at the end of the 1990s and at the dawn of the new millennium that pushed some States to reconsider their IIAs. The first wave of arbitral cases manifested the actual and potential reach of IIAs, including the fact that both developing and developed States could be targeted by claims disputing an almost infinite range of governmental measures under open-ended and far-reaching guarantees against expropriation, discrimination, and unfair and inequitable treatment. Concerns were raised that through exposing Host State conduct to arbitral scrutiny and monetary liability, IIAs fettered sovereign regulatory power and limited States' capacity to pursue competing policies in such areas as public health and safety, environmental protection, labour standards, and human rights. Yet the ways in which States responded to these concerns in their investment treaty policies have been far from uniform.

Some of the new generation IIAs have been redesigned to embrace an evolved notion of investment protection. In contrast with the first generation treaties that remained silent about the interplay between investment

<sup>11</sup> See eg art 7 of the 1980 United Kingdom–Bangladesh BIT providing: 'The provisions in this Agreement relative to the grant of treatment less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from (1) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or (b) any bilateral international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.'

<sup>12</sup> Even prior to the 1987 model draft, the customs union and free trade area exception was included in selected US BITs. See K Vandeveld, 'US Bilateral Investment Treaties: The Second Wave' (1993) 14 *Mich J Intl L* 621, 644–6.

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protection and national regulatory flexibility in pursuit of socially desirable policies, the new instruments contain interpretive statements which expressly acknowledge the importance of promoting and protecting investment in a manner that does not undermine the State's promotion of other public goods, such as socially responsible corporate practices, sustainable development, public health, labour, and environmental protection concerns. The United States was among the first to herald regulatory flexibility clauses as a key feature of its new generation IIAs.<sup>13</sup> For instance, the preamble of the US–Uruguay BIT expressly acknowledges the desirability of promoting and protecting investment in a manner consistent with the protection of the environment.<sup>14</sup> In a similar vein, the preamble of the 2004 Canadian Model FIPA contains a reference to the promotion of sustainable development as one of the overarching objectives behind investment promotion and protection.<sup>15</sup>

In contrast with express treaty-based exceptions, interpretive statements—including those contained in treaty preambles—do not explicitly insulate certain areas of governmental decision-making or certain industries and economic sectors from the scope of investment protection guarantees. Instead, such statements aim to clarify the purpose and scope of investment treaty provisions and to ensure that, in deciding investment claims under IIAs, arbitral tribunals take into account, and are more sensitive to, the fact that investment protection is but one of the policies Host States pursue in regulating economic and social affairs within their national boundaries. The fact that such provisions are declaratory in their nature and do not create enforceable obligations for contracting State Parties detracts from their effectiveness. Nonetheless, they provide textual guidance in establishing the object and purpose of a relevant IIA and thus can have a certain bearing on the interpretation of substantive treaty obligations.<sup>16</sup> The lack of references to non-investment policy objectives in the early IIAs has led to situations where the protection of investment was construed as a primary and overriding treaty goal, thus prioritising investor rights over States' duty to regulate.<sup>17</sup> The inclusion of statements in

<sup>13</sup> In so doing, the United States was building upon its experiences under the North American Free Trade Agreement which had already introduced a number of innovations in its chapter on investment. See eg NAFTA Preamble and art 1114 (Environmental Measures).

<sup>14</sup> See the text at <[http://unctad.org/sections/dite/ia/docs/bits/US\\_Uruguay.pdf](http://unctad.org/sections/dite/ia/docs/bits/US_Uruguay.pdf)>.

<sup>15</sup> See the text at <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>.

<sup>16</sup> See the Vienna Convention on the Law of Treaties, art 31 (1969).

<sup>17</sup> See eg *SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, 29 January 2004 (ICSID Case No ARB/02/6) para 116: 'The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.'

the preamble on the importance of socially desirable regulation in some of the new generation IIAs is likely to militate against considering investment treaties solely through the prism of investment protection and promotion. By explicitly acknowledging the significance of non-investment policy objectives alongside the creation and maintenance of favourable conditions for investors and investments, the new Canadian and US models (among others) strive to redefine prospectively the limits of investment protection guarantees and to ensure that their effective interpretation does not compromise the pursuit of other economic and social ends on a national and international level.

It is noteworthy, however, that the creation of the new breed of IIAs and in particular the use of regulatory flexibility provisions has been confined to certain countries and regions, pointing to the emergence of something akin to a new form of regionalism. The amended versions of the UK, Germany, and Netherlands IIAs, as well as the recently concluded Swiss IIAs continue to follow the traditional drafting patterns, and do not feature any significant changes of the kind embraced in the US and Canada models.<sup>18</sup> Such variance in the drafting of IIAs of different States can be seen as a ‘two-speed’ or ‘variable geometry’ evolution, whereby some treaties increasingly endorse and make room for non-investment values such as environmental protection, public health, and sustainable development, whilst others continue to prioritise investment protection as a dominant and overriding objective. The two-speed development of investment treaty practice can be seen as the rise of a ‘New Conservatism’ in the sense that some of the erstwhile advocates of strong and unadulterated investment protection guarantees, like the United States and Canada, have come to disagree with the status quo and have proposed new rules as well as amendments to existing norms. The fact that a number of long-standing investment treaty champions still continue to favour the first generation drafting models in their treaty-making practice is reminiscent of the historic opposition by developing States to the customary rules on the protection of foreign investment, with some developed states now standing in the vanguard of contesting and retuning the traditional investment protection maxims. The question is whether this variable geometry is an expression of some form of regionalism both as ‘a technique for international law-making’<sup>19</sup> and ‘as the pursuit of geographical exceptions to

<sup>18</sup> This conclusion is drawn on the basis of a textual analysis of the Netherlands Model BIT (1997) and the UK Model BIT (2005, with 2006 amendments) (available in Z Douglas, *The International Law of Investment Claims* (Cambridge 2009) 547, 559) as well as of the German Model BIT (2008) <<http://www.italaw.com/sites/default/files/archive/ita1025.pdf>> and the Switzerland-Syria BIT (2007).

<sup>19</sup> ‘Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 13 April 2006) 106.

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universal law rules',<sup>20</sup> namely those norms contained in the first generation of IIAs. Before turning to this phenomenon and analysing its underpinnings and policy implications, the next sections will examine the variable geometry of IIAs through the prism of regulatory flexibility provisions incorporated into the substantive treaty obligations.

## *2.2. Regulatory flexibility and national treatment*

Some of the more recent IIAs have gone beyond modifying the language of preambles, and revised the wording of substantive obligations so as to reconcile the promotion and protection of investment with the exercise by Host States of their regulatory functions. The national treatment clause in the Investment Agreement for the COMESA Common Investment Area provides an interesting case in point. It offers explicit textual support for the inclusion of policy objectives into the non-discrimination analysis, particularly at the stage of establishing whether national and foreign investors are in like circumstances.<sup>21</sup> This grants Host States freedom to use differentiation as a means of achieving legitimate non-protectionist policy objectives such as the protection of public health, safety and the environment. Unlike its more sparsely-worded counterparts among the first generation IIAs, this model embodies a compromise between contracting State Parties' efforts on the one hand to provide their companies with investment access and protection on equal terms with their competitors in Host States and international competitors, and on the other hand to prevent an unnecessarily restrictive interpretation of the national treatment standard which may result in legitimate policy differentiations being condemned as incompatible under the relevant treaty.

<sup>20</sup> Ibid, 108.

<sup>21</sup> Art 17 (2) [National Treatment] reads as follows:

For greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia:

- (a) its effects on third persons and the local community;
- (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
- (c) the sector the investor is in;
- (d) the aim of the measure concerned;
- (e) the regulatory process generally applied in relation to the measure concerned; and
- (f) other factors directly relating to the investment or investor in relation to the measure concerned;

and the examination shall not be limited to or be biased towards any one factor.

(The full text is available at <<http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreccomesa.pdf>>)

Indeed, differentiation is an important economic and social policy device, especially in such areas as environmental protection, sustainable development, and climate change and mitigation. For instance, investments in green energy may call for preferential tax rates so as to facilitate their competitiveness in a marketplace dominated by conventional energy products with higher carbon footprints. Would such differentiation be challenged and pronounced inconsistent with the national treatment obligation, and therefore wrongful and leading to an obligation to pay damages to an aggrieved investor? A decision on compatibility of green energy incentives with the State's commitments to national treatment would hinge on the wording of the latter, namely the extent to which the relevant provision allows contracting State Parties to make legitimate non-protectionist differentiations. By expressly providing that rational policy distinctions in pursuit of policy objectives in such areas as public health, safety and environmental protection are not to be seen as discriminatory, the COMESA IIA model responds to the lack of uniformity and particularly to the possibility of a broad interpretation of national treatment provisions in the practice of investment arbitration. Among other things, investment tribunals have been far from consistent in their approaches to determining whether a foreign investment and its domestic counterpart are in like circumstances. Some arbitral panels have set disturbing precedent by setting too broad a basis for comparing between local and foreign investments.<sup>22</sup> Whilst many policy measures—in particular those aimed at the protection of public health, safety, and the environment—frequently necessitate differentiation between investments that are greener, healthier, and safer and those that are less so, arbitral tests setting too broad a basis of comparison render such differentiation impossible. This in turn delimits the range of policy solutions which host governments can adopt in the exercise of their decision-making powers in the public interest. It also remains unclear whether tribunals would consider a disputed differentiation to be justifiable by public policy considerations, even where the applicable IIA does not contain express derogations to this effect.<sup>23</sup> By expressly insu-

<sup>22</sup> The broader the range of comparators to choose from, the greater the possibility that a disputed measure might be found to be discriminatory. For example, in *Occidental v Ecuador*, an investor claimed that a refusal to grant VAT refunds to oil companies was in violation of the national treatment standard because companies engaged in the export of other goods, such as flowers and seafood products had been entitled to the refunds. The tribunal held that the 'like circumstances' prerequisite ought not to be confined to companies operating in the same sector but called for comparison between exporters generally. Selecting a domestic comparator from a broader range of exporters was the vehicle by which the tribunal arrived at its finding of discrimination (*Occidental Exploration and Production Company v Ecuador*, Award, 1 July 2004 (LCIA Case No UN 3467) para 173).

<sup>23</sup> Some tribunals have read an implicit derogation into the non-discrimination provisions of IIAs. See *Pope & Talbot Inc v Canada*, Award on the Merits of Phase 2, 10 April 2001 (Ad hoc—

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lating legitimate policy measures from the scope of national treatment provisions in their revised IIAs, COMESA States have made an effort to reclaim control over the application of investment treaty protections so as to prevent their expansive interpretation by arbitral tribunals and forestall their constraining effect on national policy-making capacity.

Again, what is noteworthy is the fact that such clarification of the scope of national treatment clauses has been undertaken only in the selected IIAs of the revised and new stock. The 2006 Model IIA of the UK, for example, continues to favour the same wording of the national treatment clause as has been used since the UK first launched its bilateral investment programme in 1974.<sup>24</sup> Likewise, the Netherlands, Switzerland and to a large extent Germany endorse the traditional drafting models, and have not clarified the scope of the national treatment standard. This variance results in an increasingly fragmented treaty landscape, counteracting the creation of uniformity in international investment law, defying the claims of its multilateralization and pointing to new forms of regionalism in the drafting of IIAs.

*2.3. Regulatory flexibility and expropriation*

The regionalisation of investment treaty practice and its variable geometry can also be discerned in existing preferences to the drafting of expropriation clauses. Since the expropriation standard has historically played a leading role in the harnessing of IIAs to challenge regulatory acts of host states, it is unsurprising that the wording of the relevant provisions has been revisited in a number of newer model treaties. The expropriation standard in the first generation BITs was founded upon the Hull formula and reflected an effort by capital-exporting developed States to counter the opposition to the customary international rules from developing states.<sup>25</sup> In the 1960s and 1970s, as the

UNCITRAL Arbitration Rules) para 79. See also *GAMI Investments, Incorporated v Mexico*, Final Award, 15 November 2004 (Ad hoc—UNCITRAL Arbitration Rules) para 114 (the measure must be plausibly connected with a legitimate goal of policy); *Saluka Investments BV v Czech Republic*, Partial Award, 17 March 2006 (PCA—UNCITRAL Arbitration Rules) para 307 (any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment).

<sup>24</sup> See, for example, art 3 of the UK Singapore BIT (1975) where the national treatment obligation, subsumed in the MFN clause, does not offer much detail except for requiring the contracting state to subject investors and investments of the other contracting party treatment no less favourable than that which it accords to its own investors and their investments.

<sup>25</sup> See eg the UN GA Resolution No 1803 (14 December 1962) and No 3281 (12 December 1984). For the impact of UN resolutions on the international law of expropriation, see HW Baade, 'Permanent Sovereignty over Natural Wealth and Resources', in RS Miller and RJ Stanger (eds) *Essays on Expropriation* (Ohio University Press, 1967); BH Weston, 'The Charter

UN General Assembly increasingly contested the customary rules on the protection from expropriation, and newly-independent states embarked on large-scale expropriations and nationalisations of property belonging to owners from former colonial nations, capital-exporting states turned to bilateral agreements to ensure that such interference with foreign investment would always be compensated. The first generation IIAs exhibit a remarkable uniformity in their endorsement of the rule that host governments are free to expropriate foreign investment but only if such expropriation is for a public purpose, non-discriminatory, and—importantly—accompanied by the payment of ‘prompt, adequate and effective’ compensation.<sup>26</sup>

The recent modification of expropriation clauses in some of the new generation IIAs is a response to yet another fundamental shift in the international law on foreign investment, namely further liberalisation of investment markets, the change in the direction of investment flows, the steady rise of indirect, regulatory State interference in economic affairs, and the proliferation of investor claims seeking damages caused therefrom. Already at a time when the first generation IIAs offered little room for distinguishing between compensable expropriation and non-compensable legitimate regulatory action, selected scholars and arbitrators acknowledged the need to exclude the pursuit of certain public policy objectives from the scope of expropriation provisions.<sup>27</sup> The conflict between the protection of property rights and regulatory freedom acquired a new dimension following the vociferous opposition to the Multilateral Agreement on Investment (and its eventual failure).<sup>28</sup> Subsequently, after the first wave of investment arbitrations manifested the extent to which the expropriation clause could encroach upon States’ regulatory freedom in such areas as public health and safety and the

of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth’ (1981) 75 *AJIL* 437; D Johnson, ‘The Effect of the Resolutions of the General Assembly of the UN’ (1955) 32 *British Ybk Intl L* 97; R Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’ (1982) 176 *Recueil des Cours* 259.

<sup>26</sup> See examples cited in NJ Calamita, ‘The British Bank Nationalizations: An International Law Perspective’, 58 *ICLQ* 119 (2009).

<sup>27</sup> The doctrinal codification of the international law on state responsibility in the Harvard Draft Convention provides the most influential example of support for the police powers exception. It acknowledged that, subject to procedural and substantive legality conditions, no international wrong results from an uncompensated taking that is carried out as part of the normal operation of the laws or from the pursuit of important public policy objectives ((1961) 55 *AJIL* 515, 554).

<sup>28</sup> The NGO community made a significant contribution to the failure of the efforts by the OECD to launch a multilateral agreement on investment (MAI). NGO opposition to the MAI raised awareness of its one-sided nature as a pure investment protection instrument and of its restrictive effect on the ability of states to regulate in the public interest. See P Muchlinski, ‘The Rise and Fall of the Multilateral Agreement on Investment: Where Now?’ (2000) 33 *Int’l L* 1033, 1049.

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protection of the environment,<sup>29</sup> the renewed political sensitivity surrounding the interpretation and application of expropriation clauses forced treaty drafters to clarify the meaning and scope of the relevant provisions in the new and revised treaties. The recent Canadian IIAs, for instance, have responded by delimiting the exposure of contracting State Parties to liability for expropriation through the exclusion of certain categories of governmental action from the scope of the otherwise absolute obligation to compensate:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.<sup>30</sup>

Similar efforts to curb the expansive interpretation of expropriation clauses and to redefine their protective scope can be found in the modifications adopted in US IIAs. Yet again, the clarification of the scope of expropriation provisions has not been uniformly adopted in recent IIAs. Among other investment treaty champions, Germany, the Netherlands, Switzerland, and the UK continue to provide for a categorical and absolute protection against expropriation, with no exception for regulatory measures adopted in pursuit of public policy objectives.<sup>31</sup> Under these models, the task of drawing a line between compensable expropriation and non-compensable regulatory interference remains vested in arbitral tribunals. It should be conceded that even in the absence of clarification in a treaty text, some tribunals may endorse the stance taken by the NAFTA tribunal in *Methanex v United States*<sup>32</sup> and determine that a disputed measure is a lawful exercise of regulatory powers.<sup>33</sup> However, the lack of predictability and consistency in arbitral jurisprudence

<sup>29</sup> See eg *Waste Management Inc v Mexico*, ICSID Case No ARB(AF)/98/2 (Award, 2 June 2000); *Metalclad Corp v Mexico*, ICSID Case No ARB(AF)/97/1 (Award, 30 August 2000).

<sup>30</sup> See Annex A to art VI of the 2009 Canada–Czech Republic BIT.

<sup>31</sup> See eg art 5(1) of the UK Model BIT stating that ‘Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.’ A largely similar provision is contained in the Netherlands and Germany IIAs, with no express mention made of non-expropriatory regulatory interference.

<sup>32</sup> *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, 3 August 2005 (Ad hoc—UNCITRAL Arbitration Rules) Part IV Chapter D, para 7.

<sup>33</sup> See eg *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL PCA Trib. (Parital Award, 17 March 2006).

also suggests that the absence of regulatory flexibility provisos in an IIA may well be construed as an express endorsement by contracting states of the expropriation standard in an unmitigated form. Should this happen, legitimate regulation in the public interest may be found expropriatory and the payment of compensation may be required.<sup>34</sup>

Given the role expropriation clauses may play in allocating the cost of regulatory intervention in the public interest, the emerging dichotomy between the new vision heralded by the US model treaties (also embraced among others by Canada and members of COMESA) and the traditional concept of expropriation endorsed by other States is significant in terms of its doctrinal and normative implications. Among other things, the variable geometry and geography of IIAs point to a fundamental shift in the ideological divide that long characterized both the formation and operation of international investment law. It offers yet further evidence of the replacement of the long-standing but increasingly dwindling North–South divide by a more complex ideological disagreement about the place of non-investment interests and policy demands on the investment protection and promotion agenda.

#### *2.4. Regulatory flexibility and other treaty provisions*

The emerging but very fragmented recognition of the need to promote non-investment values alongside the promotion and protection of investment can be discerned not only in the key treaty standards on expropriation and non-discrimination but also in clauses dealing with performance requirements and other stand-alone treaty provisions. Under the recent Canadian model IIA, for instance, a measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements is not to be regarded as a prohibited performance requirement.<sup>35</sup> The US model too redefines the scope of the otherwise categorical prohibition of performance requirements by incorporating a GATT-like general exception proviso which bars a range of regulatory measures from being regarded as performance requirements. The exception covers environmental regulations, as well as measures that are necessary for the protection of human, animal, or plant life or health, and those related to the conservation of living or non-living exhaustible natural resources.<sup>36</sup> A prominent feature that sets the 2012 US

<sup>34</sup> This outcome can always be supported by the wording of expropriation clause in the first generation IIAs, which require that expropriation is always subject to the payment of compensation.

<sup>35</sup> Art 7(2) (see the full text at <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>).

<sup>36</sup> The 2012 US Model BIT, art 8(3)(C) <<http://italaw.com/sites/default/files/archive/ita1028.pdf>>.

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Model IIA apart from both its predecessors and IIAs of other states is that regulatory flexibility or the right-to-regulate provisions have been incorporated in the form of two stand-alone clauses on 'Investment and Environment' and 'Investment and Labour.' Even though the language of these provisions renders them largely declaratory, the fact that the importance of non-investment related concerns has been expressly acknowledged can be seen as evidence of a shift away from the hitherto prevailing practice of prioritising investment protection at the expense of competing public policy objectives. Besides, just like treaty preambles, such declaratory clauses—although not quite carrying the same weight as express exceptions—have the capacity to influence the interpretation of investment protection standards in cases where the exercise by a host government of its regulatory powers in the areas of environmental protection, public health and the like detrimentally affects an investor's undertaking. Ultimately, even given their declaratory nature, the stand-alone provisions on environmental and labour standards facilitate the defragmentation of international investment law, and militate against it being pigeon-holed into a specialist field where the enforcement of private rights can be undertaken in isolation from and immune to the application of international environmental, labour, and human rights instruments. However, such developments in the architecture of IIAs are presently confined to only a few States, with the majority of States remaining silent on, or reluctant to acknowledge, the importance of non-investment interests in their new and revised instruments.

### 3. WHERE WORLDS COLLIDE: TREATY EXCEPTIONS AS AN UNCOMMON DENOMINATOR

Fragmentation is particularly discernible in existing approaches to public policy derogations, which include non-precluded measures clauses and exceptions. Just like interpretive statements, exceptions did not feature widely in the first generation IIAs.<sup>37</sup> The first wave of investor-State disputes exposed the far-reaching effect of investment treaty protections and the extent to which they could impinge on the regulatory freedom of host governments, particularly in times of economic emergency. This has inevitably cast into sharp relief the importance of providing Host States with a means of defending their measures and precluding unmitigated exposure to monetary claims. General exceptions clauses are traditionally regarded as a device enabling States to pursue specific policy objectives—such as the

<sup>37</sup> Only selected BITs included some form of exception clause other than the commonly used REI, tax customs union exception. See for instance, art 10 of the US–Egypt BIT (1986).

protection of the environment and public health, safeguarding public morals, and preserving public order and security—without incurring liability for a violation of their international obligations. By expressly insulating certain categories of governmental measures from the protective scope of IIAs, treaty exceptions offer a potent means of both defending host state action *ex post* and safeguarding regulatory freedom *ex ante*.

It has been rightly observed that ‘exceptions in some cases actually may serve to strengthen the operative provisions of the BIT.’<sup>38</sup> Indeed, the availability of express derogations renders it unnecessary for defendant states to argue for a narrower interpretation of investment protection guarantees and for tribunals to favour such interpretation to balance the investment protection objective with compelling national policy demands. The inclusion of express derogations in a treaty text facilitates drawing a clearer line between what constitutes permissible governmental conduct and what amounts to a treaty violation for which the Host State will be held responsible. Such provisions enhance the overall clarity of investment treaty texts and the predictability of arbitral practice. Express derogations also serve to mitigate criticisms of investment treaty law as a one-sided regime where the protection of investment prevails over other competing policy objectives. The emerging trend towards incorporation of general exceptions in IIAs can therefore be seen as evidence of their gradual recalibration into (bilateral) instruments of economic governance where safeguarding the security of private investment is no longer an absolute and overarching goal of the regime but rather one of its multiple and competing objectives.

The shift towards more flexibility through express treaty derogations, however, has not occurred uniformly across the entire network of IIAs. In contrast with the first generation IIAs that are characterized by a considerable degree of homogeneity so far as the absence of exceptions is concerned, the more recent IIAs exhibit considerable variation in terms of the presence, scope and wording of exceptions contained therein. For the purposes of this paper, the existing landscape of IIAs can be classified into three principal categories. The first category consists of a relatively small number of IIAs that have incorporated a GATT-like comprehensive exception clause.<sup>39</sup> Arguably, this category represents the most progressive and balanced approach to drafting IIAs.

<sup>38</sup> KJ Vandevlede, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 179.

<sup>39</sup> See art 10(1) of the Canada–Peru BIT and art 18 of the Jordan–Singapore BIT. General exceptions also feature in a number of Singapore FTAs with investment chapters, including the 2002 Singapore–Japan New Age Economic Partnership Agreement and the 2003 India–Singapore Comprehensive Economic Cooperation Agreement. For an overview, see A Newcombe, ‘General Exceptions in International Investment Agreements’ in M-C Cordonier Segger, MW Gehring, A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 355.

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The second category is exemplified by the recent UK Model BIT which has embraced the idea of regulatory flexibility but in a limited form. In contrast with the earlier UK BITs which contained a fairly limited exception clause dealing with membership in regional economic integration organisations and international agreements on taxation, the new UK model goes a step further and precludes the application of the national treatment and MFN obligations to 'measures which are necessary to protect national security, public security or public order.'<sup>40</sup> The extent to which the incorporation of this type of security exception in IIAs would create regulatory flexibility, in particular by enabling States to act in such areas as the protection of the environment, public health, and sustainable development, remains questionable for a number of reasons.

First of all, the scope of the security exception in the UK model BIT is fairly narrow as it precludes the applicability of national treatment and MFN provisions only. The new German Model BIT has a similar structural problem: the only non-precluded measures that the draft mentions are 'measures that have to be taken for reasons of public security and order.'<sup>41</sup> This exception forms part of the national treatment and MFN clause and, due to its narrow remit, does not insulate the relevant category of governmental measures from the effect of other substantive obligations such as expropriation and fair and equitable treatment, and, in some cases, under the arbitrary and discriminatory measures clause.<sup>42</sup> The fact that claimant-investors can easily circumvent the security exception by invoking alternative standards of treatment in lieu of the national treatment and MFN provisions renders the public security and order exception clause in its current form almost entirely inadequate.

Secondly, compared with the essential security exception in the 2012 US model BIT, the UK version is not self-judging as it refers to 'measures *which are necessary to ...*'. This formulation leaves it for arbitral tribunals to decide whether disputed measures were indeed necessary for the protection of security interests.<sup>43</sup> By contrast, the essential security exception in the US model offers a stronger means of protecting States' regulatory freedom as it refers to 'measures that *it* [the State party] *considers necessary* for the fulfilment of its

<sup>40</sup> For the full text, see Douglas (n 18).

<sup>41</sup> Art 3(2) of the German Model BIT <<http://www.italaw.com/sites/default/files/archive/ital025.pdf>>.

<sup>42</sup> For a discussion of the interchangeable use of investment treaty standards, see M Sattorova, 'Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?' (2012) 4(2) *Trade L & Dev* 315, 347.

<sup>43</sup> On the requirement of necessity and its interpretation in arbitral practice see, among others, a comprehensive account by W Burke-White and A von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Va J Intl L* 307.

obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.<sup>44</sup> This language enables the Host States to decide on the necessity of security measures, and places such measures by and large outside the purview of arbitral tribunals. The German model features a similar structural issue as its non-precluded measures clause refers to ‘measures that *have to be taken*’ to safeguard public security and public order. Whilst acknowledging the need to insulate a certain category of governmental decision-making from the effect of investment protection guarantees, this drafting model still constrains regulatory freedom of host states by subjecting their decisions to arbitral review and thus placing control over politically and economically vital matters of public interest in the hands of arbitral tribunals.

Another disadvantage of the UK model IIA is that it limits the scope of the exceptions clause to measures aimed at the protection of public security and order. Compared with comprehensive general exceptions provisions which expressly list a variety of policy objectives, ranging from the preservation of exhaustible resources to the protection of human, animal, and plant life or health, the ‘public security and order’ clause has a significantly narrower remit. Similarly narrow language features in some of the Indian IIAs which, in addition to being not self-judging, confine the scope of the exceptions clause to situations where essential security interests or circumstances of *extreme emergency* are at stake.<sup>45</sup>

Of course, while the meaning of the terms ‘public security’ and ‘public order’ remains imprecise (and is often left to be interpreted by adjudicators), it is in principle possible to construe them flexibly to accommodate a variety of governmental policies. It has been rightly observed that the notion of national security or a State’s essential security interests may not remain constant over time.<sup>46</sup> At the time they were first incorporated in the early international commerce and trade agreements the security exceptions may have been conceived with the aim to address ‘the immediate political-military conditions that a State deems important for its position in the world’.<sup>47</sup> It is beyond doubt, however, that even a narrow concept of security may change

<sup>44</sup> Above (n 36).

<sup>45</sup> The relevant provision states that ‘Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis’ (Art 12 of the India–Latvia BIT). See P Ranjan, ‘NonPrecluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation’ (2012) 2 *Asian Journal of International Law* 21, 33.

<sup>46</sup> See WJ Moon, ‘Essential Security Interests in International Investment Agreements’ (2012) 15 *J Int Economic Law* 481, 497.

<sup>47</sup> MJ Hahn, ‘Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception’ (1991) 12 *Michigan Journal of International Law* 558, 580; also Moon, *Ibid*.

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in keeping with the evolutionary processes that have transformed the entire landscape of international law. The FET standard provides a fitting example of such evolution in the interpretation of core investment protection standards. Many panels have agreed that the threshold of illegality that needs to be shown in order to establish a breach of the FET standard is presently lower than that which was set out in the *Neer* case.<sup>48</sup> The notions of acceptable State behaviour have changed to accommodate higher standards: for an investment treaty breach to be established it is no longer necessary that disputed governmental conduct be egregious and outrageous in its character, and in some cases IIA provisions have been construed as protecting investors against State conduct that displays 'a relatively lower degree of inappropriateness' in comparison with the higher threshold required in establishing a violation of customary international law.<sup>49</sup> When viewed in light of the evolutionary changes in the scope and meaning of investment protection standards, the concept of national security too cannot remain static. 'National' and 'public' security can no longer be confined to political-military and even economic emergency concerns but should arguably also be extended to concerns traditionally falling under the rubrics of 'environment protection' and 'sustainable development'—including the mitigation of climate change and preservation of exhaustible natural resources.<sup>50</sup> The fact that the UN Security Council has recently acknowledged that climate change poses a threat to global security testifies to the changing perceptions of 'security'.<sup>51</sup> Still, notwithstanding the

<sup>48</sup> *LFH Neer v United Mexican States* (1926) AJIL 555 is well known as an early customary international law authority for a high threshold that ought to be satisfied before a breach of the international minimum standard could be established. A number of tribunals, including *Mondev International Ltd v United States*, Award of 11 Oct 2002 (ICSID Case No ARB(AF)/99/2) (2003) 42 ILM 85, para 116, have held that the content of the minimum standard has since evolved and no longer requires showing outrageousness and other extreme forms of illegality in the state behaviour as a pre-condition for establishing a breach of FET.

<sup>49</sup> *Saluka Investments BV v Czech Republic*, Partial Award, 17 March 2006, PCA-UNCITRAL Arbitration Rules, para 293.

<sup>50</sup> See P Muchlinski, 'Balancing Investor Rights and the Right to Regulate. The Issue of National Security' in KP Sauvant (ed) *Yearbook on International Investment Law & Policy 2008–2009* (OUP, 2009) noting that 'depending on how one defines "national security" it could conceivably include any governmental action.'

<sup>51</sup> 'Make No Mistake', Says Secretary-General, 'Climate Change Not Only Exacerbates Threats to Peace and Security, It Is a Threat to International Peace and Security', UN Security Council SC/10332, available at <<http://www.un.org/News/Press/docs/2011/sc10332.doc.htm>>. The increasing importance of links between renewable energy, energy security and food security can also be garnered from the Report of the Secretary-General at the United Nations General Assembly 'Promotion of new and renewable sources of energy', 17 August 2012 UN Doc A/67/318. It is also noteworthy that already in 1997 the ICJ considered the related notion of ecological damages to fall within the rubric of an essential interest of all states. See *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) (1997) ICJ Reports 7, at <<http://www.icj-cij.org/docket/files/92/7375.pdf>>, para 53.

possibilities of a broad and liberal construction, there are limits beyond which the terms ‘public security’ and ‘public order’ cannot be plausibly stretched. These outer limits define the extent to which public security and order exceptions could be utilized in reconciling investment protection with the need for regulatory flexibility.

In a stark contrast with treaties that embrace either comprehensive or more limited forms of exceptions, a significant portion of the more than 3,000 IIAs currently in force, including many new and revised models and recently signed IIAs, contain no general exceptions whatsoever. Some commentators have suggested that general exceptions ‘appear in all or most of the BITs concluded by a number of states of importance to international investment flows’.<sup>52</sup> This is not entirely accurate. Long known as strong advocates of IIAs, the Netherlands and Switzerland have a significant share in the existing treaty stock and their treaties contain no exceptions.<sup>53</sup> Moreover, even though a number of German IIAs provide for exceptions, the latter are enshrined in the protocols<sup>54</sup> rather than forming part of the main treaty text. This—along with the fact that general exceptions are absent in the most recent German model—seems to suggest that the right to derogate on specified policy grounds is not considered as a benefit Germany is prepared to offer on a unilateral basis to all of its treaty partners.

The absence of express derogations—even in the limited form—in a large number of IIAs, including recently revised models, is striking. The practice of investment arbitration has amply demonstrated both the bite of investment treaty standards and the importance of providing Host States with the possibilities to derogate from their investment protection commitments in pursuit of other policy objectives. While some States have responded to these concerns by creating a new breed of IIAs, other States continue to steadfastly adhere to the minimalist texts and maximalist focus on investment protection as reflected in the drafting of the first generation IIAs. It is also noteworthy that the IIAs of these States do not contain interpretive references to public goods besides investment protection, such as the importance of the protection of environment and public health, socially responsible investment, and sustainable development. Neither do these treaties include a right-to-regulate provision such as that enshrined in some of the recent Canadian IIAs. Does this variance in drafting approaches to exceptions signify an emergence of a new ideological divide or a mere inertia in adapting treaties to changing realities of the global investment environment? What lies beneath an increasingly fragmented investment treaty practice? What theoretical and practical implications

<sup>52</sup> Burke-White & Von Staden (n 43) 318.

<sup>53</sup> The UNCTAD BITs database suggests that Switzerland, for example, is among the states with the highest number of BITs.

<sup>54</sup> Burke-White & Von Staden (n 43) 326.

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is this new form of regionalism likely to have for the functioning and future development of the investment treaty regime?

#### 4. VARIABLE GEOMETRY AND REGIONALISM IN INVESTMENT TREATY PRACTICE: THEORETICAL UNDERPINNINGS AND POLICY IMPLICATIONS

##### 4.1. *Regulatory squeeze*

The variance in investment treaty practice and the deliberate choice by states not to include any exceptions clauses (or to include such clauses in a very limited form) in some of their new and revised treaties can be explained by reference to the argument which postulates that general exceptions do not enhance regulatory flexibility, especially where general exceptions are framed as a closed list of legitimate policy objectives in pursuit of which states can derogate from their investment protection commitments. The closed list of derogations may have an unintended effect of further squeezing policy space available to States.<sup>55</sup> It has been argued, for instance, that the absence of a GATT-like general exceptions clause in IIAs could in fact be more conducive to a greater regulatory flexibility as tribunals, undeterred by textual formulations in IIAs, might be encouraged to adopt a more deferential approach and allow States to derogate in connection with a potentially unlimited range of policy objectives.<sup>56</sup> Some authors have also argued that arbitral interpretation of policy justifications under IIAs which contain no general exception clauses has been less restrictive than that adopted by WTO panels whose discretion was bound by the narrow frame of reference of GATT Article XX.<sup>57</sup>

Recent arbitral practice, however, casts doubt on whether the absence of derogations in IIAs would encourage tribunals to adopt a more deferential stance in setting the boundaries of regulatory space within which States can operate without exposing their measures to international scrutiny and incurring monetary liability. For instance, in *Continental Casualty v Argentina*, the availability of an express treaty derogation for measures aimed at the maintenance of public order and the protection of essential security interests enabled Argentina to defend its policy decisions adopted in response to the economic

<sup>55</sup> Ibid 358.

<sup>56</sup> Ibid.

<sup>57</sup> For instance, while derogations from GATT commitments are usually valid only if *necessary* for the achievement of a certain policy goal, a *prima facie* breach of investment treaty norm can be justified if shown to be reasonably and rationally *related to* the policy objective at issue. See the awards in *Pope & Talbot* and *GAMI* (n 23); also N DiMascio & J Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin' (2008) 102 *AJIL* 48, 77; A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 367.

and political crisis in 2001–2002.<sup>58</sup> By contrast, in *Total v Argentina* the applicable BIT did not offer such possibility for derogation, and the respondent government was limited in the range of defences it could invoke in justification of the disputed policy measures.<sup>59</sup> A string of similar claims against Argentina vividly demonstrated the difficulties with relying on the customary international law defence of necessity in an attempt to avoid international responsibility. In matters as important as the exemption of host states from responsibility for economic consequences of national policy measures, the absence of express derogations in the text of an IIA is unlikely to result in tribunals showing more deference to national policy-makers. In fact, a comparative analysis of *Continental Casualty* and *Total* suggests that tribunals are more likely to give weight to policy justifications where the applicable treaty expressly allows them to do so.

The silence of treaties as to policy objectives which may legitimately be invoked in justification of investment treaty breaches—and the lack of regulatory flexibility provisions in general—also may become increasingly problematic as other States begin to include exceptions clauses in their IIAs. The fact that some of the more recent treaties continue to provide no exceptions clause—after a number of IIAs and model treaties have expressly embraced them—might be construed as implicit evidence that the State Parties wish to treat their investment protection commitments as non-derogable. Once exceptions clauses have been included in a number of new and revised IIAs, the absence of such provisions in IIAs that have been signed or drafted during the same period can and is likely to be seen as a deliberate policy choice. A comparative textual analysis of differences in the wording of treaty provisions among various treaties has already been used by arbitral tribunals in clarifying the scope of the FET standard.<sup>60</sup> If a similar approach is adopted in interpreting the absence of justifications in some of the recently revised and new IIAs—and this possibility should not be discounted—the treaties containing no express derogations would entail a greater squeezing effect on national policy-making in the public interest.

<sup>58</sup> *Continental Casualty Company v Argentina*, Award, 5 September 2008 (ICSID Case No ARB/03/9) paras 231–3.

<sup>59</sup> Argentina's plea of necessity under customary international law as well as its attempt to invoke art 5 (3) of the Argentine–France BIT were unsuccessful (*Total S.A. v Argentine Republic*, Decision on Liability, 27 December 2010 (ICSID Case No. ARB/04/1) paras 224–230).

<sup>60</sup> For instance, the *Vivendi* tribunal declined to follow some of the previously decided cases and equate FET with the international minimum on the ground that the wording of the applicable treaty did not support such interpretation (*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Award, 20 August 2007 (ICSID Case No ARB/97/3) para 7.4.7). See also Newcombe and Paradell (n 57) 264 (supporting the view that the interpretation of a specific FET provision depends on the actual text of the treaty in question under principles of treaty interpretation).

*The Variable Geometry and Geography of Investment Treaty Law* 297*4.2. Universalization of the lowest common denominator: a race to the bottom?*

Another problematic consequence of the variable geometry and geography of investment treaty practice—is the hindering effect such variation may have upon efforts to embrace non-investment policy objectives in new treaties. To mention one possibility, investors may invoke MFN clauses and resort to corporate structuring and treaty shopping so as to benefit from IIAs that are more-investor friendly and correspondingly less accommodating of environmental protection, sustainable development and other policy objectives.<sup>61</sup> Such forum-shopping and treaty-shopping tactics will greatly detract from efficacy of the treaties that have taken a more progressive stance on reconciling investment protection guarantees with the pursuit of socially desirable policies. As observed earlier, the emergence of distinct centres of regulation-friendly treaty-making could be seen as a form of regionalism in investment treaty law. The fact that some States have moved away from the hitherto universally shared treaty models towards more tailor-made and policy-friendly IIAs could be seen as a means of contesting the old regime by allowing regional practice to take the lead.<sup>62</sup> The regionalism of North American IIAs lies not in their geography but in that they display what Koskenniemi referred to as ‘a certain homogeneity based on a convergence of interests, values or political objectives’.<sup>63</sup> This regionalism may represent a first step forward by tackling a global problem to which no multilateral and universally shared solution has yet been offered<sup>64</sup>—such as environmental protection and the promotion of sustainable corporate practices—and can therefore be ‘a source of inspiration and influence on the progressive development of international law’.<sup>65</sup> Yet the availability of MFN clauses and treaty shopping would detract from these efforts and hamper the reorientation of the old regime towards a more policy-friendly alternative.

<sup>61</sup> The discussion of the MFN clause has so far been framed predominantly in terms of the latter’s capacity to entitle investors and investments to ‘better’ substantive standards from other treaties. However, in the context of new and more policy-friendly IIAs vis-à-vis the old generation IIAs, the availability of ‘better’ treatment equates to the availability of a regime where investment protection is prioritised at expense of the environment protection, national security and of policy intervention in the public interest.

<sup>62</sup> A-C Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 *LJIL* 1, 18.

<sup>63</sup> ILC Report on Fragmentation (n 19) 105.

<sup>64</sup> D Pulkowski, Theoretical Premises of ‘Regionalism and the Unity of International Law’ (2012) *ESIL Conference Paper Series*, Conference Paper N 16/2012, at 4; available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193763)>).

<sup>65</sup> A de Hoogh, ‘Regionalism and the Unity of International Law From a Positivist Perspective’ (2012) *ESIL Conference Paper Series*, Conference Paper No. 3/2012, at 3; available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193745](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193745)>.

It is interesting that MFN clauses as well as corporate structuring and treaty shopping have been considered to be part of a progressive multilateralization mechanism driven by ‘the common interest of States in establishing uniform and universal rules for the protection of foreign investment.’<sup>66</sup> Recent developments, however, render this view less convincing. First, the variable geometry and geography of recent investment treaty practice shows that, beyond the basic consensus on the importance of protecting and promoting investment in facilitating economic growth, States differ in their perceptions of how private rights should be reconciled with the exercise by host governments of their regulatory powers in the wider public interest. The increasingly varied investment treaty landscape displays less commonality of interest between States than that which characterized the first generation of IIAs. Secondly, the emergent (though presently localized) trend towards the incorporation of regulatory flexibility provisions and in particular comprehensive exceptions clauses in some of the new generation IIAs can be viewed as a different form of multilateralization. It appears that multilateral instruments such as GATT have influenced the language of treaty exceptions and thus determined the way in which States have been redesigning their investment treaties. At the same time, despite its origins in the external multilateral legal regime, such influence on investment treaty law has been uneven and confined to a few regional ‘reformist’ treaty-makers. As noted earlier, only a small number of IIAs follow the GATT’s approach to derogations. Ironically, the very devices of multilateralization—MFN provisions, corporate structuring, and treaty shopping—that were allegedly supposed to generate uniformity and facilitate the development of a truly multilateral investment treaty regime<sup>67</sup> are in fact likely to cause fragmentation through encouraging the use of the first generation IIAs by private claimants who prefer the unadulterated strength of protection under traditional treaties to the regulatory flexibility of the new models.

Furthermore, multilateralism arguably ‘assumes the existence and legitimacy of interests of an international community beyond the interests of States.’<sup>68</sup> However, the interests of the international community are diverse and not confined to investment protection. It was this diversity of interests and concerns underpinning the contemporary investment environment—and the recognition of the role of national regulation in addressing and reconciling them—that precipitated a failure of the historical attempts to conclude a multilateral agreement on investment.<sup>69</sup> Multilateralization does facilitate overcoming the limits of bilateralism by enabling investors to resort to MFN

<sup>66</sup> Schill (n 1) 68.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid, 362.

<sup>69</sup> See above n 28.

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provisions and treaty shopping and thus making investment treaty protections universally available. Yet such exercise in private ordering is likely to result in a race to the bottom as far as regulatory flexibility and the creation of policy space for the pursuit of competing public interests are concerned. Until Canada and the US replace all of their IIAs with treaties drafted in accordance with their new (and more policy-friendly) models, investors would be encouraged to take advantage of the first generation treaties through recourse to MFN provisions and corporate structuring. This in turn would defeat the emerging bilateral regional efforts to rebalance investment protection with the pursuit of competing socio-economic policies.

*4.3. Variable geometry and entrenched inequalities of power:  
revisiting the hegemonic critique of IIAs*

The fact that some States have been reluctant to incorporate regulatory flexibility provisions, including comprehensive general exceptions, in their recent IIAs can be seen as a means of exporting certain normative values aimed at reinforcing power structures which underpin the formation and functioning of international investment law. IIAs have long been considered as instruments of hegemony—even ‘prolonged imperialism’<sup>70</sup>—whereby developed States exercised their political and economic power over less developed treaty partners. Reciprocal on their face, IIAs were in fact binding only upon developing States, with investors from developed States acting as beneficiaries of extensive and internationally enforceable investment protection guarantees. Whilst acknowledging that power asymmetries played a considerable part at the time of creation of the investment treaty regime, critics of the hegemonic view have attempted to contest it by advancing two inter-related arguments. First, it has been argued that, although conceived with the purpose of imposing strict investment protection obligations upon developing States, IIAs have been increasingly relevant in ordering investor-State relations between developed States, with the latter becoming a frequent target of investor claims—a destiny that had traditionally been preserved for developing states only.<sup>71</sup> Second, by setting out uniform legal principles on investment protections, IIAs are arguably evolving into a multilateral order which takes away power from States—both developed and developing—and thus presents an alternative model to the hitherto imperial and hegemonic investment treaty law.<sup>72</sup>

As noted earlier, the variable geometry of IIAs and recent developments in the geographic origins and destinations of investment flows tend to detract

<sup>70</sup> Schill (n 1) 62.

<sup>71</sup> Ibid, 363–4.

<sup>72</sup> Ibid, 363.

from the strength of the traditional hegemonic critique of investment treaty law. While it is true that the relevance of the North–South divide has declined, it has been replaced by a different sort of ideological disagreement between States, including between developed countries that were previously known to be on the same side of the divide. The contemporary investment treaty landscape presents a rather complex picture. Even though IIAs can no longer be viewed as instruments of domination by the industrial North over the economically and politically less-developed South, hegemonic behaviour may still offer a conceptual framework for explaining the two-speed evolution of investment treaty practice. Some argue that the new generation of IIAs and their attempt to strike a balance between investment protection and national regulatory flexibility has its roots in the geopolitical shift that has occurred over the last decade or so, in particular the increase in south–south investments, the change in the direction of investment flows, and the use of investment arbitration against developed States.<sup>73</sup> This, in turn, points to what Krisch views as just another form of hegemonic strategy whereby dominant states withdraw from and reshape those international rules which they had earlier advocated but which ceased to serve their interests.<sup>74</sup> Indeed, is it a mere coincidence that developed States which had experience of defending their policy measures in investment arbitration, including Canada and the United States, have incorporated regulatory flexibility provisions in their recent IIAs, whilst other developed States—which have been spared such fate—continue to adhere to the older drafting models? Consider a hypothetical example of a treaty between the UK and the Isle of Growth (a fictitious capital-importing State) which follows traditional drafting patterns: sparsely worded, containing open-ended standards and providing no derogations which both Contracting State Parties might supposedly need to justify their public policy measures. Could the reluctance on the part of the UK to make room for pressing social policy demands in the treaty text be explained by the UK being predominantly focused on ensuring that the treaty safeguards the best protection of British investors in the Isle of Growth and, importantly, being fairly confident that the same treaty will hardly ever be deployed in challenging UK policies by investors from the Isle of Growth (thus rendering general exceptions unnecessary as far as the UK is concerned)? The fact that the US and Canada have embraced regulatory flexibility provisions in their treaties could be regarded not as much as a progressive acknowledgement of the importance of creating space for social policies but merely as a reflection of their dissatisfaction with the emerging reciprocity of IIAs and an attempt to redefine international rules that no longer serve their interests.

<sup>73</sup> Spears (n 10) 1043.

<sup>74</sup> N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *EJIL* 369.

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A recent political science analysis of IIA design by Allee and Peinhardt to a certain extent supports this hegemonic explanation of the variation in investment treaty practice:

... the home government consistently pursues its universal design preferences, and the resulting treaty typically conforms to its wishes, provided that its relative bargaining power is sufficient. The starting point for this perspective is the long standing emphasis on power politics within international relations ... BITs, and the terms within them, are particularly susceptible to global power dynamics. For one, most treaties are signed by pairs of states in which one state is to some degree more powerful than the other.<sup>75</sup>

After empirically testing various theoretical explanations of IIAs design, the study concludes that the so-called 'power and preferences of the home country' approach produces more convincing results in explaining the formation of treaties.

*4.4. Healthy pluralism or perilous exclusion? Variable geometry and the domestic political process*

Although hegemonic behaviour provides a potentially very useful and viable framework for analysing developments in the process of investment treaty-making, it does not quite explain the variation between IIA models of developed States, such as the US and Canada on the one hand and Germany, the UK, and Switzerland on the other. Of interest here is an observation that 'the preferences of *important domestic actors* within the country become integrated into the treaties.'<sup>76</sup> Among such influential actors the authors point to multinational corporations as well as right wing governments who are likely to insist on stronger investment protection clauses.<sup>77</sup> Indeed, the variable geometry and increasingly regionalised patterns of investment treaty-making prompt a question about the role domestic political processes, structures and actors play in shaping international investment rules. Might the abiding loyalty of some investment treaty champions to the traditional sparsely-worded treaty models be seen as evidence of their deliberate failure to adequately respond to the evolving nature of the global economic environment or rather their political incapacity and reluctance to do so? Could the fact that some countries continue to endorse the first generation drafting samples be explained by cost saving behaviour? The cost of the drafting,

<sup>75</sup> T Allee and C Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) *World Politics* 47, 62.

<sup>76</sup> *Ibid.*, 72.

<sup>77</sup> *Ibid.*

negotiation, and conclusion of new IIAs can be a significant factor not only for developing states but also for recession-stricken governments of developed countries. This consideration was put forward to explain similarity between the first generation IIAs of different states.<sup>78</sup> Today it can serve as an explanation for heterogeneity of new models.

Just as the variance between domestic political processes may account for the variable geometry (and geography) of investment treaty practice, the different role for civil society in shaping national treaty models could also be a relevant factor in explaining the emerging fragmentation patterns. In his analysis of the interactions between investment and non-investment obligations, Hirsch has suggested that the interplay between epistemic systems of international law such as the laws of human rights and investment protection could be regarded as an instance of 'social interaction' between discrete communities.<sup>79</sup> Likewise, Koskenniemi has defined fragmentation as the creation of distinct regimes 'that cater for special audiences with special interests and special ethos'.<sup>80</sup> However, the focus of existing scholarship on fragmentation has been largely confined to the perceived reluctance by investment tribunals to apply international norms on human rights. What about the 'socio-cultural distance'<sup>81</sup> between IIA negotiators and those involved in pushing environmental protection, human rights and other social policy agendas? The social interaction (or the lack of it) between discrete communities—or 'special audiences with special interests and ethos'—may be instrumental for advancing our understanding of the processes which lie beneath the increasingly fragmented and regionalised IIAs. Particularly important is the question of how and to what extent domestic political processes that lead to the formation of IIAs accommodate such interaction between different groups with competing agendas. Do Canada, the US and, interestingly, COMESA states provide the necessary platform for the interaction between discrete communities while other states fail to do so? Could it be a varying degree of 'the socio-cultural distance' between those in charge of investment treaty-making and other epistemic communities that leads to the different place allocated to non-investment policy values in IIAs? The related issue is whether the inclusion of regulatory flexibility provisions in new and revised IIAs reflects a progressive acknowledgement of the need to make room for social policy objectives or merely represents an effort to quell civil society opposition.

<sup>78</sup> Schill (n 1) 67.

<sup>79</sup> M Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective' in T Broude & Y Shany (eds) *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011) 219.

<sup>80</sup> Martineau (n 62) 4, citing M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 1, 2.

<sup>81</sup> Hirsch (n 79) 219.

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Whatever the answer to this question, it seems that in some states the process of formation of investment treaty policies (including the drafting of model IIAs) allows for the non-investment interests and demands to be taken into account to a greater extent than in others.<sup>82</sup> Indeed, the variance in the degree to which regulatory flexibility has been embraced in recent IIAs could be reflecting different socio-cultural values of the involved communities.<sup>83</sup> The question is how social values in the US and Canada differ from those in the UK, and why investment treaties of the latter are characterised by a different set of values for internal and external use (ie in the domestic sphere where the importance of socially desirable regulation is acknowledged, and in the context of drafting IIAs where the UK seems to be reluctant to espouse the pursuit of the same set of policy values).

Closely linked to the place of civil society in the shaping of IIAs is the position of stakeholders other than investors and host states within the emerging architecture of the global investment regime. In their recent political science perspective on government behaviour in signing IIAs, Aisbett and Poulsen question 'whether more participants in the policy-making process reduce the aggregate impact of individual biases.'<sup>84</sup> Could the existing variation in the drafting of treaty models be explained by a more inclusive process in the US and Canada and a relatively limited involvement of stakeholders other than the business community and their lobby in the treaty-making process in the UK, the Netherlands, Germany and Switzerland? It has been observed that the '[i]nvestment treaty system exists somewhere between bilateralism and multilateralism, and between ad hoc and systemic dispute resolution. The risks of this in-between approach are inconsistency and confusion, while the rewards are diversity and dynamism.'<sup>85</sup> The question is whether variable geometry and the ensuing diversity represent 'healthy pluralism' or perilous division.<sup>86</sup> Would a greater involvement of other stakeholders—more participants<sup>87</sup>—in the drafting of model treaties militate against individual biases and lead to a more inclusive and pluralistic investment treaty policy? It appears that, at least at this stage, the diversity and dynamism which flow from the fragmented development of the investment treaty regime are likely to benefit only the party seeking the lowest common denominator in form of

<sup>82</sup> See NJ Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 (3) *Legal Issues of Economic Integration*, 301.

<sup>83</sup> M Hirsch, 'The Sociology of International Investment Law' in Z Douglas, J Pauwelyn, and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, forthcoming 2014) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322328](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322328)>.

<sup>84</sup> LN Skovgaard Poulsen and E Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273, 303.

<sup>85</sup> Roberts (n 10) 14.

<sup>86</sup> Martineau (n 62) 2.

<sup>87</sup> Skovgaard Poulsen and Aisbett (n 84) 303.

the least policy-friendly IIA. Of all stakeholders, only investors appear to be in a position to gain from the existing variance in treaty practice as it enables them to challenge a broad array of governmental measures under the IIAs that provide little by way of regulatory flexibility safeguards. The divergence of bilateral approaches to regulatory flexibility can also be seen through the prism of a clash between stability and change. However, the multidimensional or cross-policy nature of investment policies means that maintaining stability of investment protection on existing terms, as embodied in the first generation IIAs, would translate into stagnation for other stakeholders—the beneficiaries of policies aimed at the protection of the environment, human rights, public health and safety, and labour rights.

## 5. CONCLUSION

Regulatory flexibility provisions are just one set of treaty terms that diversifies the new generation of IIAs. Another source of variation between existing models is the provisions relating to transparency of investor-state arbitration and the involvement of third parties in arbitral proceedings. The recent generation IIAs also differ in how they frame the fair and equitable treatment standard, with some models favouring the traditional open-ended formulation and others revealing a somewhat cautious attitude and qualifying its potentially far-reaching effect on regulatory freedom through a combination of drafting techniques. Although not universally endorsed, these additions to the traditionally minimalist treaty texts seem to suggest that there is a growing appreciation of the need to re-orientate investment treaty law towards the regime where investment protection is regarded not as a sole and overriding goal but one among multiple and competing policy objectives. What remains uncertain is whether the fragmentation—variable geometry and geography—that presently characterizes investment treaty practice would hinder this process and result in piecemeal and regionalized reforms. This paper has attempted to uncover some of the doctrinal and normative implications of the variable geometry of IIAs. It has questioned the relevance of the hegemonic critique of IIAs and concluded that, although the traditional North–South divide has receded into the past, it has been superseded by a different sort of ideological divide. The existing variance in investment treaty policies of the erstwhile advocates of strong investment protection can still be explained as an expression of a hegemonic behaviour, prompted in particular by the change in the direction of investment flows and the advent of investor claims against developed States. In its examination of consequences the variable geometry of IIAs may entail, the paper points to the threat of a race to the bottom, where the divergent stances taken by States with regard to regulatory flexibility would mean that investors could, through the use of MFN clauses

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and treaty shopping, cherry-pick and have resort to least public policy-friendly IIAs. This would enable them to take advantage of the strength of unadulterated investment protection guarantees and thus avoid the effect of the arguably progressive new models. The paper has also considered the role of domestic political process and in particular the role of civil society in the formation of the new generation IIAs, and questioned the extent to which variation in the design of IIAs of different States is rooted in the different role allocated to both civil society groups and other organizations that advance environmental protection, human rights, public health and sustainable development agendas.

Should the variable geometry and fragmented evolution of IIAs be seen as facilitating healthy pluralism and diversity? It has been argued that 'strong concepts of legal unity are not suitable for international law'<sup>88</sup> and that 'regional international law does not jeopardize legal unity by potentially setting out [different] prescriptions'.<sup>89</sup> However, a critical glance at the regulatory flexibility provisions (or their glaring absence) in new and revised IIAs tends to suggest that States which continue to favour the first generation drafting samples are in fact supporting outdated prescriptions that militate against the development of a uniform strategy for addressing the clash between investment protection and the pursuit of public policy objectives in the areas of growing global significance. The emergence of regional approaches to drafting IIAs also brings to the fore the importance of further research, including empirical and interdisciplinary studies, into the factors that shape national and regional investment policies and into the role of disparate epistemic communities in facilitating a more inclusive and pluralistic treaty-making process within the nation States and supranational structures.

<sup>88</sup> Pulkowski (n 64) 8.

<sup>89</sup> Ibid, 9.