The bilateral treaty of friendship, commerce and navigation was for centuries a staple of international diplomacy. These treaties were famous for addressing a wide range of issues—including human rights, trade and investment protection—in a single document. In recent years, however, states have increasingly entered into specialized agreements on topics that were historically addressed by these treaties. Today, the conventional wisdom is that treaties of friendship, commerce and navigation are of primarily historical interest. This Article both confirms and challenges this conventional wisdom. It first provides a richly detailed account of how the treaty of friendship, commerce and navigation has been undermined as a source of rights in the United States over the past fifty years. It then goes on to argue that, notwithstanding this loss of influence, treaties of friendship, commerce and navigation continue to offer important conceptual insights to scholars and policy-makers in two ways. First, they show how treaty rights might be coordinated across specialized treaty regimes. Second, they
show how treaty rights might be better balanced within a single regime. This Article suggests that a renewed appreciation for these insights could both enrich contemporary debates about the “fragmentation” of international law and lead to important reforms to the bilateral investment treaty regime.

INTRODUCTION

The bilateral treaty of friendship, commerce and navigation (FCN treaty) was once a staple of international diplomacy.1 Throughout the nineteenth century and well into the twentieth, the United States and other nations routinely entered into agreements that

1. Herman Walker, Jr., Modern Treaties of Friendship, Commerce, and Navigation, 42 MINN. L. REV. 805, 805 (1958) (“The bilateral ‘treaty of friendship, commerce and navigation’ is one of the most familiar instruments known to diplomatic tradition.”).
sought to determine “the legal status that each country grants to citizens of the other country living on its territory.”

These treaties covered what today seems an extraordinary number of topics—human rights, trade, intellectual property, investment protection, immigration, shipping, taxation, establishment, inheritance and even workers’ compensation—in a single legal text.

Today, the conventional wisdom is that FCN treaties are historical relics; no new treaties of this type have been concluded by the United States in over forty years. Nations have instead entered into specialized agreements on topics that were historically addressed in FCN treaties. The General Agreement on Tariffs and Trade, for example, now covers trade issues. The International Covenant on Civil and Political Rights now covers many human rights issues. Bilateral investment treaties now cover issues relating to foreign investment. The conventional wisdom, in short, is that the wide-ranging FCN treaties have outlived their usefulness.

2. Counter-Memorial of Italy, Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 2 I.C.J. Pleadings 98. (Nov. 16, 1987); see also Todok v. Union State Bank, 281 U.S. 449, 455 (1930) (“[T]he general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other.”).


This Article both confirms and challenges this conventional wisdom. It first considers the extent to which litigants continue to rely on these treaties in litigation before U.S. courts. In particular, it asks whether subsequent legal developments—in the form of new statutes, new treaties and new court decisions—have brought about a change in the way that these treaties are used in the U.S. legal system. This Article concludes that they have and that, as a consequence, the FCN treaty is today far less important as a source of rights than in decades past. In support of this argument, the Article offers a richly detailed account of how the FCN treaty has been undermined as a source of rights in the United States over the past fifty years. It shows how certain treaty rights were read into the U.S. Constitution, how others were written into more specialized international agreements and how still others were incorporated into federal statutes. This story has never before been told and serves as a useful case study in the slow process of treaty obsolescence. The Article ultimately concludes that many of the rights historically vouchsafed by FCN treaties have migrated to other legal texts and that litigants today look primarily to these texts—not to any FCN treaty—as a source of rights. In this respect, the conventional wisdom that these treaties are of primarily historical interest is largely correct.

The Article then goes on to argue, however, that even if FCN treaties are no longer important as a source of legal rights, they may still offer useful insights in at least two ongoing academic debates. First, a number of commentators have expressed concern that the proliferation of specialized agreements has led to a “fragmented” international legal order in which it has become increasingly difficult to coordinate the aspirations of various treaty regimes and, more ominously, to resolve conflicts that may arise between them. In this fragmented world, wide-ranging treaties such as the FCN treaty can serve to facilitate the task of thinking seriously about the intersections and interrelationships among issues in international law. In this capacity, they may serve as models for how to coordinate different issue areas in a single legal text, thereby ensuring that these various issue areas do not (at least overtly) work at cross-purposes.

Second, commentators have observed that bilateral investment treaties have, at least historically, offered little in the way of legal protections to citizens of developing countries. Although these


individuals theoretically stand to benefit from the influx of foreign capital said to follow the conclusion of such agreements, several empirical studies cast doubt on the proposition that bilateral investment treaties attract foreign capital to developing countries.\(^\text{11}\) If these treaties do not attract foreign capital, and if they offer few meaningful legal protections to nationals of developing states, then developing states have little incentive to enter into these agreements or, indeed, to remain party to those agreements they have already ratified. In this world of lopsided treaty rights, FCN treaties may serve as models for how to successfully balance rights within the bilateral investment treaty framework by offering a model for how rights unrelated to investment protection may be integrated into these agreements.

This Article proceeds as follows. Part I describes the history and content of the treaties of friendship, commerce and navigation that were historically negotiated by the United States. Part II chronicles the decline of this particular treaty regime in the U.S. legal system. Part III explains why the FCN treaty may yet serve as a useful model to scholars and policymakers seeking to identify ways to bind together an increasingly “fragmented” international legal order and to reform the model U.S. bilateral investment treaty to ensure that it offers a more balanced set of legal protections.

I. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

Unlike most other treaties concluded by the United States during the past century, the treaty of friendship, commerce and navigation is a treaty of general relations.\(^\text{12}\) In this capacity, it serves as both “a basic accord fixing ground-rules governing day-to-day intercourse between two countries” and the “medium par excellence through which nations have sought in a general settlement to secure reciprocal respect for their normal interests abroad.”\(^\text{13}\) This Part first

\(^\text{11}\) See, e.g., Joseph E. Stiglitz, Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities, 23 AM. U. INT’L L. REV. 451, 454 n.7 (2008) (“While some studies have come to the opposite conclusion, the weight of the evidence suggests that BITs have had little, if any, positive effect on [foreign direct investment].”); see also infra note 202.

\(^\text{12}\) The hallmark of the FCN treaty has long been its breadth. See Herman Walker Jr., The Post-War Commercial Treaty Program of the United States, 73 POL. SCI. Q. 57, 57 (1958) (“In contradistinction to limited-purpose trade agreements dealing with commerce in the narrow sense, [FCN treaties] are designed to establish the ground rules regulating economic intercourse in the broad sense, and they accordingly must reflect a meeting of minds . . . on a variety of subject matters.”).

\(^\text{13}\) See Walker, supra note 1, at 805 (emphasis in original).
provides a brief history of the FCN treaty. It then describes the content of the prototypical FCN treaty.

1. History

The United States entered into its first FCN treaty with France in 1778. Over the course of the next decade, the United States would enter into additional FCN treaties with the Netherlands (in 1782), Sweden (in 1783) and Prussia (in 1785). In 1815, the United States entered into an FCN treaty with Great Britain, a treaty that is still in force today. These early FCN treaties were viewed as vitally important to the success of the United States as an independent nation and were, accordingly, used primarily to obtain economic and political support from more powerful states. Over the course of the nineteenth century, the focus of these treaties shifted. As U.S. vessels began to engage more extensively in international shipping, for example, treaty provisions addressing issues such as the ability of these vessels to trade in foreign ports were updated and expanded.


17. See Vernon G. Setser, Treaties to Aid American Business Abroad, 40 Foreign Commerce Weekly 3 (Sept. 11, 1950).

18. Id. at 3–4 (“From 1815 to about 1860, the principal emphasis was upon the prevention of the imposition of discriminatory duties and other restrictions upon United States vessels in foreign ports . . .”); id. at 4 (observing that “it was under the protection of such treaties that the American merchant marine . . . became supreme upon the seas”). In 1895, the United States Commissioner of Navigation declared that “[t]he negotiation of
In the years following the First World War, the focus of these treaties shifted yet again. As the volume and scope of U.S. investments abroad expanded, the United States sought to include in its FCN treaties more detailed provisions relating to property protection. In the years immediately after the Second World War, an even greater emphasis was placed on protecting the foreign investments of U.S. investors. The postwar years saw an explosion of interest in FCN treaties; between 1946 and 1968, the United States negotiated more than twenty such agreements. Although the primary justification for these new treaties was to protect the property of U.S. investors abroad, they continued to address the broad range of issues that had historically been included in the FCN treaty.

The era of the FCN treaty ended with surprisingly little fanfare. On February 5, 1967, the United States ratified an FCN treaty with the Togolese Republic. The State Department heralded the treaty as an important step in U.S.-African relations and spoke warmly about the treaty’s potential to improve relations between the United States and other newly independent African states. The State

these treaties . . . is surely one of the greatest boons ever conferred upon the mercantile marine of the world.” Eugene T. Chamberlain, Our Merchant Marine, in CHAUNCEY M. DEPEW, ONE HUNDRED YEARS OF AMERICAN COMMERCE 39 (1895).

19. See Eric V. Youngquist, United States Commercial Treaties: Their Role in Foreign Economic Policy, 2 STUD. L. & ECON. DEV. 72, 79 (1967–68) (“It was not until after World War I that a conscious effort was made to adjust commercial treaties to the sweeping changes that had taken place in the United States economy. . . .”).

20. WILSON, supra note 14, at 1–2 (“[A]t one period in the nineteenth century the promotion of American shipping was a major consideration. In the inter-war period . . . there were strong investor as well as trading interests. After the Second World War, the interests of investors tended to become predominant.”).

21. Id.

22. CHARLES H. SULLIVAN & RONNY E. JONES, U.S. TREATIES OF FRIENDSHIP, COMMERC AND NAVIGATION: STUDIES, U.S. DEP’T OF STATE 50–54 (1981) [hereinafter Sullivan Study] (listing FCN treaties negotiated between 1940 and 1970). This study summarizes the FCN treaty provisions set forth in the Standard Draft, see infra note 35, offers guidance as to how these provisions should be interpreted, and catalogues a number of disputes that have arisen in connection with particular treaty provisions. It also contains a comprehensive list of secondary sources (circa 1981) that discuss the FCN treaty.

23. U.S. National Study on Trade in Services: A Submission by the United States Government to the General Agreement on Tariffs and Trade (1984), at 40 (“[P]ostwar FCN treaties differ from their predecessors in that they place greater emphasis on the right of establishment and the promotion of private foreign investment than on trade and shipping.”).


25. Statement by the Honorable William C. Trimble, Deputy Assistant Secretary of
Department noted plans to negotiate additional such treaties in the years to come as part of a strong U.S. commitment to promoting trade and investment in all parts of the world.26 Indeed, the United States ratified a similar treaty with Thailand later in 1967; the treaty entered into force on June 8, 1968.27 The U.S.-Thailand FCN treaty was, however, the last of its kind. In the years that followed its ratification, the United States gradually wound down its FCN treaty program. After 1968, the United States would negotiate no additional FCN treaties with other nations.

In retrospect, scholars have identified three factors that led to the termination of the FCN treaty program. First, many newly independent states were wary of entering into any treaty of “friendship” with the United States amid the diplomatic pressures of the Cold War.28 Second, an upsurge in foreign nationalizations in the late 1960s and early 1970s led U.S. officials to set aside the wide-ranging FCN treaty and to develop instead a more highly specialized agreement—the bilateral investment treaty—that dealt exclusively with the issue of investment protection.29 Third, the successful negotiation of

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26. Id. (stating that the treaty represented “a hopeful precedent for extension of our commercial treaty system to other African countries which have only recently achieved independence and are now developing their national commercial relations with the rest of the world”); id. (stating that the United States would “continue to pursue a policy of extending the body of commercial treaties to the fullest extent possible”).

27. With respect to the treaty with Thailand, the State Department remarked that it “represents a further step in the program being pursued by the United States for the extension and modernization of its commercial treaty structure.” United States and Thailand Sign Treaty of Amity and Economic Relations, 54 Dep’t of State Bull. 961, 992 (1966).

28. Mark S. Bergman, Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty, 16 N.Y.U. J. Int’l L. & Pol’y 1, 8 (1983) (“[G]iven the myriad subjects covered, the politically nonaligned states were wary of entering into a relationship based on an FCN out of concern that it would be interpreted as a political alignment with the United States.”); Int’l Chamber of Commerce, Bilateral Treaties for International Investment 8 (1977) (“There might also be some hesitation on the part of developing countries to conclude these [FCN] treaties for fear their formal structure and the wide range of subjects they cover might be regarded as indicating a special political alignment with the other contracting State.”); Kenneth J. Vandevelde, The BIT Program: A Fifteen-Year Appraisal, Address Before the American Society of International Law (Apr. 4, 1992), 86 Am. Soc’y Int’l L. Proc. 532, 534 (1992) (“The modern FCN program lasted exactly twenty years, from 1946 to 1966 . . . . After that, the United States, unable to find any other parties willing to conclude a modern FCN, went out of the investment treaty business.”).

29. See Don C. Piper, New Directions in the Protection of American-Owned Property
multilateral agreements on a number of topics—trade foremost among them—meant that bilateral agreements covering these same topics were no longer viewed as necessary. The end of the FCN treaty program, though generally unheralded at the time, was a significant milestone in U.S. treaty practice. It marked the end of a treaty regime that had endured, albeit with some modifications, for almost two centuries.

Although the United States negotiated no new FCN treaties after 1968, more than forty of these agreements remain in force today. The United States is currently a party to FCN treaties with many of its historic allies, including the United Kingdom, Germany and Japan. It is a party to FCN treaties with Latvia, Honduras and Togo, but not with China, India or Brazil. The United States is also currently a party to several FCN treaties with states with which it is not on particularly friendly terms. It is, for example, a party to an FCN treaty with Serbia, a state that the U.S. military bombed in the late 1990s and where an angry mob overran and burned the U.S. em-


30. See Joseph Jude Norton, The Renegotiability of United States Bilateral Commercial Treaties with the Member States of the European Economic Community, 8 TEX. INT’L L.J. 299, 306 (1973) (“With the introduction of the reciprocal trade agreement program by President Roosevelt during the 1930’s and with the creation of GATT in 1947, the function of the F.C.N. in promoting international trade was severely curtailed.”) (internal citations omitted).

31. The United States is currently a party to FCN treaties with Argentina, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Kosovo, Latvia, Liberia, Luxembourg, Macedonia, Montenegro, the Netherlands, Norway, Oman, Pakistan, Paraguay, Serbia, Slovenia, Spain, Suriname, Switzerland, Taiwan, Thailand, Togo and the United Kingdom. See 22 U.S.C. § 503 (2006) (giving formal legislative citations for many of the treaties, some of which are no longer in force); see also U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 9, Visas (9 FAM §41.51) (2010); Chang and Boos, List of E-1 and E-2 Treaty Countries (9 FAM §41.51, Exhibit 1) (2011), available at http://www.americanlaw.com/treatylist.html.

32. See supra note 31 (listing FCN treaty countries).

33. Id.
bassy in 2008, and with Iran, a state with which the United States has no diplomatic relations.34

2. Content

The typical FCN treaty guarantees that treaty nationals shall enjoy certain legal and economic rights across a range of areas.35 With respect to these rights, there are three different standards of treatment that may be granted. First, the treaty may guarantee that treaty nationals shall enjoy substantive rights that are denied to citizens, such as a blanket exemption from military service.36 Second, the treaty may guarantee that treaty nationals be accorded national treatment with respect to rights in a particular area.37 Third, and finally, the treaty may guarantee most-favored-nation treatment with respect to a particular set of rights.38

34. Id.

35. In a sense, there is no such thing as a “typical” FCN treaty because they were negotiated over such a long time period; the 1815 FCN treaty between the United States and Great Britain is quite different from the 1967 FCN treaty between the United States and Togo. Nevertheless, to the extent that all of these treaties tend to address the same topics, one can identify commonalities despite these differences. In the years following the Second World War, the U.S. State Department developed a model FCN treaty known as the “Standard Draft,” which it used as the starting point in negotiating many of the postwar FCN treaties. See U.S. Dep’t of State, Standard Draft Treaty of Friendship, Commerce and Navigation (1970) [hereinafter Standard Draft].

36. Treaty of Friendship, Commerce, and Navigation, between the United States and the Argentine Confederation, U.S.-Arg., art. X, July 27, 1853, 18 Stat. 16. In Sumitomo, the U.S. Supreme Court stated “[t]he purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.” Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 187–88 (1982). This view is clearly incorrect with respect to military service. See, e.g., Itzcovitz v. Selective Service Local Board No. 6, 301 F. Supp. 168, 171 (S.D.N.Y. 1969) (holding that an otherwise draftable Argentine national could not be required to serve in the U.S. military, per the terms of the U.S.-Argentina FCN treaty). At least one scholar, moreover, has argued that this view is likewise incorrect with respect to the ability of treaty nationals to hire individuals of their choice. See Gerald D. Silver, Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “Of Their Choice”, 57 Fordham L. Rev. 765 (1989) (arguing that the employer choice provision in some FCN treaties does, in fact, confer rights on foreign companies that are denied to domestic companies).

37. See Ventress v. Japan Airlines, 486 F.3d 1111, 1115 (9th Cir. 2007) (discussing national treatment standard).

The substantive rights to which one of these standards will attach fall into four general categories: (1) navigation rights, (2) trading rights, (3) rights of entry and establishment and (4) human rights. First, the prototypical FCN treaty contains a number of provisions relating to navigation rights, which grant vessels the right to enter foreign waters and ports.\textsuperscript{39} The treaty generally ensures that, upon a treaty vessel’s arrival at these ports, it shall receive preferential treatment with respect to the payment of tonnage duties and harbor fees.\textsuperscript{40} Many of these treaties also exempt cargo carried on foreign vessels from discriminatory customs duties levied on such cargo.\textsuperscript{41} In addition, the navigation provisions set forth in many modern FCN treaties seek to prevent discrimination against foreign carriers through cargo preference laws, which typically reserve a certain percentage of cargoes to national vessels.\textsuperscript{42} The overall effect of these provisions is to promote trade and commerce between the treaty countries by guaranteeing a minimum level of treatment with respect to commercial vessels flying the flag of the other nation.

Second, the prototypical FCN treaty contains a number of provisions relating to trading rights. Specifically, these treaties dictate what customs duties to assess on goods imported from the territory of the treaty partner.\textsuperscript{43} In virtually every case, the treaty guarantees most-favored-nation treatment with respect to certain goods. Prior to 1923, the treaties typically provided for conditional most-favored-nation treatment.\textsuperscript{44} Almost without exception, however, treaties negotiated after 1923 provide for unconditional most-favored-nation treatment for imported goods.\textsuperscript{45} Such provisions mirror those found in many bilateral and multilateral free trade agree-

\textsuperscript{39} See Don C. Piper, Navigation Provisions in United States Commercial Treaties, 11 AM. J. COMP. L. 184 (1962). This Article considers a provision “prototypical” when at least a majority of FCN treaties contain the provision or one like it.

\textsuperscript{40} Id. at 196–97; see The Sophie Rickmers, 45 F.2d 413, 417–18 (S.D.N.Y. 1930).

\textsuperscript{41} Piper, supra note 39, at 199–200.


\textsuperscript{43} See In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 319, 324 (3d Cir. 1983) (rejecting claim that Japanese goods imported into the United States were denied national treatment in violation of U.S.-Japan FCN treaty).


ments to which the United States is currently a party, including the General Agreement on Tariffs and Trade (GATT).

Third, the prototypical FCN treaty contains a number of provisions relating to rights of entry and establishment. With respect to individuals, the treaties guarantee that nationals of each treaty partner country shall be permitted to enter (and reside) in the territory of the other for the purpose of engaging in business. In the United States, these entry rights are granted through a special visa class—the E visa—that enables treaty nationals to enter the United States in order to engage in trade or to develop an investment. In 2010, the United States issued 27,300 such visas, primarily to citizens of Japan, France, Germany and the United Kingdom. After their entry into the treaty partner country, treaty nationals are granted the right to establish themselves in the occupation of their choice. In practice, this right of establishment means the right to national treatment “with respect to engaging in all types of commercial, industrial, financial and other activities for gain . . . .” A number of FCN treaties also guarantee that companies that have established themselves abroad shall have the right to engage accountants, executives, attorneys and other

46. The right of entry is now typically granted subject to the immigration laws of each country. In addition, most treaties specifically decline to guarantee national treatment to aliens with respect to their establishment in certain sensitive industries, such as communications and banking. See e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. VII(2), Apr. 2, 1953, 4 U.S.T. 2063; see also ROBERT RENBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 81–91 (1960) (discussing rationales underlying various industry exclusions). An early FCN treaty between the United States and Japan—which guaranteed that treaty nationals would enjoy the “same privileges, liberties, and rights” as native citizens while “residing[ ]” in the territory of the other nation—played a key role in ensuring that children of Japanese were able to attend public school in San Francisco after the local school board attempted to bar them from these schools in 1906. See Richard Delgado & Jean Stefanie, California’s Racial History and Constitutional Rationales for Race-Conscious Decision-Making in Higher Education, 47 UCLA L. Rev. 1521, 1567 (2000); Elihu Root, The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution, 1 Am. J. Int’l L. 273–77 (1907).

47. See infra note 171 and accompanying text. With respect to corporations, FCN treaties negotiated after 1900 typically guarantee that treaty nationals are entitled to national treatment with respect to the right to establish corporate entities abroad. See Herman Walker Jr., Provisions on Companies in U.S. Commercial Treaties, 50 Am. J. Int’l L. 373 (1956). Treaties negotiated in the nineteenth century, by contrast, generally made no provision for corporate rights. Id.


specialists “of their choice.”

Fourth, the prototypical FCN treaty contains provisions that grant a variety of human rights to treaty nationals residing in the territory of the counterpart nation. Treaty nationals are, for example, frequently guaranteed the right to travel freely in the territory of the treaty partner country. They are guaranteed the right to access the courts (and hire local counsel) on the same terms as nationals. They are guaranteed the right to bequeath their property to relatives living abroad when they die. They are guaranteed the right to practice their religion as they see fit and the right to be free from harassment by local authorities. They are promised that their property shall “enjoy the most constant protection and security” and that it shall not be taken “without the prompt payment of just compensation.” If they are injured or killed in an industrial accident, they and their dependents are sometimes granted the right to receive worker’s compensation benefits on the same terms as nationals.

Viewed collectively, these four clusters of rights—navigation rights, trading rights, rights of entry and establishment, and human


51. FCN treaties always contain provisions that address rights specifically protected by the U.S. Constitution. A number of FCN treaties, for example, guarantee that treaty nationals shall enjoy freedom of religion and freedom of association, which freedoms are guaranteed by the First Amendment. Many of these treaties also contain protections against unreasonable searches and seizures, which are covered by the Fourth Amendment, and against the taking of private property without the payment of just compensation, which is covered by the Fifth. These provisions were included in the treaties not so much for the benefit of treaty nationals living and working in the United States but, rather, for the benefit of U.S. citizens living and working abroad.


53. Treaty of Friendship, Commerce and Navigation, U.S.-Para., supra note 44, art. IX.


57. Treaty of Friendship, Commerce and Navigation, U.S.-Ger., supra note 55, art. IV.
rights—constitute something akin to a bill of rights for treaty nationals. Treaty nationals are granted the right to enter a particular nation and to establish themselves in business there. They are given the right to sail their ships into another nation’s ports without having to pay discriminatory fees. They are permitted to import their wares into that same nation at favorable tariff rates. And, in the course of conducting their business, they are assured (among other things) that their property will not be taken from them without just compensation, that their religious beliefs may be freely expressed and that they will not be harassed by the local authorities.

In addition to the clusters of rights discussed above, those FCN treaties negotiated by the United States after the Second World War frequently contain a number of miscellaneous provisions addressing the rights and obligations of state officials and state actors. With respect to consular relations, for example, a number of FCN treaties require states to notify consular officers upon the request of a treaty national taken into custody and to permit these officers to visit and communicate with the treaty national. With respect to sovereign immunity, modern FCN treaties include a waiver of sovereign immunity for commercial enterprises owned or controlled by a foreign state. With respect to arbitration, the modern treaties provide that no national court shall decline to enforce an arbitral award solely on the grounds that it was rendered by an arbitral panel located in the territory of the treaty partner country. And with respect to international dispute resolution, the modern treaties provide that disputes arising under the treaty may be submitted by the state parties to the treaty to the International Court of Justice for resolution.

58. See Muthucumarswamy Sornarajah, The International Law on Foreign Investment 180 (2004) (“The FCN treaty contained almost a charter of rights that the alien was to enjoy in the host state, often listing his due process and procedural rights in the case of arrest and criminal trial.”); Arthur Nussbaum, A Concise History of the Law of Nations 200 (1947) (“The typical treaty of commerce of the nineteenth century embodied . . . what one may call an international bill of rights.”).


60. Standard Draft, supra note 35, art. III(2).

61. Id. art. XVIII(3).

62. Id. art. V(2).

In sum, the wide-ranging treaty of friendship, commerce and navigation was a staple of U.S. foreign policy for almost two centuries. Notwithstanding this long history, and despite the fact that more than forty of these treaties remain in force, the importance of the FCN treaty in the U.S. legal system has waned considerably over the past half-century, to the point that these treaties are today rarely invoked as a source of rights by foreign litigants. The next Part explores the reasons why.

II. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION AS RELIC

When a state concludes that continued adherence to a particular set of treaty obligations is no longer in its interest, international law generally permits it to cast off those obligations by announcing its intent to withdraw from the treaty. The effects of this action are to release the exiting state from any future obligation to comply with the treaty going forward, and incidentally, to ensure that the treaty no longer constitutes an independent source of rights to individuals in that state’s courts. It is possible, however, for a treaty to be marginalized as a source of rights even if it is never formally terminated and even as the states in question continue to support its broad policy goals. A state may, for example, enter into a subsequent treaty on the same topic. Or it may enact a comprehensive statutory scheme that expands and improves upon existing treaty provisions. Or a nation-


65. See Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“[T]he termination of a treaty under its provisions or in accordance with the present Convention . . . releases the parties from any obligation further to perform the treaty.”).
66. This analysis holds true only in states such as the United States, which permit an individual to invoke a treaty directly as a source of rights in national courts even in the absence of implementing legislation. In other states, such as the United Kingdom, where the treaty has no legal significance as a matter of domestic law unless and until the national legislature enacts legislation, the treaty cannot serve as an independent source of rights.
67. See Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004) (“[T]he Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention.”).
68. See Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp. Ltd., 11 CIV. 0955 PGG, 2011 WL 6187077 (S.D.N.Y. Nov. 28, 2011) (noting litigant’s invocation of sovereign immunity provision in U.S.-Ireland FCN treaty but resolving case on
al court may conclude that its national constitution guarantees rights previously vouchsafed by an international agreement. In these instances, a treaty may lose its influence not because a state wishes to terminate or to evade its provisions but, rather, because the state has chosen to incorporate those provisions into other sources of national law.

This Part suggests that the FCN treaty offers a rare case study in which all of the above developments have undermined a treaty’s continued vitality. Specifically, it argues that the utility of the FCN treaty has over the past fifty years been undermined by constitutional decisions rendered by the U.S. Supreme Court and by the decision of the political branches to enter into more highly specialized treaties and by the enactment of federal legislation that replicates and expands upon certain FCN treaty provisions. These developments warrant attention because they highlight the ways in which treaties that were prominent in one era can become afterthoughts in another. To date, these developments have attracted almost no comment in the academic literature, possibly because most scholars would prefer to track a treaty’s rise to prominence than to trace its slow decline into obscurity. Yet by exploring how new developments in other areas of law can contribute to a treaty’s decline, it becomes possible to better understand how certain treaties—even those that remain in force—may fade into near-irrelevance even as the state parties to these agreements continue to support their basic policy goals.

This Part sets forth a comprehensive account of the decline of the FCN treaty as a source of rights in the U.S. legal system. First, it explores the ways in which various rights set forth in the FCN treaty have been read into the U.S. Constitution. It then explains how a shift in international practice away from omnibus treaties such as the FCN treaty in favor of more specialized agreements led courts and litigants increasingly to look to these latter agreements as a source of rights. Finally, this Part discusses how certain FCN treaty rights were incorporated into federal statutes enacted by the U.S. Congress. The primary consequence of these various developments was the hollowing out of the FCN treaty regime. As the legislative, executive and judicial branches of the U.S. government incorporated provision after provision from the FCN treaty into other sources of law, the treaty was reduced to the status of a metaphysical car propped up on cinder blocks—one by one, its most useful parts were installed in newer models.

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1. The Constitutionalization of Treaty Rights

Throughout the nineteenth century and the first half of the twentieth century, foreign nationals living and working in the United States routinely invoked FCN treaties to challenge state and local laws that imposed limitations on their ability to work in certain occupations. At the dawn of the twenty-first century, the FCN treaty is virtually never invoked to this end. One explanation for why this is so is that many of the discriminatory laws in question were repealed in the second half of the twentieth century. This explanation, however, omits a significant part of the story.

State legislatures did not decide, unprompted, to repeal these discriminatory laws, a substantial number of which were still on the books as of the late 1940s. Rather, in a series of decisions handed down between 1948 and 1976, the U.S. Supreme Court held that many state and local laws that discriminated on the basis of alienage violated the Equal Protection Clause of the U.S. Constitution. At approximately the same time, the Supreme Court concluded that certain state statutes imposing restrictions on the ability of non-resident aliens to inherit property constituted an impermissible intrusion by the states into foreign affairs. The combined effect of these and other decisions was to write directly into the U.S. Constitution protections that had historically been available to aliens primarily or exclusively through the FCN treaty.

Consequently, when state and local laws are today challenged on the grounds that they impermissibly discriminate on the basis of alienage, they are typically challenged on equal protection grounds or, alternatively, on the basis that they infringe upon the federal government’s exclusive prerogative to conduct foreign affairs. They are not challenged as being inconsistent with FCN treaty provisions. This development has had the welcome effect of expanding these protections to all aliens—not just those whose home countries are party to an FCN treaty with the United States—but it has also had the perverse effect of marginalizing the treaties that for more than a century served as a vital bulwark against state-based discrimination against aliens. While these treaties continue to be invoked occasionally by non-resident aliens who are not otherwise entitled to protection under the U.S. Constitution, they are of relatively little import today as a shield against discriminatory state and local laws. The reasons why are explored below.
a. Equal Protection and Establishment Rights

In 1886, the U.S. Supreme Court held in *Yick Wo v. Hopkins* that aliens were “persons” within the meaning of the Fourteenth Amendment and were therefore entitled to equal protection under the law.\(^70\) This decision notwithstanding, U.S. courts would over the course of the next fifty years uphold the constitutionality of a number of state laws that discriminated on the basis of alienage.\(^71\) The explanation for this incongruity lies in what became known as the “special public interest” doctrine, which permitted states to distinguish between citizens and non-citizens when the law in question related to matters in which the state had a special interest.\(^72\) In theory, this doctrine covered only such topics as the ownership of land,\(^73\) the use of natural resources\(^74\) or the employment of aliens on public works projects.\(^75\) In practice, however, many courts adopted an expansive interpretation of what constituted a “special” state interest and upheld many local laws for which there existed no plausible state interest other than economic protectionism and overt hostility to aliens.\(^76\)

In the absence of robust constitutional protections, discriminatory laws that prohibited aliens from working in certain occupa-

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70. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). In that case, the Supreme Court held that Chinese citizens had been denied licenses to operate laundries in San Francisco based on “no reason . . . except hostility to the race and nationality to which [they] belong . . . .” *Id.* at 374. At the time of the Founding neither the U.S. Constitution nor the constitutions of the separate states addressed the rights of aliens in any detail. *Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens* 167 n.8 (1985); *Ronald Alexander, Rights of Aliens Under the Federal Constitution* 89 (1931). Until the passage of the Fourteenth Amendment in 1868, therefore, there were few if any constitutional limitations on the ability of states to discriminate on the basis of alienage.


73. Terrace v. Thompson, 263 U.S. 197, 217 (1923).


76. *See* Miller v. City of Niagara Falls, 202 N.Y.S. 549, 550–51 (4th Dept. 1924) (upholding law forbidding aliens from selling soft drinks); Gizzarelli v. Presbrey, 44 R.I. 333, 335 (1922) (upholding law forbidding aliens from operating public buses); Commonwealth v. Hana, 195 Mass. 262, 265 (1907) (upholding law forbidding aliens from working as peddlers); *but see* State v. Montgomery, 94 Me. 192, 207 (1900) (striking down statute denying peddlers license to noncitizens).
tions proliferated. As late as 1946, forty-nine states barred noncitizens from practicing law, thirty-nine states barred them from the liquor trade, seventeen states barred them from working as embalmers at funeral homes, nine states barred them from working as guides, eight states barred them from working as private detectives, three states barred them from working as pawnbrokers, two states barred them from working as auctioneers, and one state barred them from working as wrestling promoters.88

During this era, FCN treaties served as an important check on the ability of the states and localities to enforce laws that imposed limitations on an alien’s ability to work in the occupation of his choosing.79 Consider the case of Asakura v. City of Seattle, in which

77. See Rotunda & Nowak, supra note 71, at § 18.12(B) ("In the period from [1886] until 1948, aliens were not accorded very significant constitutional protection."); William Marion Gibson, Aliens and the Law 119–20 (1940) ("To avoid giving the impression that there is no discrimination against aliens in the matter of employment, it should be made clear at this point that discrimination does exist and that aliens do not have as much freedom as nationals."); see also Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O’Brien, 263 U.S. 313 (1923); Brown v. Fletcher, 237 U.S. 583 (1915); People v. Crane, 239 U.S. 195 (1915). For an example of a rare successful challenge to such laws, see Truax v. Raich, 239 U.S. 33 (1915) (striking down, on preemption and equal protection grounds, Arizona statute mandating that at least eighty percent of an employer’s workforce had to be citizens of the United States).

78. See Milton R. Konvitz, The Alien and the Asiatic in American Law 210–11 (1946). As late as 1970, New York denied a request by an Iranian citizen who applied for a liquor license. See State Dep’t Practices Under U.S. Treaties of Friendship, Commerce, and Navigation 64 (Aug. 1981). In 1958, the Massachusetts Attorney General issued an opinion stating that the U.S.-German FCN treaty granted German citizens the right to work as waiters in liquor-serving establishments notwithstanding state laws barring aliens from this line of work. Id. at 66. The monograph relied upon in this footnote chronicles seemingly all of the instances between 1953 and 1981 in which a U.S. citizen contacted an embassy abroad to request assistance and/or advice in asserting rights under a particular FCN treaty. It also recounts several cases in which foreign governments complained to the State Department about state laws that discriminated on the basis of alienage. This monograph does not appear to have been previously cited in any law review article or court case. Although the study presents a number of limitations—most notably, it does not capture instances in which U.S. citizens exercised FCN treaty rights without consulting the State Department, and its period of coverage ends in 1981—it offers a useful survey of instances in which U.S. citizens relied on FCN treaties when doing business abroad.

79. These treaty-based protections were in some cases also subjected to the limitations imposed by the special public interest doctrine. See, e.g., Heim v. McCall, 239 U.S. 175, 191 (1915); Patrone v. Pennsylvania, 232 U.S. 138, (1914); People v. Crane, 214 N.Y. 154, 170 (1915). In the treaty context, however, the courts were more willing to impose limits on the scope of that doctrine. Compare Magnani v. Harnett, 257 A.D. 487, 492 (N.Y. App. Div. 1939) ("The principle is well-settled that a State may by statutes discriminate against aliens despite treaties of amity and commerce" so long as the legislation in question
the Supreme Court considered a challenge to a Seattle ordinance that banned non-citizens from operating pawnshops.\textsuperscript{80} This ordinance was challenged by a Japanese national on the grounds that it violated an FCN treaty provision guaranteeing him the right to “carry on trade” in the United States.\textsuperscript{81} A unanimous Supreme Court held that the term “trade” was broad enough to encompass pawnbroking and that the ordinance could not be validly applied to Japanese citizens.\textsuperscript{82} Thereafter, although Seattle could legally apply the ordinance to prevent certain aliens from operating pawnshops, it could not apply the ordinance to Japanese citizens or, indeed, to nationals of any other state that had negotiated an FCN treaty with the United States guaranteeing the right of establishment on the same terms.\textsuperscript{83}

In the face of state and local legislation that imposed restrictions on the ability of aliens to work in certain occupations, and in light of many courts’ reluctance to strike down such legislation on constitutional grounds, FCN treaties served as a vital source of protection against state discrimination.\textsuperscript{84} In 1948, however, this dynamic began to change. In that year, the Supreme Court struck down a California statute that prohibited the issuance of a fishing license to any “person ineligible for citizenship.”\textsuperscript{85} In its decision, the Court

\textsuperscript{80} See Asakura v. City of Seattle, 265 U.S. 332, 340 (1924).

\textsuperscript{81} Id.; see also Treaty of Commerce and Navigation, U.S.-Japan, art.1, Apr. 5, 1911, 37 Stat. 1504.

\textsuperscript{82} Asakura, 265 U.S. at 343; see also Jordan v. Tashiro, 278 U.S. 123, 128–29 (1928). The lower federal courts and the state courts likewise relied on FCN treaties to strike down state laws barring aliens from working in certain industries during this era. See State v. Tagami, 234 P. 102, 106 (Cal. 1925) (right of Japanese citizen to operate a sanitarium); Magnani v. Harnett, 14 N.Y.S.2d 107, 111 (App. Div. 1939) (right of English citizen to work as a chauffeur).

\textsuperscript{83} There were some instances in which the FCN treaties were deemed to lack the language needed to achieve the end sought. In 1927, for example, the Supreme Court ruled that an FCN treaty between the United States and Great Britain did not operate to invalidate a Cincinnati ordinance that barred aliens from operating billiard halls because that treaty spoke only of “commerce” and the Court believed that it would be “an extravagant application of the language quoted to say that it could be extended to include the owner of a place of amusement who does not necessarily buy, sell or exchange merchandise or otherwise participate in commerce.” Clarke v. Deckebach, 274 U.S. 392, 395–96 (1927).

\textsuperscript{84} See supra note 76 (collecting cases).

\textsuperscript{85} Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948). This shift was presaged by decisions beginning in the early 1930s in which the Court used terms such as “injurious
noted that under the U.S. Constitution, “the power of a state to apply its laws exclusively to alien inhabitants as a class is confined within narrow limits.”

In the years that followed this decision, the lower federal courts and the state courts relied upon it to strike down a number of discriminatory state statutes on constitutional grounds.

In 1971, the Supreme Court went a step further in *Graham v. Richardson*, holding that all state classifications based on alienage were subject to strict scrutiny. Over the next twenty years, state laws that discriminated on the basis of alienage were challenged and, in many cases, removed from the statute books. As a result, legal aliens residing in the United States today enjoy rights under the U.S. Constitution—including the right to work in the occupation of their choice—that are far more robust than in 1947.

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87. See Purdy & Fitzpatrick v. State, 456 P.2d 645 (Cal. 1969); Dep’t of Labor v. Cruz, 212 A.2d 545 (N.J. 1965); Sei Fujii v. California, 242 P.2d 617, 622–29 (Cal. 1952); Namba v. McCourt, 204 P.2d 569 (Or. 1949); see also Note, *Constitutionality of Restrictions on Aliens’ Right to Work*, 57 COLUM. L. REV. 1012, 1013 n.4 (1957) (“The overwhelming weight of opinion . . . is that [state legislation restricting the economic opportunities of aliens] is a patently unconstitutional threat to the civil liberties of citizens and aliens alike.”) (collecting sources). The passage of the Civil Rights Act in 1964 had less of an impact on the rights of noncitizens, *per se*, than one might expect because the courts quickly concluded that discrimination on the basis of “national origin” was distinct and different from discrimination based on alienage. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (concluding that Title VII does not cover discrimination based on “alienage” or “citizenship” but, rather, only on “national origin”).


90. See, e.g., 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.12(c) (5th ed. 2012) (observing that “the Court has been quite
Ironically, this revolution in the Supreme Court’s equal protection jurisprudence had the effect of undermining an instrument that had played a key role in guaranteeing the rights of aliens for the previous century—the FCN treaty. As a consequence of this shift, many of the rights that had historically been included in the FCN treaty were read directly into the U.S. Constitution. Once this process was completed, these rights were exercisable by all aliens in the United States, not just those aliens whose country of origin had entered into an FCN treaty with the United States. In the wake of these decisions, however, litigants had little cause to invoke FCN treaties. 91 Instead, discriminatory state laws were challenged as violating the Equal Protection Clause of the U.S. Constitution.

b. Foreign Affairs and Inheritance Rights

The Equal Protection Clause was not the only constitutional means by which the efficacy of the FCN treaty was undermined. In the 1930s and 1940s, a number of states enacted laws that imposed restrictions on the ability of residents of communist nations to inherit property from decedents in the United States. 92 Since communist

91. Paul B. Stephan, Treaties in the Supreme Court, 1946–2000, in International Law in the Supreme Court 340–41 (David Sloss, Michael D. Ramsey, & William S. Dodge eds., 2011) (discussing Graham and noting that “[u]ltimately this strand of jurisprudence became understood as a narrower form of preemption, based not on exclusive federal control over foreign affairs, but rather the primary responsibility of the national government to set the terms under which aliens are admitted to the country”).

states denied the very existence of private property, it was feared that the devised property would be confiscated before it reached the intended beneficiaries.\textsuperscript{93} While the goal of these “iron curtain statutes” was to prevent assets located in the United States from being used to support communist governments,\textsuperscript{94} they aroused a great deal of resentment among non-resident alien heirs who found themselves denied legal title to property that had been left to them by decedents in the United States.\textsuperscript{95}

In the 1950s and 1960s, these heirs challenged the validity of a number of iron curtain statutes on the ground that they were inconsistent with the language of particular FCN treaties and therefore preempted by federal law.\textsuperscript{96} In 1961, the Supreme Court sided with the heirs when it ruled in \textit{Kolovrat v. Oregon} that an iron curtain statute enacted by the state of Oregon was preempted by the U.S.-Serbia FCN treaty.\textsuperscript{97} The Court concluded that the treaty guaranteed the right of Yugoslav citizens residing in Yugoslavia to receive property left to them by decedents in the United States and that, consequently, an Oregon statute could not block their receipt of this prop-

\textsuperscript{93} See Harold J. Berman, Soviet Heirs in American Courts, 62 COLUM. L. REV. 257, 257 (1962) (“A considerable number of American courts, though by no means all, refuse to permit distribution of funds in estates to Soviet heirs, on the ground that such funds are likely to be confiscated or otherwise diverted by the Soviet state.”).

\textsuperscript{94} See Jacob Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents, 25 S. CAL. L. REV. 297, 297–98 (1952) (comparing U.S.-Russia relations after World War II to prior U.S.-Germany relations, when the United States wanted to keep assets located in the United States from Nazi control).

\textsuperscript{95} See Berman, supra note 93 at 259–60 (discussing the frustration of Soviet heirs who had devised property withheld from them by U.S. states).

\textsuperscript{96} Note, Property Rights of Aliens Under Iowa and Federal Law, 47 IOWA L. REV. 105, 108–12 (1961) (discussing cases challenging iron curtain statutes as inconsistent with U.S. treaty obligations). These cases were preceded by an earlier generation of cases that also challenged state inheritance laws as inconsistent with U.S. treaty obligations. See Clark v. Allen, 331 U.S. 503 (1947). \textit{Compare} Johnson v. Olson, 142 P. 256, 260 (Kan. 1914) (concluding that “an alien is not allowed to inherit real property under the law as it exists in Kansas”), with Colson v. Carlson, 227 P. 360, 361 (Kan. 1924) (concluding that a new consular treaty between the United States and Sweden permitted Swedish heir to inherit real property) and Olsson v. Savage, 240 P. 586, 587 (Kan. 1925) (reaching the same conclusion with respect to personal property).

\textsuperscript{97} 366 U.S. 187 (1961). The law in question required the non-resident alien to show that the foreign nation (1) had enacted a law granting to U.S. citizens a reciprocal right to take property by succession or testamentary disposition, (2) would permit U.S. citizens to receive money originating from the estates of persons who had died in the foreign nation and (3) would not confiscate money or property that would otherwise devise to foreign heirs. \textit{Id.} at 188 n.1.
In 1964, the Court reaffirmed this decision when it summarily reversed a Pennsylvania Supreme Court decision that refused to distribute the proceeds of an estate to residents of Yugoslavia.

The significance of these decisions was, however, substantially undercut by another decision rendered by the Supreme Court just a few years later. In Zschernig v. Miller, the Court held that certain state iron curtain statutes were unconstitutional to the extent that they infringed upon the exclusive prerogative of the federal government to conduct foreign affairs. The Court observed that “[t]he practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious” and ultimately concluded that “those regulations must give way if they impair the effective exercise of the Nation’s foreign policy.”

The decision in Zschernig—like the decisions in Takahashi and Graham—was thus a constitutional decision that undermined earlier decisions in which the Court had relied on an FCN treaty to reach the same outcome.

In sum, there can be little doubt that a number of changes in the Supreme Court’s constitutional jurisprudence in the 1960s and 1970s brought about a decline in the importance of certain FCN treaty provisions. Even as the Equal Protection Clause achieved new prominence as a means of protecting aliens against discrimination at the hands of state and local governments, an expanded view of dormant foreign affairs preemption limited the ability of states to prevent non-resident aliens from inheriting property. Largely as a consequence of these decisions, contemporary litigation challenging discriminatory state or local laws now proceeds as a constitutional claim. The FCN treaty is virtually never mentioned.

98. Id. at 198.
101. Id. at 440–41.
102. See Stephan, supra note 91, at 340 (“[O]ne may regard the argument that States cannot engage in regulation that touches on foreign affairs as absurd and still note the broader point: the Court believed that regulation of state discrimination against aliens should rest on the Constitution, not on the disparate and inconsistent web of treaty relations.”); id. at 348 (“[T]he Court did not back away from the [FCN] treaties because it questioned their legitimacy as a source of a rule of decision, but rather because they were not comprehensive enough to [protect aliens from discrimination].”).
2. Incorporating Old Rights into New Treaties

Over the past half-century, there has been a pronounced shift in international treaty practice. Whereas states once routinely entered into general agreements that covered a range of issues, they now typically negotiate more specialized instruments that address just a single topic. In the wake of this shift in practice, treaties that deal exclusively with one set of issues have proliferated. Treaties that purport to comprehensively address all of these topics in a single document, by contrast, have become rare.\(^{104}\) While international agreements may occasionally seek to link multiple issues together—as when bilateral trade agreements include investment chapters—wide-ranging treaties that cover a range of issues are now largely a thing of the past.

As specialized international instruments have come to replace FCN treaties, those latter treaties have fallen into disuse.\(^ {105}\) A range of provisions set forth in these treaties—covering such areas as investment law, arbitration law and trade law—are now addressed in separate specialized treaties on the same topic. Consequently, when a dispute arises in any of these areas, the litigants will almost invariably invoke the more highly specialized treaty as a source of rights; the parallel provision in the FCN treaty will, by contrast, typically go unmentioned.\(^ {106}\) The dynamics at play in this context are similar to


\(^{105}\) Kenneth Vandervelde, U.S. International Investment Agreements 91 (2009); see Int’l Chamber of Commerce, supra note 28, at 8 (observing that “the negotiation of the general [FCN treaty] . . . seems to have come to a halt” and suggesting that this “may be due to the multitude of relations which these treaties cover which complicate their negotiation”); Vandervelde, supra, at 92 (suggesting that “noninvestment provisions even could be regarded as counterproductive” to the extent that they “might complicate and thus delay or even prevent the conclusion of a BIT”).

\(^{106}\) One might argue that it is inefficient to have more than one treaty dealing with the same issue. However, this happens all the time in international law. As one arbitral body has stated:

[I]t is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute . . . . The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. The broad provision for the promotion of universal respect for and observance of human rights . . . found in . . . the Charter of the United Nations have not been discharged for States Parties by their ratification of the Human Rights Covenants and other human rights trea-
those in the constitutional context discussed in the preceding Section. Although the nature of the legal text that replaces the FCN treaty is different, the end result is much the same: the further marginalization of the FCN treaty as a source of rights in the U.S. legal system.

a. Investment Rights

In the late 1970s, partly in response to a rash of foreign expropriations, the United States began to develop a model bilateral investment treaty (BIT). Like the FCN treaty, the stated purpose of the BIT was to protect the interests of U.S. nationals doing business overseas. Accordingly, State Department officials borrowed a great many provisions that had historically been a part of the FCN treaties in drafting this model agreement. As Kenneth Vandevelde has written:

The [BIT] drafters began with one of the model texts used to negotiate the modern Friendship, Commerce, and Navigation treaties, which they stripped of provisions not directly related to investment protection. The remaining group of investment provisions was rewritten either to strengthen or to add greater specificity to the formulations used in the modern FCNs.

Given this provenance, it should come as little surprise that there are many similarities between the last FCN treaties negotiated by the United States in the late 1960s and the first BITs negotiated by the United States in the early 1980s. The BITs, for example, addressed such issues as the right to entry and establishment, the right to be free of harassment by local authorities, the right of access to the

*Southern Bluefin Tuna case (Austl. and N.Z./Japan)* Award of August 4, 2000 (Jurisdiction and admissibility) UNIRIAA vol. XXIII (2004) 40–41, para. 52. There are, moreover, a number of rules that have developed for navigating conflicts between treaties that address the same topic. *See* Borgen, *supra* note 9, at 576–77; *VCLT*, supra note 65, art. 30(3).

107. **Vandevelde, supra** note 4, at 167–70. In this effort, the United States was somewhat late to the party. In the late 1950s, Germany began to negotiate a series of bilateral investment protection agreements ("BIPAs") that contained a number of provisions that were similar to the investment protection provisions added to the FCN treaties negotiated by the United States after World War II.


109. **Vandevelde, supra** note 105, at 91–92. *See also id.* ("Traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection.").
courts and, most importantly, the right to prompt, adequate and effective compensation in the event that one state nationalized property owned by nationals of the other state.\textsuperscript{110} These similarities have prompted a number of scholars to describe the BIT as a “successor” regime to the FCN treaty.\textsuperscript{111}

There were, however, important differences between the two treaty regimes.\textsuperscript{112} Since the BIT was concerned primarily with protecting the rights of foreign investors, it lacked provisions relating to trade, navigation, consular relations and many other topics that were addressed in many FCN treaties.\textsuperscript{113} Moreover, the dispute resolution mechanism contained in the BIT was and is very different from the one set forth in the modern FCN treaties.\textsuperscript{114} The FCN treaties contemplated that disputes arising under the treaty would be resolved by the national courts of the host state or, alternatively, by the International Court of Justice. The BITs, however, permitted investors to initiate international arbitral proceedings directly against states alleged to have violated the treaty.\textsuperscript{115} This innovation has led in recent years to a significant number of investor-state arbitrations at the international level.\textsuperscript{116} It has also led to a burgeoning scholarly literature that examines the impact of BITs across a range of issues.\textsuperscript{117}

Over the past three decades, the United States has negotiated

\begin{itemize}
\item \textsuperscript{110} See id. at 108 (discussing similarities between FCN treaties and BITs).
\item \textsuperscript{111} See, e.g., K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards, 4 INT’L TAX & BUS. L. 105, 109 (1986) (“The U.S. BIT program can fairly be characterized as the successor to the U.S. FCN treaty program.”); Timothy A. Steinert, If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People’s Republic of China, 2 J. CHINESE L. 405, 405 (1988) (describing the bilateral investment treaty as “the modern day successor to the post World War II treaties of Friendship, Commerce, and Navigation”).
\item \textsuperscript{112} William S. Dodge, Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement, 39 VAND. J. TRANSNAT’L L. 1, 13–14 (2006) (discussing differences between FCN treaties and BITs).
\item \textsuperscript{113} See Kathleen Kunzer, Developing a Model Bilateral Investment Treaty, 15 LAW & POL’Y INT’L BUS. 273, A–1 (1983).
\item \textsuperscript{115} See id. at 256–58.
\item \textsuperscript{116} See Gary Born, A New Generation of International Adjudication, 61 DUKE L.J. 775, 831–44 (2012).
\end{itemize}
more than forty BITs—primarily with developing nations. Once the United States was confident that it could find treaty partners with which to negotiate BITs, it saw little need to continue the FCN treaty program because policymakers viewed the BIT regime as more effective at protecting the interests of U.S. investors overseas. Because investment protection had increasingly come to be viewed as the central purpose of the FCN treaty, the United States had no reason to continue the FCN treaty program. The rise of the BIT thus led directly to the U.S. government’s negotiation of fewer FCN treaties.

It is important to note, however, that the BITs did not formally supplant the legal protections set forth in most of the existing FCN treaties. The United States has typically negotiated either an FCN treaty or a BIT with a particular nation; it has negotiated both with the same nation on only six occasions. Consequently, there are only a few instances in which a treaty national would be in a position to choose whether to rely on an FCN treaty or a BIT as a source of rights and, by virtue of this choice, to signal a preference for one regime over the other. One cannot, therefore, look to the relative preferences of treaty nationals in this context to gain insight into the perceived utility of the FCN treaty.

It is, however, possible to gain insight into this issue by looking to other specialized treaties to which the United States is party. These specialized agreements have, for the most part, been ratified by both the United States and by those nations with which it has negotiated FCN treaties. In many cases, these treaties contain legal protections that overlap with those set forth in the FCN treaty, thereby giving treaty nationals a choice as to which treaty to rely upon. As is discussed in greater detail below, these individuals have overwhelmingly chosen to rely on the specialized multilateral treaty to the exclusion of the FCN treaty and, even when they have not, the courts

118. The United States is currently party to BITs with Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bolivia, Bulgaria, Cameroon, Congo, Croatia, the Czech Republic, Ecuador, Egypt, El Salvador, Estonia, Georgia, Grenada, Haiti, Honduras, Jamaica, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Mozambique, Nicaragua, Panama, Poland, Romania, Russia, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, Ukraine, Uruguay and Uzbekistan. See U.S. Trade Compliance Center, Bilateral Investment Treaties, EXPORT.GOV, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Feb. 12, 2013).

119. See Vandevelde, supra note 4, at 171.

120. The United States is a party to both a BIT and an FCN treaty with only Argentina, Bolivia, Croatia, Estonia, Honduras and Latvia. Compare supra note 31 (listing countries with which United States has negotiated an FCN treaty), with supra note 118 (listing countries with which United States has negotiated a BIT).
have looked primarily to these specialized treaties—rather than any FCN treaty—to resolve disputes.

b. Arbitration Rights

One specialized treaty that has supplanted the FCN treaty as a source of rights is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. The purpose of this convention is to “provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.”

To this end, the Convention requires that national courts decline to adjudicate disputes arising out of international commercial contracts containing arbitration clauses and, instead, to refer such disputes to arbitration. It also requires that national courts recognize and enforce awards subsequently rendered by foreign or international arbitrators. Significantly, a national court may decline to recognize and enforce an arbitral award only if the award fails to satisfy certain enumerated criteria.

The standard postwar FCN treaty also contains a lengthy arbitration provision. The first sentence of that provision bars courts from refusing to enforce an agreement to arbitrate on the ground that that agreement designated a foreign place of arbitration or, alternatively, appointed an arbitrator who was not a U.S. citizen. The second sentence of that same provision bars courts from refusing to

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122. Id. art. II(3).

123. Id. art. III.

124. Id. art. V. The Convention also contains a savings clause that stipulates that it “shall not affect the validity of . . . bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States.” Id. art. VII. One bilateral agreement concerning the recognition and enforcement of such awards is the FCN treaty.

125. Standard Draft, supra note 35, art. V(2) (“Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of the other Party, merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party.”).
enforce an arbitral award on either of these grounds.\textsuperscript{126} This provision was apparently included in the FCN treaty, among other reasons, because some state courts in the United States had historically refused to enforce arbitral agreements and awards that lacked a connection to their own jurisdiction.\textsuperscript{127}

When the United States ratified the New York Convention in 1970, it was immediately clear that its language overlapped to a significant extent with the arbitration provisions in the FCN treaty.\textsuperscript{128} The Convention required national courts in ratifying states to enforce agreements to arbitrate.\textsuperscript{129} This unambiguous command prohibited a court in the United States from declining to enforce an agreement on any ground, including those outlined in the first sentence of the FCN treaty arbitration provision. With respect to the enforcement of arbitral awards, the Convention listed seven exclusive grounds upon which a national court may decline to recognize and enforce an award.\textsuperscript{130} Significantly, neither of the grounds for declining to recognize and enforce an award set forth in the second sentence of the FCN treaty arbitration provision was listed. Accordingly, neither of these grounds for refusing to enforce an award is permitted under the Convention. The text of the New York Convention, in effect, replicated and expanded upon the arbitration provisions set forth in the FCN treaty.

This development raises the question of whether the arbitra-

\textsuperscript{126} Id. ("No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award is rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such party."); see also Landegger v. Bayerische Hypotheken und Wechsel Bank, 357 F. Supp. 692, 694 (S.D.N.Y. 1972).

\textsuperscript{127} Herman Walker Jr., Commercial Arbitration in United States Treaties, 11 ARB. J. 68, 77 (1956) ("Although the courts of Pennsylvania and New Jersey readily concluded . . . that they had the power and duty to order persons to proceed with arbitration outside the State, the New York courts declined for many years to do so.").


\textsuperscript{129} New York Convention, supra note 121, art. II(3).

\textsuperscript{130} Id. art. V(1) ("Recognition and enforcement of the award may be refused . . . only if that party furnishes . . . proof that [one of the enumerated exceptions is met].") (emphasis added); Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 518 (2d Cir. 1975) ("Foreign awards are vulnerable to attack only on the grounds expressed in other articles of the Convention . . . "); Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1066–71 (1961).
The provision language set forth in the FCN treaty is still good law. In this particular case, the issue is addressed by a savings clause in the New York Convention that states: “[t]he provisions of the present Convention shall not affect the validity of . . . bilateral agreements concerning the recognition and enforcement of arbitral awards entered into the Contracting State.”131 The existence of the savings clause makes clear that the intent of the parties was to preserve provisions in all prior bilateral agreements, including those in the FCN treaty, which dealt with the subject of arbitration. As a formal matter, the FCN treaty provision is therefore still valid.

As a practical matter, however, litigants and courts routinely ignore the FCN treaty provision in arbitration-related disputes. Consider the Second Circuit’s analysis of the relationship between the U.S.-Japan FCN treaty arbitration provision and the New York Convention in Fotochrome, Inc. v. Copal Co.:

To the extent that there may be a conflict between the [arbitration provisions in the U.S.-Japan FCN] Treaty and the [New York] Convention, we think that where both parties to a bilateral treaty . . . later become signatories to a multinational convention covering the same subject matter, the Convention is intended to control. We reach this conclusion despite the saving clause preserving the validity of bilateral agreements between the contracting states. The adhesion of additional signatories does not affect the circumstance that each signatory, bound by bilateral agreement, is modifying its earlier engagement vis-a-vis the other, but only to the extent necessary. Furthermore, inasmuch as both agreements further the same purpose, the one tending to further that purpose most forcefully, the Convention, should be given effect.132

The Second Circuit’s analysis indicates that specificity—the treaty’s ability to further the shared purpose “most forcefully”—should be the touchstone of the analysis. On this analysis, the court sees the FCN treaty arbitration provision, though still formally in effect, as basically irrelevant.133

131. New York Convention, supra note 121, art. VII.


133. The New York Convention permits a ratifying state to declare “on the basis of reciprocity . . . that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.” New York Convention,
Although the Second Circuit’s analysis in *Fotochrome* was offered specifically in the context of the New York Convention, it raises the more general question of how U.S. courts ought to approach the problem of reconciling the text of two treaties that say much the same thing in much the same language. Significantly, the problem here is not strictly one of conflicts because the political branches only rarely ratify a later treaty that *conflicts* with a particular FCN treaty provision; it is more common, as the Second Circuit discovered in *Fotochrome*, for these actors to enact a later statute or ratify a later treaty that *replicates* and *expands upon* language and concepts set forth in an FCN treaty.  

In these situations, the issue is how best to give effect to two different attempts to achieve a particular outcome. In *Fotochrome*, the Second Circuit concluded that the more specific enactment should generally prevail. There are, however, at least two analytical frameworks that one could bring to bear on this question. First, courts could give priority to the later treaty on the same topic. This approach derives some support from Article 59 of the Vienna Convention on the Law of Treaties, which takes the position that, absent some contrary indication of party intent, courts assume that the more recent treaty on a particular topic is controlling. Alternatively, as in *Fotochrome*, courts could give priority to the more specific treaty on the same topic. This is the approach that U.S. courts have tend-

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134. In a sense, these ideas could be said to have “migrated” from the FCN treaty to other sources of federal law. See Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2005); Bruno De Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 AM. J. COMP. L. 49 (2012) (distinguishing between “legal transfers” and the softer concept of “migration of ideas”).

135. VCLT, supra note 65, art. 59(1)(a) (“[A] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty.”); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 434 (2d Cir. 2001) (discussing VCLT art. 59).

136. See Borgen, supra note 9, at 589 (“Instead of deciding which treaty controls based on the order of the conclusion of the treaties in conflict, the interpretive rule *lex specialis* focuses on the scope and precision of the treaties, giving effect to the more narrowly gauged treaty. While this interpretive norm is not used in the VCLT, *lex specialis* has traditionally been applied in conflicts between multilateral treaties of general application and in special
ed to follow.\textsuperscript{137}

The courts’ adoption of this second analytical framework has, unsurprisingly, undermined the continuing relevance of many FCN treaty provisions, including the arbitration provisions at issue in \textit{Fotochrome}. The FCN treaty is a treaty of general relations. It covers a great many topics at a fairly high level of generality. When one compares the prototypical FCN treaty provision on a particular subject to a clause taken from a specialized multilateral agreement on that same subject, it is a near certainty that the latter will be deemed to have addressed the issue with more specificity. Even if it does not, the fact that the latter treaty provision is embedded in a comprehensive international regime on the topic in question will generally lead courts to focus on the text of the specialized treaty provision rather than the more generalized treaty.

c. Trade Rights

Throughout its history, the United States has also included provisions relating to trade in its FCN treaties. The postwar treaties typically guaranteed, for example, that treaty nationals would be entitled to most-favored-nation treatment with respect to import duties.\textsuperscript{138} They provided that products imported into the territory of the other nation would be accorded national treatment in all matters affecting taxation, sale, distribution, storage and use.\textsuperscript{139} These treaties also stipulated that the state parties to the treaty would promptly publish any laws, regulations and administrative rulings pertaining to import duties, to the classification of products for customs purposes and to any restrictions on imports or exports.\textsuperscript{140} Each of these provisions, along with several others, is replicated almost word-for-word in the General Agreement on Tariffs and Trade (GATT).\textsuperscript{141} One might

\textsuperscript{137} See infra Section II.2.C (following this approach in trade cases) and note 167 (following this general approach in consular relations cases); see generally VCLT, supra note 65, art. 30 (“When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”).

\textsuperscript{138} Standard Draft, supra note 35. art. XIV(1).

\textsuperscript{139} Id. art. XVI(1).

\textsuperscript{140} Id. art. XV(1).

\textsuperscript{141} GATT, supra note 5. Article I of the GATT guarantees most-favored-nation treatment with respect to import duties. Article III of the GATT requires that imported products be accorded national treatment in all matters affecting internal taxation, sale, distribution and use. Article X of the GATT requires that state parties promptly publish
think that any attempt to reconcile the FCN treaty provisions with those of the GATT would proceed along the same path followed by the courts in the context of arbitration rights, with the more highly specialized GATT taking precedence. There are, however, two important differences between the GATT and other specialized multilateral treaties that merit attention. The first relates to the timing of its enactment. The second relates to the distinction between self-executing and non-self-executing treaties.  

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142. The Supreme Court has long distinguished between self-executing treaties, which may be invoked by litigants in U.S. courts even in the absence of implementing legislation by Congress, and non-self-executing treaties, which do not create enforceable rights under federal law unless and until Congress acts to implement the treaty. See John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT’L L. 655, 666–67 (2010). While the precise test for distinguishing between self-executing and non-self-executing treaties is unclear, it is generally accepted that FCN treaties are self-executing treaties. See *Medellin v. Texas*, 552 U.S. 491, 520–21 (2008); *Al-Bihani v. Obama*, 619 F.3d 1, 15–16 (D.C. Cir. 2010). Thus, where many modern treaties that expressly deal with individual rights are of only limited utility in domestic litigation by virtue of the fact that many of them have been declared non-self-executing, the FCN treaties operate under no such handicap. The Supreme Court recently noted, however, that the mere fact that a treaty is self-executing does not mean that treaty likewise creates private remedies. See *Medellin*, 552 U.S. at 506 n.3. In order for a plaintiff to obtain such remedies in court, the treaty in question must also create a private right of action that permits an alien plaintiff to initiate a civil suit. At least historically, the courts have concluded that FCN treaties create private rights of action for aliens in U.S. court. See David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20, 101–02 (2007). Some commentators have argued, however, that this conclusion is inconsistent with the recent statement by the D.C. Circuit that the U.S.-Iran FCN treaty “does not provide a cause of action.” Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 73–75 (2012) (quoting McKesson v. Islamic Republic of Iran, 539 F.3d 483, 491 (D.C. Cir. 2008)). The problem with this argument is that it overlooks the context in which the statement was made. What the D.C. Circuit meant was that FCN treaties have not historically been read to provide a cause of action to American plaintiffs to sue foreign defendants in American courts. Nothing in the court’s decision should be read to suggest that an Iranian national seeking to sue in American courts would similarly lack a private right of action. Indeed, in its amicus brief, the United States Government implicitly recognized this distinction when it stated: “The Treaty of Amity does not create a private right of action against Iran under the law of the United States. Nothing in the text of the treaty explicitly provides that a United States national may sue Iran in the courts of the United States (or that an Iranian national may sue the United States in Iranian courts).” Brief for United States as Amicus Curiae Supporting Appellees, McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008) (No. 07-07113), available at http://www.state.gov/documents/organization/138803.pdf. It follows, therefore, that FCN treaties continue to provide a private right of action to foreign plaintiffs in U.S. courts notwithstanding the D.C. Circuit’s decision in *McKesson*. 
The United States acceded to the GATT in 1947. In contrast to the New York Convention, which was ratified in 1970, the GATT predates many of the postwar FCN treaties. This raises the question of how, precisely, to reconcile the FCN treaty provisions and the parallel provisions set forth in the GATT. Should the bilateral treaty of general relations, which was enacted later in time, prevail? Or should the more specialized and comprehensive multilateral agreement be given priority? In this particular case, the question is resolved by a clause in the relevant FCN treaties stating that nothing in the treaties shall preclude the contracting state from taking actions specifically permitted by the GATT. Those individuals tasked with drafting the FCN treaty, in short, made clear that they wanted the more specialized multilateral instrument to prevail, thereby making it unnecessary for the courts to address the issue. Here again, the more specialized treaty will prevail over the more general one.

The second difference goes to the issue of self-execution. When Congress approved the Uruguay Round Agreements Act in 1994, it declared the GATT to be a non-self-executing treaty. This non-self-executing status raises the possibility that the trade provisions in the FCN treaty may actually prove to be more useful to foreign nationals engaged in trade with the United States than those in the GATT because the FCN, as a self-executing treaty, may be directly invoked as a source of rights in U.S. courts. A number of

143. Under United States law, the GATT was originally a U.S. executive agreement, treated as a treaty obligation. See Proclamation 2761A, 12 Fed. Reg. 8863 (Dec. 30, 1947). With the passage of the Uruguay Round Agreements Act by Congress in 1994, which legislation gave formal legislative approval to the GATT, that agreement can now be said to postdate the FCN treaty.

144. Treaty of Friendship, Commerce and Navigation, U.S.-Republic of Korea, art. XXI(3), Nov. 28, 1956, 8 U.S.T. 2217 ("The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement.").

145. Each of the states with which the United States is a party to an FCN treaty is a WTO member—and hence has ratified the GATT—except for Ethiopia, Iran, Liberia and several of the states that comprised the former Yugoslavia. With respect to these states, therefore, the FCN trade provisions control.

146. S. REP. No. 103-412, at 13 (1994) (accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)) (stating that TRIPs and other GATT agreements "are not self-executing and thus their legal effect in the United States is governed by implementing legislation").

trade claims were, in fact, brought directly under various FCN treaties in the 1960s and 1970s, and the courts were willing to entertain them at that time.\footnote{148} There is no obvious reason why such claims could not be brought today.

These claims have not, however, been brought. A comprehensive search of the Lexis and Westlaw databases failed to turn up a single reported case in which a litigant invoked the trade provision in an FCN treaty at any point over the past three decades; the last case invoking these provisions appears to have been filed in the mid-1970s.\footnote{149} There are many possible explanations for this absence of reported cases and it is impossible to know the precise reason why FCN treaty claims have not been brought. It seems at least plausible, however, that the declining visibility of the FCN treaty as a whole over this time period played a contributing role. As these treaties have become less well known, litigants may no longer think to invoke them even where they may actually offer advantages over more specialized instruments.

3. \textit{Statutory Codification}

Just as new treaties have diminished the role that FCN treaties play in modern diplomacy, the incorporation of certain FCN treaty rights into federal statutes has also contributed to the declining influence of this particular treaty regime. The Foreign Sovereign Immunities Act (FSIA), which Congress enacted in 1976, contains language specifically abrogating the sovereign immunity of foreign states and their instrumentalities when they are engaged in commercial activities connected in some way to the United States.\footnote{150} The

\footnotesize

law on the basis of GATT in federal or state courts, allowing only the National Government to raise such a challenge\textquotedblright.


\footnote{149} Japan Lines, Ltd. v. County of Los Angeles, 132 Cal. Rptr. 531 (Cal. Ct. App. 2d Dist. 1976).

\footnote{150} Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 139(f) and 1601–11 (2006). This statute was adopted \textquotedblleft[s]ubject to international agreements to which
thrust of this legislation replicates, to a significant extent, a clause included in many of the FCN treaties negotiated by the United States after the Second World War. The FCN treaty clause in question spells out when foreign states may be deemed to have waived their sovereign immunity for certain commercial activities pursued by enterprises owned or controlled by the states in question:

No enterprise of either Party . . . which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.\(^{151}\)

A careful reading of this FCN treaty provision reveals that it has been wholly supplanted by the language in the FSIA.

Consider the language describing the entities affected by the immunity provisions in the treaty and the statute, respectively. Where the FCN treaty contains a waiver of immunity from suit only for commercial “enterprises” owned or controlled by the foreign state,\(^{152}\) the FSIA abrogates the immunity of the foreign state, its agencies and its instrumentalities when they are engaged in commer-

\(^{151}\) The United States [was] a party at the time of [its] enactment,” 28 U.S.C. § 1604, and the statute’s legislative history indicates that this saving clause was included in part to preserve the effect of certain waivers of sovereign immunity set forth in various FCN treaties. H.R. REP. NO. 94-1487, at 17–18 (1976) (“Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity the bill would control; the international agreement would control only where a conflict is manifest.”). The continuing relevance of certain provisions of the FCN treaty following the enactment of the FSIA, therefore, depends upon the existence of a manifest conflict between the treaty and the statute. In Amerada Hess, the Supreme Court considered (and rejected) the argument that the U.S.-Liberia FCN treaty fit within the FSIA’s savings clause. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441–43 (1989). This decision was unquestionably correct because that treaty lacked the sovereign immunity provisions that are discussed in this Section; the treaty provision cited by the amicus in that case was the access-to-courts provision.

cial activities. The scope of the abrogation in the statute is thus broader than the scope of the waiver set forth in the treaty in that it applies to the “state” itself in addition to its “enterprises.”

This pattern continues when one examines the nature of the commercial activities that may result in a loss of sovereign immunity. Where the FCN treaty constituted a waiver of immunity from suit only for commercial activities undertaken “within the territorial limits” of the United States, the FSIA also abrogates the immunity of the foreign state in connection with commercial activities carried out elsewhere that “cause a direct effect in the United States.” Again, the statute sweeps more broadly than the treaty.

Moreover, the FSIA and the FCN treaty both address the issue of immunity from execution of judgments. Again, the FSIA offers broader and more comprehensive language than that set forth in the FCN treaty. The FCN treaty contains language stating that a state enterprise waives its immunity from “execution of judgment” when that enterprise is engaged in commercial activity. The FCN treaty makes no reference, however, to any waiver of immunity with respect to the attachment of property after the execution of a judg-

153. 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity."); 28 U.S.C. § 1603(a)-(b) (defining foreign state broadly to include the state, its agencies, and its instrumentalities).

154. Soudavar v. Islamic Republic of Iran, 186 F.3d 671, 674–75 (5th Cir. 1999) ("The limited waiver of [sovereign] immunity [set forth in the FCN treaty] . . . 'extends only to enterprises of Iran, not Iran itself.'") (quoting Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 452 (D.C. Cir. 1990); Berkowitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir. 1984)).

155. Standard Draft, supra note 35, art. XVIII(3).

156. 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").


158. The treaty also references a waiver of sovereign immunity with respect to “taxation.” This provision has been supplanted not by the FSIA, but rather by Section 892 of the U.S. Tax Code, which requires foreign states to pay U.S. income tax on any income "derived from the conduct of any commercial activity (whether within or outside the United States)." 26 U.S.C. § 892(a)(2) (2006).

159. Standard Draft, supra note 35, art. XVIII(3).
ment. The FSIA, by contrast, contains language that abrogates the immunity of the foreign state with respect to both the execution of judgments and attachment of property in aid of such execution post-judgment, provided that the judgment related to claims arising out of commercial activity by the foreign state. Here again, one can see that the FSIA both mirrors and expands upon the text of the FCN treaty provision.

Finally, the FSIA addresses whether and in what circumstances sovereign immunity precludes a pre-judgment security attachment in property owned by a foreign state. The statute permits such attachment only where the foreign state has “explicitly waived its immunity.” Where the immunity provision in the FCN treaty retains any relevance following the enactment of the FSIA, it would be as an explicit waiver of foreign sovereign immunity with respect to pre-judgment security attachment (“other liability”) of property owned by foreign state-owned commercial enterprises, thereby permitting plaintiffs to attach such property before obtaining a judgment. The weight of authority is, however, strongly against such an interpretation. In summary, the effect of the enactment of the

161. 28 U.S.C. § 1610(b) (“[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if... the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of [the commercial activity exception].”).
162. Id. § 1610(d)(1)–(2); see also Libra Bank Ltd. v. Banco Nacional de Costa Rica, 676 F.2d 47, 49 (2d Cir. 1982) (discussing meaning of explicit waiver); Venus Lines Agency v. CVG Industria Venezolana de Aluminio, C.A., 210 F.3d 1309, 1312 (11th Cir. 2000) (also discussing meaning of explicit waiver).
163. Standard Draft, supra note 35, art. XVIII(3) (“[N]o [commercial] enterprise of either [state]... shall... claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.”) (emphasis added).
FSIA was to render the sovereign immunity provisions set forth in the FCN treaty largely irrelevant. By embedding a commercial activity exception into a comprehensive statutory framework designed to address all issues relating to foreign sovereign immunity, and by utilizing broader language in the statutory scheme than in the case of the treaty, Congress effectively displaced the immunity waiver provisions contained in more than a dozen postwar FCN treaties. Unsurprisingly, to the extent that this issue of state immunity arises in contemporary litigation, it is typically addressed by reference to the text of the FSIA. The sovereign immunity waiver contained in the FCN treaty is only rarely invoked and, when it is, the courts tend to ignore it and to focus instead on the text of the FSIA.165

The foregoing analysis has shown how FCN treaty provisions across a wide range of areas—establishment, inheritance, investment protection, arbitration, trade and foreign sovereign immunity—have been incorporated into other sources of law in the United States over the past fifty years. To this list could be added (1) intellectual property rights, which are now the subject of a number of specialized multilateral treaties to which the United States is a party;166 (2) consular rights, which are now largely covered by the Vienna Convention on Consular Relations;167 and (3) navigation rights, which have

165. See Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp., No. 11 Civ. 0955, 2011 U.S. Dist. LEXIS 136018 (S.D.N.Y. Nov. 28, 2011) (noting litigant’s invocation of sovereign immunity provision in U.S.-Ireland FCN but resolving case on the basis of the FSIA); Soudavar v. Islamic Republic of Iran, 186 F.3d 671 (5th Cir. 1999) (same result on U.S.-Iran FCN treaty). But see Calgarth Invs. v. Bank Saderat Iran, No. 95 Civ. 5332, 1996 U.S. Dist. LEXIS 5562, at *14 (S.D.N.Y. Apr. 25, 1996) (“Because BSI is subject to suit on the basis of consent under [the U.S.-Iran FCN treaty] ... [i]here is no need to consider the applicability of the FSIA’s commercial activity exception.”).

166. The language contained in most FCN treaties relating to the protection of intellectual property is replicated almost word-for-word in the Paris Convention for the Protection of Industrial Property, which has in turn been incorporated by reference into the WTO’s TRIPS Agreement. Compare Standard Draft, supra note 35, art. X(1), with Paris Convention for the Protection of Industrial Property, art. 1(2), 2(1), Mar. 20, 1883, as last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, and Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 2(1), Dec. 15, 1973, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 ILM 1197. Since every FCN treaty partner except for Ethiopia and Macedonia is a party to either the Paris Convention or the TRIPS Agreement, the FCN treaty provision addressing this issue is of little continuing relevance.

167. A number of foreign nationals in the United States have challenged their death sentences by arguing that they were never given notice of their right to contact a consular official upon their arrest, as required under the VCCR. See Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. Although the language requiring local officials to provide this notice was absent from the
been largely incorporated into a number of federal statutes. To my knowledge, there exists no other treaty regime that has been undermined by such a range of developments. The decline of the FCN treaty thus serves as a unique and useful case study of the ways in

classic postwar FCN treaty, certain plaintiffs were able to utilize provisions in an earlier generation of FCN treaties that guaranteed most-favored-nation treatment in the field of consular relations to obtain the same benefits. See Republic of Paraguay v. Allen, 134 F.3d 622, 626 n.2 (4th Cir. 1998) (discussing most-favored-nation provision in Article 12 of the 1859 U.S.-Paraguay FCN treaty as alternative basis for consular notification claim). Since the United States had entered into several bilateral consular conventions that contained the language in question, the FCN treaty provision thus permitted the plaintiffs to rely upon virtually identical language to that contained in the VCCR as a basis for the claim. In one well-known case, the Paraguayan government sought to halt the execution of one of its nationals by alleging violations of both the VCCR and an FCN treaty. See Brief for Plaintiffs-Appellants at 6, Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998), (No. 96-2770). In denying a petition for a writ of certiorari in this case, however, the Supreme Court made no reference to the FCN treaty. See Breard v. Greene, 523 U.S. 371 (1998). Instead, the majority and the dissenting opinions focused exclusively upon the text and commentary relating to the VCCR. Id, at 373 (majority opinion); id. at 379 (dissenting opinion). They did so notwithstanding the fact that the VCCR contained a savings clause and notwithstanding the fact that the petitioner’s brief asserted rights under both the FCN treaty and the VCCR. See id. (discussing claims under VCCR but making no mention of any FCN treaty); VCCR, supra, art. 73(1) (“The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them.”); Brief for Plaintiffs-Appellants, Paraguay v. Allen, 134 F.3d 622, (4th Cir. 1998) (No. 96-2770) (referencing FCN treaty on eight occasions). The Court’s approach to this case is thus consistent with the approach followed by the Second Circuit in Fotochrome. Where a specialized treaty replicates and expands upon a particular provision set forth in an omnibus agreement, then the former will typically serve as the touchstone in any subsequent legal analysis. The mere fact that a particular article set forth in the VCCR supplants this particular provision set forth in an FCN treaty, however, does not always mean that the VCCR necessarily supplants all prior bilateral treaties dealing with consular relations. A number of countries, including the United States, continue to negotiate bilateral consular relations treaties to supplement the provisions set forth in the VCCR because they believe that these bilateral consular treaties generally provide for more robust protection for their consuls. Stephen Kho, A Study of the Consular Convention Between the United States and the People’s Republic of China, 6 CONTEMP. ASIAN STUD. SERIES 1, 12–13 (1996). In cases where a bilateral treaty provision is more specific—where it furthers a shared purpose more forcefully than a multilateral convention—then this provision should be given effect.

168. Under U.S. law, discriminatory duties are automatically assessed on goods imported to the United States in a foreign vessel unless the President makes a finding that the foreign government in question does not assess such duties on goods imported in U.S. vessels, in which case the United States will not assess any discriminatory duties. See 46 U.S.C. §§ 60502–03 (2006). A similar approach characterizes the U.S. approach to assessing special tonnage taxes and so-called “light money.” See 46 U.S.C. §§ 60302–04 (2006). This statutory scheme means that foreign vessels originating in nations that do not have an FCN treaty with the United States may still be entitled to some of the same rights as vessels originating in nations that do have such a treaty.
which treaty provisions can fade into near-irrelevance, undone by subsequent events, even as the state parties to the treaty in question continued to support the treaty’s general aims.

These developments—combined with the fact that the United States has not negotiated any new FCN treaties in over forty years—have led litigants and courts increasingly to disregard these treaties as a source of rights.169 To be sure, there are some areas in which these treaties continue to be relevant. The United States will, for example, issue certain types of visas to individuals whose home countries have entered into an FCN treaty with the United States.170 Non-resident alien dependents occasionally invoke these treaties to preempt discriminatory state workers’ compensation laws.171 The access-to-courts provision is occasionally invoked (to little effect) in contemporary litigation.172 And a number of foreign corporations continue to invoke “employee choice” provisions in various FCN treaties as a

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169. See supra Parts II.1–II.3.


171. See, e.g., Mizugami v. Sharin W. Overseas, Inc. 615 N.E.2d 964 (N.Y. 1993); see also infra note 221 (collecting sources).

172. This provision is, for example, sometimes cited in the context of a foreign national protesting a forum non conveniens dismissal. See, e.g., King v. Cessna Aircraft Co., 562 F.3d 1374, 1382–83 (11th Cir. 2009). In this context, however, the provision rarely affects the outcome because the provision guarantees only national treatment and because U.S. courts may take into account the proximity of a U.S. national’s residence to the forum in deciding whether to dismiss the case. See, e.g., Abad v. Bayer Corp., 563 F.3d 663, 666 (7th Cir. 2009); Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 72–73 (2d Cir. 2003); see also Allan Jay Stevenson, Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff’s Rights, 13 HASTINGS INT’L & COMP. L. REV. 267 (1990); Christopher A. Whytock, The Evolving Forum Shopping System, 96 CORNELL L. REV. 481, 526–27 (2011). This provision is also sometimes cited in support of the proposition that U.S. courts should recognize judgments rendered by the national courts of our treaty partners. See, e.g., Otos Tech Co. v. OGK Am., Inc., 653 F.3d 310, 312 (3d Cir. 2011); Daewoo Motor Am. v. Gen. Motors Corp., 459 F.3d 1249, 1259 (11th Cir. 2006). This is an extraordinary, and wholly unsupported, reading of the treaty text. By its terms, this provision grants to treaty nationals only the right to sue and be sued in the courts of the other state on the same terms as that state’s own citizens; it says nothing about the right to enforce foreign judgments. See Jerome A. Hoffman, Recognition by Courts in the Eleventh Circuit of Judgments Rendered by Courts of Other Countries, 29 CUMBA L. REV. 65, 92 (1999); Robert R. Wilson, Access-to-Courts Provisions in United States Commercial Treaties, 47 AM. J. INT’L L. 20 (1953).
defense in employment discrimination litigation.\textsuperscript{173} These exceptions notwithstanding, the overall portrait of the FCN treaty is one of a regime in decline.\textsuperscript{174} The conventional wisdom that these treaties are invoked as a source of rights less and less frequently is largely correct.\textsuperscript{175}

III. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION AS MODEL

If past is prologue, one would expect the steady decline in the relevance of the FCN treaty regime to continue. As the United States enters into additional specialized international agreements, and as it enacts additional comprehensive statutory schemes, these new sources of law are likely to supplant existing FCN treaty provisions on the same topic. Assuming that the United States chooses not to resume negotiating FCN treaties, and assuming that it declines to negotiate amendments to those FCN treaties currently in existence, the continued decline of the FCN treaty regime in the U.S. legal system


\textsuperscript{174} Other treaty provisions that have been successfully invoked over the past fifty years are of only limited relevance to most litigants today. There was, for example, a case brought in the 1960s in which an Argentine national successfully invoked the U.S.-Argentina FCN treaty to avoid being drafted into the U.S. army. See, e.g., Vazquez v. Attorney Gen. of U.S., 433 F.2d 516 (D.C. Cir. 1970). With the abolition of the draft in 1973, however, this provision is obviously of limited salience today. In 2000, the Spanish government relied on an FCN treaty to block U.S. treasure hunters from excavating a sunken Spanish warship off the coast of Virginia. Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000). The treaty provision in question, however, is relevant exclusively to the Spanish government; it may not be invoked by individual Spanish citizens or by any other government with which the United States has negotiated an FCN treaty. \textit{Id}. at 642; Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1174 n.8 (11th Cir. 2011) (noting uniqueness of treaty provision in question).

\textsuperscript{175} See supra note 149 and accompanying text (discussing declining use of trade provisions); supra note 165 and accompanying text (discussing declining use of sovereign immunity provisions).
seems likely to continue apace. 176

Yet even if this particular type of treaty has been largely supplanted as a source of legal rights in the United States, it may yet serve as an invaluable point of reference for scholars and policymakers. In particular, these treaties offer important insights into how treaty rights might be coordinated across specialized treaty regimes (their “coordination function”) and how these rights might be better balanced within a single regime (their “balancing function”). 177 To date, however, their capacity to shed light on these issues has gone largely unrecognized.

This Part seeks to close this gap by applying insights derived from the foregoing analysis of the FCN treaty to two of these debates. It first explains how a better understanding of these treaties’ coordination function could serve to enrich discussions about potential solutions to the problem of “fragmentation” in the international legal order. It then explains how a better understanding of these treaties’ balancing function could lead diplomats to revise the current draft of the model bilateral investment treaty to ensure that these treaties offer a more balanced set of benefits to citizens of developing countries.

1. Coordination amid Fragmentation

When it comes to international legal regimes, greater specialization is frequently presented as a normative good. A more specialized legal regime is said, for example, to offer more nuance with respect to the stated rules in a given area of law and greater clarity to those affected by them. 178 The consensus seems to be that special-

176. Although there are scenarios in which these agreements may regain some of their lost prominence—the enactment of new legislation that expressly discriminates on the basis on alienage, the incorporation of FCN treaties by reference into new legislation—none of these scenarios seems particularly likely as of this writing.

177. Although this topic is not discussed in any length in this Part, FCN treaties may also serve as a useful model for how to aggregate issues into a single treaty regime. There may, for example, be a number of small issues that, standing alone, would not warrant the time and expense of negotiating a specialized treaty. Viewed together, however, it may be possible to pull together a number of such issues into a single wide-ranging agreement that offers significant benefits to nationals of the signatory nations.

ized treaties are simpler, more effective and easier to negotiate than their generalist counterparts. Andreas Paulus offers the following summary of the attitudes that have led to this preference:

> The increasing compartmentalization of international society requires specifically tailored solutions to common and indeed collective action problems of states. Legal regimes need to be specific, not general. The lofty abstractness of international law leads it to oblivion. Rather, international law ought to be divided up into different issue areas: criminal law, trade law, human rights law, etc. ‘General’ international law has all but ceased to exist, or matter.

The received wisdom, therefore, is that specialized international agreements offer significant advantages over treaties of general relations such as the FCN treaty.

In recent years, however, a number of scholars have voiced concern that specialization may have undesirable consequences. Specifically, these scholars have argued that an international legal regime comprised exclusively of specialized multilateral agreements may lead to the fragmentation of the international legal order. In a fragmented legal universe, there exists the potential for a loss of perspective to the extent that “specialized law-making and institution-building tends to take place with relative ignorance of legislative and

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institutional activities in the adjoining fields and of the general principles and practices of international law.’’

The FCN treaty—or a new treaty regime modeled upon it—could fill this role. In particular, these treaties could play an important role in coordinating the workings of various specialized treaty regimes.

Consider international economic law, which could be said to encompass the movement of goods, services, people and capital across national borders. The movement of goods and services is currently addressed in two separate but related agreements: the GATT and the General Agreement on Trade in Services. The movement of capital is largely regulated by thousands of BITs. The movement of people is addressed by several different treaty regimes, including the Convention on Migrant Workers. This variegated treatment, to be sure, facilitates the development of rules and norms that are well-suited to particular areas of law, but it also makes it easy to lose sight

182. Koskenniemi, supra note 8, at 11.

183. Christopher Borgen, Resolving Treaty Conflicts, 37 GEO. WASH. INT’L L. REV. 573, 574 (2005) (“After the successes of the last fifty years, international law may become increasingly dysfunctional in the first decades of the twenty-first century due to the sheer number of . . . treaties and the lack of useful, principled, methods to resolve conflicts between them.”); id. at 575 (“[T]reaty conflicts are a key underlying cause of fragmentation and . . . the current rules are inadequate to provide clear, systematic solutions to treaty conflicts.”).


186. See Eric V. Youngquist, United States Commercial Treaties: Their Role in Foreign Economic Policy, 2 STUD. L. & ECON. DEV. 72, 76 (1967–1968) (“The [FCN treaty] . . . served both as a symbol of peaceful relations and a protector of vital commercial interests. In a world of exclusively bilateral relations, it was virtually the sole instrument for important peacetime agreements between nations.”).


of the ways in which these related matters intersect.\textsuperscript{189} An FCN treaty, by comparison, offers a model for how to deal with all of these issues in a single text; these agreements simultaneously address the movement of goods, the provision of services, the transfer of capital across national borders and the immigration of persons.\textsuperscript{190} These treaties thus offer a model for thinking seriously about the intersections and interrelationships among these issues in a way that more specialized agreements do not.

Wide-ranging treaties such as the FCN treaty can also help to avoid and mitigate conflicts between treaty regimes. In this capacity, the purpose of a generalist treaty is not to serve as a substitute for specialized multilateral regimes but, rather, to serve as a coordinating document that helps to navigate the relationships between them.\textsuperscript{191} One might, for example, consult an FCN treaty to examine the relationship between its trade provisions and its investment protection provisions to gain insights into how to resolve a conflict between the GATT and a particular BIT.\textsuperscript{192} Alternatively, one may take advantage of the fact that these treaties frequently deploy common definitions of key terms, which could shed light on the relationship between different parts of that document and, by extension, on the

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\textsuperscript{189} Phillipe Sands, \textit{Treaty, Custom and the Cross-Fertilization of International Law}, 1 \textit{Yale Hum. RTS. & Dev. L.J.} 85, 88 (1998) (“The world of international law is invariably presented as one in which the various substantive subject matters [sic] areas exist in quasi-hermetrical isolation: ... taught and treated as discrete areas, subject to their own norms and institutional structures. The separate subject matter areas are treated as a part of general international law, but often presented as organically disconnected from each other. The whole is made up of a collection of fragmentary parts, the implication being that the different parts only seldom, if ever, connect.”) (citation omitted).

\textsuperscript{190} See Herman Walker Jr., \textit{Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice}, 5 \textit{Am. J. Comp. L.} 229, 244 (1956).

\textsuperscript{191} See \textit{Int’l Chamber of Commerce}, supra note 28, at 8 (observing that “these FCN treaties, because of the general language in which they are couched, do not obviate the need to cover the details of the respective relationship by specialized treaties”); Eric V. Youngquist, \textit{United States Commercial Treaties: Their Role in Foreign Economic Policy}, 2 \textit{Stud. L. & Econ. Dev.} 72, 89 (1967–1968) (“Ideally, [FCN treaties] should be supplemented by more detailed agreements in special fields such as taxation, consular matters, and arbitration . . . .”).

\textsuperscript{192} See Bodansky & Crook, supra note 104, at 774 (observing that the rise of specialized regimes might serve nevertheless to “heighten[ ] the importance of general rules that can fill gaps and play a unifying role in international law”); Koskenniemi, supra note 8, ¶ 99, at 54–55 (“The special rule in the Protocol has become an independent and authoritative representative of what the Convention means in terms of the obligations it provides. And yet, the Convention continues to express the principles and purposes that also affect the interpretation and application of the Protocol.”).
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possible meaning of that term as used in two different specialized treaties regimes.\(^{193}\) In these ways, FCN treaties may help to forge bonds between various specialized regimes and, in so doing, coordinate the exercise of the rights granted by them.

The case for looking to FCN treaties as a model for how to coordinate various specialized regimes is buttressed by the fact that these treaties have served a coordination function in the past. These treaties were, for example, well-known to diplomats in Europe and the Americas throughout the nineteenth and early twentieth century.\(^{194}\) In this capacity, FCN treaties and other treaties of general relations provide the connective tissue that links together the specialized agreements negotiated in the 1950s and 1960s; as discussed above, many of these agreements drew upon the FCN treaties as a source.\(^{195}\) As newly independent nations from Africa and Asia began to join the community of states, however, and as the number of issues deemed appropriate for international agreement expanded, this connective tissue began to fray. Many of these new states were not party to any FCN treaty. And many of the newer specialized treaty provisions had no analog in the earlier generation of agreements. As a consequence, countries could rely on fewer and fewer treaties of this type to provide textual links between specialized multilateral treaty regimes.

In this light, the bilateral FCN treaty is still conceptually useful to scholars and policymakers because it offers—at least in theo-

\(^{193}\) Obviously, FCN treaties may only serve this function when disputes arise between nations that are party to both a bilateral FCN treaty and a number of more specialized treaty regimes. Even given these constraints, however, they offer a more promising approach than most alternatives. See Borgen, supra note 9, at 584–87.

\(^{194}\) See Republic of Paraguay v. Allen, 134 F.3d 622, 626 n.2 (4th Cir. 1998) (discussing MFN clause in U.S.-Paraguay FCN treaty); Nussbaum, supra note 58, at 201 (“[T]reaties of commerce acquired in the nineteenth century a special significance for international law through the customary use of certain stock clauses which, in a measure, were a substitute for norms of universal international law.”); Walker, supra note 1, at 805.

\(^{195}\) This attribute is clearly apparent, for example, in contemporary discussions relating the drafting of the VCCR. See, e.g., United Nations Conference on Consular Relations, Mar. 4–Apr. 22, 1963, Summary records of first plenary meeting, ¶ 55, U.N. Doc. A/CONF.25/16 (Mar. 4, 1963) (“An analysis of those bilateral consular conventions showed a great number of identical or similar provisions. Through the operation of the most-favoured-nation clause, a series of those provisions had become ever more generalized. Together with the generally accepted rules of customary international law, those provisions formed a body of rules of consular relations which was already widely applied by States.”); see also Luke T. Lee, Vienna Conventions on Diplomatic and Consular Relations 44 (1966) (noting the importance of the Franco-British Treaty of Commerce of 1860 as a commercial treaty containing provisions relating to consular relations).
ry—a partial solution to the problem of fragmentation in an increasingly multilateral international legal order. Such treaties offer a model of how to forge bonds between specialized agreements. In turn, those bonds may help to ameliorate the problems caused by the fragmentation of the international legal order. The solution to the fragmentation problem, in other words, may not lie in efforts to broaden the scope of specialized agreements currently under negotiation. It may lie instead in efforts to forge links between these agreements by negotiating new treaties that coordinate their operations.

2. Balancing the Bilateral Investment Treaty

While FCN treaties can serve as a model for how to coordinate treaty rights across regimes, they can also serve as a model for how to balance treaty rights within a single regime. In some specialized regimes, the exclusive concern with one particular issue may, over time, lead to criticism that the regime’s focus is impeding its effectiveness. What the treaty may be said to lack, in other words, is a sense of balance. In these cases, the wide-ranging FCN treaty may offer a model for how to expand the number of issues addressed by the more specialized agreement, thereby restoring the missing balance to that regime.

One treaty regime that is arguably out of balance at the present moment is the bilateral investment treaty (BIT). Although the BIT is often described as the “successor” to the FCN treaty, this description tends to overstate the similarities between the two regimes. While the FCN treaty was a treaty of general relations that covered a range of issues, the modern BIT is concerned almost exclusively with protecting the property rights of treaty nationals investing overseas. The transition from the FCN treaty to the BIT, moreover, represents a transition from a treaty regime concerned with protecting individuals to one concerned with protecting investment. The broad swath of rights granted by the FCN treaty, for example, vest in people and companies; the language in typical postwar FCN treaty stipulates that “nationals and companies of either High Con-

196. See supra note 113 and accompanying text.

197. Note that there are immigration provisions and a few others, but nothing like the range of the FCN treaty.

198. See Pamela B. Gann, The U.S. Bilateral Investment Treaty Program, 21 Stan. J. Int’l L. 373, 374 (1985) (“Unlike the FCN treaties which operate in terms of rights and obligations with respect to nationals and companies, the BIT establishes rights and obligations with respect to investments per se.”).
tracting Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain.” The rights granted by the BIT, by contrast, vest in investments; the language in a typical BIT guarantees national treatment with respect to “existing or new investments in its territory, and associated activities related to these investments.” In practice, therefore, the legal benefits to be derived from these treaties flow disproportionately to those in the developed world.

One could argue that the absence of meaningfully reciprocal legal protections in many BITs is irrelevant because the host states benefit economically from the inflow of capital stimulated by these agreements. This is the so-called “grand bargain” offered by the BIT—nationals in capital-exporting states obtain legal protection for their investments; nationals in capital-importing states benefit from the economic growth resulting from the influx of foreign capital. In recent years, however, a number of empirical studies have called into question whether BITs do, in fact, attract investment from abroad. If BITs do not attract foreign capital, and hence do not

199. Walker, supra note 1, at 806 (stating that the FCN treaty is “concerned with the protection of persons, natural and juridical, and of the property and interests of such persons”).

200. To be sure, the term “investment” set forth in most BITs is extremely broad. The 2004 U.S. model BIT, for example, defines “investment” to mean “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.” Notwithstanding the breadth of this definition, it is unlikely that these treaties could be invoked by workers, students, tourists, legal permanent residents or others who have not made any formal “investment” in the host country within the meaning of the treaty. See U.S. DEP’T OF STATE, TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [COUNTRY] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, art. I (2004).


202. In particular, critics have argued that the BIT is a one-sided agreement that grants
promote economic growth in capital-importing states, then the lopsided nature of the legal protections in the BITs becomes increasingly difficult to justify. If subsequent studies confirm these empirical results, less developed countries may conclude that it is in their best interest to decline to enter into any additional BITs with their wealthier counterparts. They may even decide to terminate those treaties that are currently in force.

If a BIT offered a more balanced mix of rights, however, then this calculus would change. This insight was, tellingly, recognized by those individuals at the State Department tasked with negotiating FCN treaties after World War II. As Herman Walker, the architect of the FCN treaty program, noted in 1956:

An FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations. While conclusion of a treaty means perforce that both sides concour on the mutual desirability of investment protections, in the case of a country having little or no capital to export the legal rights vouchsafed investors can appear on their face to constitute a lopsided bargain unless balanced by rights utilizable in actual practice by that country’s own citizens. Provisions on matters such as visa rights for merchants, and rights for citizens of humble station to work in the common occupations and enjoy workmen’s compensation... can thus assume material significance in the process of reaching a meeting of minds on purely “investment” protection to developed country investors without generating much by the way of benefit for developing country host states in terms of increased investment flow. See Stiglitz, supra note 11; Jason W. Yackee, Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence, 51 Va. J. Int’l L. 397, 405–14 (2011) (surveying empirical studies examining the relationship between BITs and FDI and ultimately concluding that BITs do not meaningfully affect FDI decisions). But see Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, 33 World Dev. 1567 (2005) (suggesting that BITs do increase FDI); Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain, 46 Harv. Int’l L.J. 67, 111 (2005) (arguing that U.S. BITs attract FDI but that BITs negotiated by other countries do not).
questions.\textsuperscript{203}

This analysis suggests that agreements focused on protecting the property rights of foreign investors to the exclusion of most other issues may not be in the long-term best interest of the capital-exporting states. If developing states come to feel that they have struck a "lopsided bargain," then there is a strong likelihood that these states will eventually come to rethink the desirability of the BIT.

In order to ensure the long-term viability of the investment treaty regime, therefore, developed states such as the United States should consider negotiating more wide-ranging investment agreements that are more meaningfully reciprocal.\textsuperscript{204} Specifically, treaty drafters should look to an earlier generation of treaties—the FCN treaty—that sought to protect the rights of foreign investors alongside the rights of workers. To again quote the architect of the postwar FCN treaty program:

In a real sense . . . the FCN treaty as a whole is an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist. A specialized "investment agreement" based on a narrower premise would be to that extent unrealistic and inadequate.\textsuperscript{205}

If the BIT were to broaden its scope and become less specialized and more meaningfully reciprocal—if it were, in short, to look more like

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205. Walker, supra note 203, at 244–45; see also William Adams Brown, Jr., Treaty, Guaranty, and Tax Inducements for Foreign Investments, 40 AM. ECON. REV. 486, 486 (1950) ("The negotiation of [FCN] treaties is a time-consuming process and it is often suggested that their investment provisions should be segregated and incorporated in separate investment treaties while we are negotiating FCN treaties at our leisure. I think this would be unwise . . . Investment treaties . . . should not be thought of as in any way substitutes for FCN treaties, since there is hardly a provision in a modern FCN treaty that is not of direct or indirect importance to investors.").
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an FCN treaty—then it may actually become more effective at achieving its stated end.

To be sure, a number of scholars have previously argued that rights not specifically related to investment protection, such as human rights, should be written into the BITs.206 In many cases, however, these scholars seem to be unaware of the full scope of provisions set forth in the FCN treaty.207 They seem unaware, in other words, that there already exists a bilateral agreement (the FCN treaty) that guarantees that property belonging to foreign nationals shall be granted “equitable treatment” and “the most constant protection”208 even as it grants those same individuals the right to “enjoy liberty of conscience,”209 to “hold private and public religious services”210 and the right to “reasonable and humane treatment” if arrested.211 Bringing this type of treaty into the dialogue thus has the potential to enrich the debate over the optimal allocation of rights in a BIT.212


207. See Choudhury, supra note 206; Sheffer, supra note 206. This oversight is not limited to scholars who advocate for more wide-ranging BITs. See Pierre-Marie Dupuy, Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 46–55 (2009) (Dupuy et al., eds.) (discussing the origins of the relationship between human rights and international investment law without making any reference to FCN treaties); Jasper Krommendijk & John Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 425 n. 12 (2009) (Dupuy et al., eds.) (observing that “[h]uman rights are barely included in international investment agreements” without mentioning the many FCN treaties negotiated by the United States that contain language pertaining to investment protection as well as human rights).

208. Standard Draft, supra note 35, art. I, VI.

209. Id. art. II(2).

210. Id.

211. Id. art. III(2).

212. A number of international organizations also seem to be unaware of the FCN treaty’s relevance in this respect. In 2005, for example, the International Institute for
In considering how the U.S. model BIT might be revised to make it more meaningfully reciprocal, along the lines of the FCN treaties of yore, policymakers should bear three principles in mind. First, the new language should not simply duplicate legal protections already vouchsafed by other international treaties. If these protections are already guaranteed elsewhere, adding them to the BIT will not serve to make it more balanced. Second, any new language should focus primarily on legal protections that would be useful to foreign nationals living and doing business in developed states such as the United States. The treaty drafters should not, in other words, focus solely upon the interests of U.S. nationals operating abroad. Third, and finally, the new language should look to past treaty practice as a means of ensuring its political viability. The very fact that the United States has granted certain legal protections to foreign nationals in the past—and continues to grant them to many such persons pursuant to those FCN treaties that remain in force—undercuts any argument that these proposals are unrealistic or otherwise politically impossible to achieve. To be sure, adherence to these principles will likely mean that the changes to the BIT regime are likely to be more incremental than revolutionary. It will also mean, however, that these changes stand a realistic chance of being adopted.

With these principles in mind, the first logical step in making the model BIT devised by the United States more balanced would be to expand the language relating to the right of entry. Under current

Sustainable Development (IISD) published a lengthy report that criticized the BIT for being overly focused on just one goal—protecting foreign capital—to the exclusion of all others. AARON COSBEY, HOWARD MANN, KONRAD VON MOLTKE & LUKE ERIC PETERSON, IISD, MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS’ HANDBOOK (2005). IISD called upon treaty-makers to include in their treaties language requiring that foreign investors protect “human rights” and uphold “core labour standards.” Supra, art. 14(b)–(e). In advancing these proposals, however, IISD made no reference to an earlier generation of FCN treaties that addressed human rights and labor rights alongside those relating to the protection of foreign capital. In addition, the United Nations Center for Trade and Development (UNCTAD) has for years published a list of all of the bilateral investment treaties currently in existence. See U.N. Conference on Trade and Development, Trends in International Investment Agreements: An Overview, 22 fig. 2, U.N. Doc. UNCTAD/ITE/IIT/13 (1999). This list inexplicably omits FCN treaties, notwithstanding the fact that they contain a number of provisions specifically designed to protect the rights of foreign investors. Jason Webb Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, 33 BROOK. J. INT’L L. 405, 439 (2008) (discussing omission of FCN treaties from list).

213. See VANDEVELDE, supra note 105, at 363 (“The entry and sojourn provisions of the modern FCNs . . . conferred direct and immediate benefits on U.S. treaty partners. Treaty provisions conferring nationals of a treaty partner the right to enter and remain in the United States provided a benefit to these foreign nationals that was useful and that they may not
law, an individual who is a national of a state with which the United States has negotiated a BIT may be admitted to the United States as a “treaty investor” on an E-2 visa.\textsuperscript{214} This provision is obviously of limited use to many individuals in capital-importing states who lack the ability to make substantial investments in the United States. There is no reason, however, why the entry provisions must be limited in this way.\textsuperscript{215} A national who resides in a nation with which the United States has negotiated an FCN treaty, for example, may be admitted to the United States either as a “treaty investor” on an E-2 visa or as a “treaty merchant” on an E-1 visa.\textsuperscript{216} Significantly, the criteria for obtaining an E-1 visa as a treaty merchant require only a showing that one is engaged in substantial trade with the United States. Whether one has invested a substantial amount of capital in the United States is irrelevant. If the United States were to revise the text of its model BIT to permit the issuance of treaty merchant visas to more foreign nationals, this would serve to make future treaties of this type more meaningfully reciprocal. Such a change would give individuals who might otherwise lack capital the ability to live and

\textsuperscript{214} In order to qualify for an E-2 visa as a treaty investor, the applicant must be a national of a country with which the United States has an FCN treaty or, alternatively, if the applicant is a corporation, then at least fifty percent of the corporation’s stock must be owned by treaty nationals. In addition, the applicant must have invested (or be actively in the process of investing) a substantial amount in a real and operating commercial enterprise. The investment must, moreover, be more than one solely to earn a living. Finally, the applicant must be in a position to “develop and direct” the enterprise and, if the applicant is an employee, must be coming to work in an “executive” or “supervisory” capacity or must possess skills that are “essential” to the firm’s operations in the United States. See U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 9, VISAS, (9 FAM §41.51) (2010), nn. 1.2, 3.1; see also Catherine Sun, The E-2 Treaty Investor Visa: The Current Law and the Proposed Regulations, 11 AM. U. J. INT’L L. & POL’Y 511 (1996).

\textsuperscript{215} There is no principled reason why treaty nationals whose home countries have negotiated BITs with the United States should not also be eligible for admission to the United States as treaty merchants; indeed, the U.S.-Poland BIT contains language that allows for the issuance of treaty merchant visas to Polish nationals.

\textsuperscript{216} In order to qualify for an E-1 visa as a treaty trader, the applicant must be a national of a country with which the United States has an FCN treaty or, alternatively, if the applicant is a corporation, then at least fifty percent of the corporation’s stock must be owned by treaty nationals. In addition, there must be substantial trade between the firm in the United States with which the visa applicant intends to work and firms in the treaty country. The applicant must also be coming to work in an “executive” or “supervisory” capacity or must possess skills that are “essential” to the firm’s operations in the United States. See U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 9, VISAS, (9 FAM §41.51) (2010), nn. 1.2, 3.1.
work in the United States.\footnote{217}

Second, the model BIT should be revised to restore a number of individual legal protections that are guaranteed by the FCN treaty but that have not been incorporated into the model BIT. This model treaty should, for example, guarantee national treatment with respect to systems of social insurance such as social security.\footnote{218} In addition, it should guarantee national treatment with respect to the payment of workers’ compensation because, somewhat surprisingly, a number of states in the United States continue to discriminate against non-resident alien dependents in the payment of workers’ compensation benefits.\footnote{219} In the words of one treatise:

The workers’ compensation laws in all but nine states have special provisions for nonresident alien dependents. A few states expressly include nonresident aliens on equal terms with other dependents, some exclude them from benefits altogether, while most of the rest provide for reduced benefits or the commutation of benefits to a lump sum on a reduced bases \textit{[sic]}, and many restrict the classes of beneficiaries.\footnote{220} Courts have upheld these laws against equal protection chal-

\footnotetext{217}{While such a change would also benefit U.S. nationals who wish to work overseas, these individuals have historically faced far fewer challenges in obtaining visas than individuals from other nations who wish to live and work in the United States. The primary beneficiaries would thus be individuals who reside in the treaty partner state.}

\footnotetext{218}{Standard Draft, \textit{supra} note 35, art. IV(2). Such a provision would also be particularly useful because the Social Security Act currently requires, among other things, that foreign nationals be residents of the United States for five years before they become eligible to receive these benefits. The treaty provision granted national treatment with respect to access to social security was not discussed above as a right of continuing utility under the FCN treaty because various amendments to the Social Security Act adopted by Congress in the 1960s stated that benefits could not be paid to aliens unless they had been admitted to the United States for permanent residence and had resided in the United States for at least five years. See Sullivan Study, \textit{supra} note 22, at 95. Since these amendments postdated the ratification of all of the FCN treaties containing the social security provision, the latter statute would take precedence over the earlier treaty pursuant to the last-in-time rule. If the United States were to include this provision in a newly-negotiated treaty, however, then the latter treaty would prevail and the contrary earlier statute imposing restrictions on the ability of aliens to obtain social security benefits would have to give way.}

\footnotetext{219}{Standard Draft, \textit{supra} note 35, art. IV(1).}

lenges on the ground that they discriminate against non-resident aliens who, by virtue of their lack of physical presence in the United States, are not entitled to protection under the U.S. Constitution. Their presence in a BIT, therefore, would offer significant benefits to treaty nationals who would otherwise have no defense against the application of a state law that is facially discriminatory.

Finally, the model BIT should be revised to make explicit the right of aliens to inherit property left to them by decedents living in the United States. Even after Zschernig, a number of states continue to condition the ability of non-resident aliens to inherit on a showing of reciprocity, i.e. that their home state would likewise permit a U.S. citizen to inherit property that belonged to an individual who died while living abroad. To the extent that these cases require an alien heir to "prove" that the legal system of his or her home country would permit a U.S. national to inherit property, they impose costs on the litigants. A treaty provision guaranteeing the right to inherit property, by comparison, would make it unnecessary for the litigants to research the operations of a foreign legal system; the only proof that they would need would be the existence of a treaty provision granting the right in question.

One must be careful not to overstate the benefits that would flow from adding these classic FCN treaty provisions into the model BIT. Even if individuals whose home countries had negotiated a BIT with the United States were made eligible to obtain treaty merchant


222. See, e.g., N.C. GEN. STAT. ANN. § 64-3 (West 1986) (“No alien residing outside the United States or its territories shall be entitled to take personal property located in this State by succession or testamentary disposition if the laws of the nation of which such alien is a resident prohibit residents of the United States from inheriting personal property located within that nation. Except as hereinafore provided, no alien shall, by reason of his citizenship or place of residence, be disqualified from inheriting property in this State.”). Whether these statutes are permissible under Zschering is an open question. See Edward T. Swaine, Negotiating Federalism: State Bargaining and the Dormant Treaty Power, 49 DUKE L.J. 1127, 1271 n.3 (2000).

visas, for example, it is not clear how many individuals would be able to obtain them. The social security provisions would be relevant only to those individuals who are otherwise eligible for social security, and the provisions relating to workers' compensation and inheritance would inure primarily to the benefit of non-resident aliens whose relatives were living in the United States. In many respects, therefore, the practical changes brought about by these particular additions would be fairly modest. Their very modesty, however, combined with the fact that the United States currently grants these rights to foreign nationals from other nations in connection pursuant to existing FCN treaties, means that it is realistic to believe that these provisions could potentially find their way into the text of the BIT. And if the past is any guide, there can be little doubt that these provisions are likely to accomplish some good in at least some cases.

CONCLUSION

The treaty of friendship, commerce and navigation was for centuries a staple of international diplomacy. It is today a faded relic. Many of the most important provisions set forth in these treaties—relating to the right of establishment, inheritance, investment protection, arbitration, trade, intellectual property, consular notification, navigation and foreign sovereign immunity—have been read into the U.S. Constitution, written into more specialized international agreements or incorporated into federal statutes. This story of decline serves as a case study into the slow process of treaty obsolescence. While there are many articles that trace a treaty regime’s rise to prominence, this one has chronicled a regime’s descent into obscurity.

Its declining importance as a source of rights notwithstanding, the treaty of friendship, commerce and navigation continues to offer important conceptual insights to scholars and diplomats. It does so, first, by showing how treaty rights might be coordinated across specialized treaty regimes and, second, by showing how these rights might be better balanced within a single regime. With respect to their coordination function, these treaties offer one possible model for addressing the problem of fragmentation in the international legal order. With respect to their balancing function, these treaties offer a model for expanding the number of rights granted by treaty regimes such as the bilateral investment treaty.