

Book Reviews / Recensions de livres

The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties. By Kenneth J. Vandeveld. New York: Oxford University Press, 2017. 592 + xii pages.

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It is generally accepted that the first modern bilateral investment treaty (BIT) was signed in 1959 between Germany and Pakistan,¹ whereas the United States started its BIT program only in 1977 and signed its first such treaty in 1982.² In *The First Bilateral Investment Treaties*, Kenneth Vandeveld challenges this conventional wisdom as he states that friendship, commerce, and navigation (FCN) treaties concluded by the United States after the Second World War “were the first bilateral investment treaties concluded by the United States or any other country.”³

Kenneth Vandeveld, professor of law at Thomas Jefferson School of Law, has already written about the history, policy, and practice of international investment agreements.⁴ Vandeveld’s new book builds upon his doctoral dissertation, completed at the University of California in 2012, and his work as an attorney-adviser in the Department of State, where he

¹ Ahmad Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015) at 24; Jeswald Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24:3 *Intl Law* 655 at 655.

² Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, 2nd ed (The Hague: Martinus Nijhoff, 2002) at 1114.

³ Kenneth J Vandeveld, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce and Navigation Treaties* (New York: Oxford University Press, 2017) at 544.

⁴ Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (New York: Oxford University Press, 2010); Kenneth J Vandeveld, *US International Investment Agreements* (New York: Oxford University Press, 2009); Kenneth J Vandeveld, *United States Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992).

represented the United States before the International Court of Justice (ICJ) and the Iran-United States Claims Tribunal. Vandevelde explains that it was the growing importance of the FCN treaties, and his disappointment at the lack of literature concerning the history and interpretation of their investment-related provisions, that gave him an idea for this book some thirty-five years ago.⁵ Published by Oxford University Press in 2017, *The First Bilateral Investment Treaties* lays a foundation for Vandevelde's earlier publications as it addresses the events that took place before the 1977 launch of the US BIT program.

In his new book, Vandevelde makes three important statements about the development of international investment law. First, he explains that the US post-war FCN treaties, which date back to the eighteenth century and, traditionally, had been aimed at establishing trade and maritime relations, were repurposed as investment treaties in the years following the Second World War.⁶ Second, Vandevelde states that the US post-war FCN treaties embodied foreign investment policy that was developed by the Roosevelt and Truman administrations and “endeavored to project New Deal liberalism onto the world.”⁷ Third, the author concludes that the US post-war FCN treaties, which contained provisions similar to those incorporated in modern BITs, established a solid foundation for the development of contemporary international investment law.⁸

Vandevelde's well-organized book consists of an introduction, eight complementary chapters, an epilogue, and one annex. In his introduction, the author defines the core term of “New Deal liberalism” and explains its role in US foreign investment policy. In particular, he explains that New Deal liberalism had two dimensions — a positive dimension, where the state had an obligation to regulate the economy in order to correct market failures and ensure full employment, and a negative dimension, where the state had to operate within the constraints of the rule of law as set out in the US Constitution — and that the Roosevelt and Truman administrations consciously used FCN treaties to project the values found within these two dimensions onto their treaty partners.⁹

The first chapter sets the stage for all subsequent chapters as it identifies the goals and challenges faced by policy-makers in formulating US foreign investment policy following the Great Depression and the end of the Second World War. The Roosevelt and Truman administrations understood that full employment and a rising standard of living across the globe would

⁵ Vandevelde, *supra* note 3 at 5–6.

⁶ *Ibid* at 4–5.

⁷ *Ibid* at 1.

⁸ *Ibid* at 28.

⁹ *Ibid* at 19–20.

be instrumental in the avoidance of wars and economic calamities. Therefore, they sought to lower barriers to trade, promote and regulate private investment, rebuild post-war economies, and create an export market for US goods and services.¹⁰ Vandeveldt chronicles the development of US post-war foreign investment policy and concludes that the State Department, by 1948, had formulated a policy that was substantially similar to that embodied in modern BITs, given that it “called for national treatment of foreign investment; prompt, adequate, and effective compensation for expropriated property; and a prohibition on exchange controls, and it opposed ‘arbitrary or unreasonable’ treatment of foreign investment.”¹¹

In turn, Chapter 2 describes the process by which the aforementioned foreign investment policy was put into practice through the FCN treaty program launched by the Roosevelt administration in 1944. Before giving a detailed account of the negotiation of the first post-war FCN treaties with China and Italy, Vandeveldt describes the development of a standard draft FCN treaty and the role that the American business community played in the process. The book also shows how the events of world history influenced the negotiation and implementation of FCN treaties. For instance, on 5 March 1946, Winston Churchill delivered his famous speech at Westminster College in Fulton, Missouri, cautioning the American people that “an iron curtain has descended across the [European] Continent” and highlighting the need to counter “the expansive and proselytizing tendencies” of the Soviet Union.¹² Accordingly, a curious reader may find it interesting to learn about the US proposal for an FCN treaty with the Soviet Union. Also, on 1 October 1949, only eleven months after the United States and the Republic of China exchanged instruments of ratification, Mao Zedong proclaimed the founding of the People’s Republic of China (PRC), and, two months later, Chiang Kai-shek and his remaining troops fled to the island of Taiwan.¹³ While the United States did not recognize the government of the PRC as the sole legal government of China until 1 January 1979, the 1946 United States–China FCN now remains in force only with respect to Taiwan.¹⁴

Chapters 3 and 4 cover the negotiations of the International Trade Organization (ITO) Charter. In general, those who write about the failed attempt to establish the ITO usually focus on the impact that the organization would have had on the liberalization of world trade, and they

¹⁰ *Ibid* at 29–44.

¹¹ *Ibid* at 56.

¹² Reported in Harold Hinton, “Churchill Assails Soviet Policy,” *New York Times* (5 March 1946).

¹³ Vandeveldt, *supra* note 3 at 98.

¹⁴ United States Department of State, “Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2017” (2017) at 491–92.

compare the proposed ITO regime to that embodied in the successful 1947 *General Agreement on Tariffs and Trade* (*GATT*).¹⁵ Vandeveldé enriches this body of existing scholarship by studying the ITO as a manifestation of an effort to create a multilateral framework for investment. Chapter 3 thus chronicles the development of the proposal for an investment code, the work of the ITO Preparatory Committee in London in October and November 1946, and the negotiations in Geneva from April to August 1947. In turn, Chapter 4 narrates the US preparation for, participation in, and reaction to the outcome of the Havana Conference. It also describes key factors that led to the ultimate failure of the ITO, including the dissatisfaction of the US business group with the investment protection provisions in the Havana Charter, the entry into force of the *GATT* on 1 January 1948, election year politics in 1949, and the outbreak of the Korean War in June 1950.¹⁶ Nevertheless, Vandeveldé argues that US participation in the ITO negotiations had seven major consequences for the development of American foreign investment policy. In particular, the negotiations formulated a general prohibition on discriminatory treatment, introduced a requirement of “reasonableness” in international investment law, and persuaded US officials that investment-related provisions acceptable to the American business community could be negotiated, but only in bilateral treaties and not within a multilateral forum.¹⁷

Against this background, Chapters 5–7 explain how FCN treaties were transformed into investment treaties during the Truman administration in the late 1940s and provide an account of the US post-war FCN treaty negotiations in the subsequent two decades. Chapter 5 starts with Truman’s inaugural address of 20 January 1949 when the thirty-third president of the United States announced a technical assistance program for developing countries (“Point Four Program”) and emphasized the need to cooperate with other nations to “foster capital investment in areas needing development,” with the caveat that investment protection guarantees should be “balanced by guarantees in the interest of the people whose resources and whose labor go into these developments.”¹⁸ The State Department chose FCN treaties as the instrument through which to put this ambitious

¹⁵ William Diebold, “Reflections on the International Trade Organization” (1994) 14:2 N Ill U L Rev 335; Richard Toye, “The International Trade Organization” in Martin Daunton, Amrita Narlikar & Robert Stern, eds, *The Oxford Handbook on The World Trade Organization* (New York: Oxford University Press, 2012) 85. *General Agreement on Tariffs and Trade 1947*, 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948).

¹⁶ Vandeveldé, *supra* note 3 at 169–77.

¹⁷ *Ibid* at 177–78.

¹⁸ Harry S Truman, “Inaugural Address,” *Public Papers of the Presidents of the United States of America* (20 January 1949), Hein Online, online: <<https://heinonline.org/HOL/P?h=hein.presidents/ppp049000&i=150>>.

plan into practice, and, despite changes in the government, the practice of concluding such treaties did not change until the launch of the US BIT program in 1977.¹⁹ Negotiations of FCN treaties with Colombia, Uruguay, and Ireland presented the first opportunity to develop a new standard FCN treaty, taking into account the debates over the investment provisions in the ITO Charter.²⁰

In Chapter 6, Vandeveldé chronicles the conclusion of FCN treaties with Greece, Denmark, Italy (supplementing a 1948 FCN treaty), Israel, Ethiopia, and Japan. The author suggests that US officials viewed FCN treaties “as a charter of liberal principles, not a catalog of concessions,”²¹ and were willing to adjust the language of each FCN treaty to the circumstances of the other state party. Another feature of the US post-war FCN treaty program was the refusal to engage in multilateral negotiations and the insistence on confidentiality for bilateral negotiations.²²

Chapter 7 narrates the negotiation of fourteen more FCN treaties — namely those with Germany, Haiti, Iran, Nicaragua, the Netherlands, Korea, Oman, Pakistan, France, Belgium, Vietnam, Luxembourg, Togo, and Thailand. Vandeveldé concludes that the inauguration of a Republican president in January 1953 did not change the US position on FCN treaties, and the FCN treaty policy formulated by the Roosevelt and Truman administrations continued into the presidencies of Dwight Eisenhower, John Kennedy, Lyndon Johnson, and even Richard Nixon and Gerald Ford.²³

This continuity in US post-war foreign investment policy allowed Vandeveldé to formulate a comprehensive summary of investment-related standards and guarantees contained in FCN treaties. Chapter 8, which stretches across 158 pages (more than 25 percent of the entire book) and includes 873 footnotes, draws upon the negotiating history and various FCN treaty provisions to formulate an invaluable summary of the US position on international investment law issues that continue to be important in the twenty-first century, including national treatment, most-favored-nation (MFN) treatment, fair and equitable treatment requirements, rules on expropriation of foreign investment, foreign exchange controls, employment of personnel rules, measures necessary to protect essential security interests, and the prohibition on unreasonable or discriminatory measures. Vandeveldé concludes that, throughout the negotiating process, the US sought primarily to ensure security of investment and to obtain guarantees of non-discriminatory treatment, reasonable regulation and

¹⁹ Vandeveldé, *supra* note 3 at 184–98.

²⁰ *Ibid* at 222.

²¹ *Ibid* at 226.

²² *Ibid* at 253–56.

²³ *Ibid* at 295, 376–78.

due process.²⁴ Post-war FCN treaties thus were not only a means of stimulating investment flows, but also a vehicle to promote the rule of law, as these treaties conferred upon American investors abroad the same guarantees that investors in the United States enjoyed under the Fifth and Fourteenth Amendments, as well as the Contract Clause (Article I), of the US Constitution.²⁵

In the epilogue, Vandeveldel states that ratification of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,²⁶ the success of BIT programs launched by European states, and troubles finding states willing to conclude new FCN treaties prompted the United States to switch from FCN treaties to BITs as an instrument to promote and protect foreign investment.²⁷ He suggests, however, that the conclusion of the *North American Free Trade Agreement (NAFTA)*,²⁸ and other comprehensive free trade agreements with investment chapters, has meant that the United States has “reembraced the FCN treaty approach.”²⁹

The research underpinning this publication is impressive. The author read over 32,000 pages of negotiating history of FCN treaties and the ITO Charter between 2009 and 2016,³⁰ and the book contains some 3,238 footnotes, the majority of which direct the reader to primary sources, including diplomatic correspondence and internal memoranda as well as treaty provisions. Despite this heavy reliance on external sources, Vandeveldel’s writing style is clear and effective, making his book a good read. Perhaps the only thing lacking is a timeline, a table, or some other graphic representation of the dates on which different FCN treaties were signed, ratified, and entered into force.

The First Bilateral Investment Treaties offers a comprehensive explanation of the policies that led to the reconceptualization of the FCN treaties as investment treaties and provides a detailed account of the negotiation of the ITO Charter and individual US post-war FCN treaties. Vandeveldel’s book, however, does not elaborate on the role FCN treaties play now, although other commentators have suggested that FCN treaties may provide foreign investors with enforceable rights in the US courts³¹ and may

²⁴ *Ibid* at 383–84.

²⁵ *Ibid* at 385–86.

²⁶ 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

²⁷ Vandeveldel, *supra* note 3 at 537–44.

²⁸ 17 December 1992, (1993) 32 ILM 289 (entered into force 1 January 1994).

²⁹ Vandeveldel, *supra* note 3 at 544.

³⁰ *Ibid* at 8.

³¹ John Coyle & Jason Webb Yackee, “Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts” (2017) 49 *Ariz St LJ* 61 at 62.

also show how to address the “fragmentation” of the international legal order by integrating rights unrelated to investment protection into BITs.³² Nor does the book analyze the judgment in *Eletronica Sicula SpA (ELSI) (United States of America v Italy)*,³³ the only international investment dispute decided by the ICJ on the merits. This case, which was brought before the court under a 1948 United States-Italy FCN treaty, addressed the meaning of “arbitrariness” in international law and is thus of particular importance with respect to the minimum standard of treatment.³⁴

Overall, the book is well researched, carefully presented, and easy to read. It will appeal to a wide audience, including those interested in international investment law and policy, economic and political history, and international relations. It will certainly be of value to academics, policy-makers and anyone researching, negotiating, or interpreting international investment agreements.

DMYTRO GALAGAN, MCIARB
LLM Candidate, University of Victoria

³² John Coyle, “The Treaty of Friendship, Commerce and Navigation in the Modern Era” (2013) 51 *Colum J Transnatl L* 302 at 305–06.

³³ [1989] ICJ Rep 15.

³⁴ Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 37–38.