# Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts

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ABSTRACT

*In an earlier era, treaties of Friendship, Commerce, and Navigation (FCNs) were the primary international law mechanism through which the U.S. government sought to promote and protect foreign investment. Conventional wisdom holds that FCNs are of only limited historical interest, having been replaced by more ambitious bilateral investment treaties (BITs).*

*In this Article we provide a partial challenge to the conventional wisdom. Our aim is to revive interest in the FCNs by arguing that these treaties, most of which remain in force, provide foreign investors with domestically enforceable rights in the courts of the United States. Many FCNs contain promises of favorable substantive treatment that are quite similar, if not identical, to the rights commonly extended to investors through BITs and investment chapters in free trade agreements such as NAFTA. We argue that because FCNs are self-executing and give rise to a private right of action, foreign nationals and companies can invoke these treaties against U.S. governmental entities in domestic litigation. The treaties thus provide investors with the ability to access substantive international investment law through domestic litigation rather than international arbitration.*

*This ability is of significant practical and theoretical importance. First, it could lead foreign companies to rethink their approach to asserting indirect or regulatory takings claims against governmental entities in the United States. Second, it suggests that these entities' risk exposure to international investment law is greater than commonly recognized. Third, it suggests a mechanism through which U.S. courts may play a meaningful role in interpreting, articulating, and developing international investment law. Fourth, and finally, it suggests that foreign investors may in some cases enjoy domestically enforceable rights that are superior to those accorded to citizens under the U.S. Constitution.*

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## I. INTRODUCTION

In an earlier era, treaties of Friendship, Commerce, and Navigation (FCNs) were the primary international law mechanism through which the U.S. government sought to promote and protect foreign investment. Conventional wisdom holds that FCNs are of only limited historical interest, having been replaced by more ambitious bilateral investment treaties (BITs).[1]

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1. The United States signed its first modern BIT in the early 1980s; there are now over forty such treaties in force. On the development of the U.S. BIT program, see Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203–06 (1988). Many countries are now also including BIT-like investment chapters in their free trade agreements. Worldwide, states have now signed more than 3,000 investment

One of the defining elements of the BITs is a right for the investor to personally enforce its substantive treaty rights before international arbitral tribunals. The result has been an explosion of investment-treaty arbitration, as investors bring increasingly creative international law claims of government mistreatment.[2]

The virtual absence of litigation under FCNs, and the explosion of arbitration under BITs, has led most observers to assume that the FCNs are of limited practical importance today. In this Article we provide a partial challenge to that conventional wisdom. Our aim is to revive interest in the FCN by arguing that the treaties, most of which remain in force, provide foreign investors with *domestically enforceable* rights under international investment law. Those rights include the right to fair and equitable treatment, the right to constant protection and security, and the right to full compensation in the event of expropriation. We argue that because FCNs are self-executing and give rise to a private right of action, foreign nationals and companies can invoke these treaties against U.S. governmental entities in domestic litigation. The treaties thus provide investors with the ability to access substantive international investment law through domestic litigation rather than international arbitration.

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treaties. U.N. Conference on Trade and Dev., IIA Issues Note: Recent Trends in IIAs and ISDS, at 1 (Feb. 19, 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (noting the total number of investment treaties) [hereinafter UNCTAD].

2. *See* UNCTAD, *supra* note 1, at 5 (documenting the growth in investment treaty cases over time). Philip Morris, the tobacco company, has sued Australia under the Australia-Hong Kong BIT, claiming that anti-smoking regulations are an impermissible expropriation of its intellectual property rights. The case was recently dismissed on jurisdictional grounds. Daniel Hurst, *Australia Wins International Legal Battle with Philip Morris over Plain Packaging*, GUARDIAN (Dec. 17, 2015, 9:19 PM), https://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging. A Canadian company is currently suing the U.S. government under the investment chapter of the North American Free Trade Agreement for President Obama's refusal to grant a permit to construct the cross-border Keystone XL oil pipeline. Todd Tucker, *TransCanada Is Suing the U.S. over Obama's Rejection of the Keystone XL Pipeline. The U.S. Might Lose.*, WASH. POST (Jan. 8, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/08/transcanada-is-suing-the-u-s-over-obamas-rejection-of-the-keystone-xl-pipeline-the-u-s-might-lose/?utm_term=.b4ffd23f1386. And a Swedish investor is suing the German government under a multilateral investment treaty over Germany's phase-out of nuclear energy production. *See generally* NATHALIE BERNASCONI-OSTERWALDER & MARTIN DIETRICH BRAUCH, INT'L INST. FOR SUST. DEV., THE STATE OF PLAY IN *VATTENFALL V. GERMANY II*: LEAVING THE GERMAN PUBLIC IN THE DARK 2 (2014), http://www.iisd.org/library/state-play-vattenfall-v-germany-ii-leaving-german-public-dark. In all three cases the investor claims that the challenged government action violates international investment law, and is seeking millions, if not billions, of dollars in damages.

This ability is of significant practical and theoretical importance. First, it could lead foreign companies to radically rethink their approach to asserting indirect or regulatory takings claims against governmental entities in the United States. Second, it suggests that these entities' risk exposure to international investment law is greater than commonly recognized. Third, it suggests a mechanism through which U.S. courts may play a meaningful role in interpreting, articulating and developing international investment law. Fourth, and finally, it suggests that foreign investors may in some cases enjoy domestically enforceable rights that are superior to those accorded to citizens under the U.S. Constitution.

Our argument is also of relevance to ongoing debates over the inclusion of investor-state arbitration in the Transatlantic Trade and Investment Partnership and the Transpacific Partnership. Both are ambitious proposed free trade agreements between the United States and European and Asian trading partners. One of the main justifications for including investor-state arbitration in these trade treaties is the claim that foreign investors otherwise lack a mechanism for enforcing international investment law. Our Article shows that this claim is inaccurate. In some cases, investors from major U.S. trading partners—Germany, in particular—have long enjoyed the domestically enforceable protections of an FCN.[3] The fact that those investors have rarely asserted their FCN rights may mean that investors view the FCNs as ineffective. On the other hand, it may also suggest that foreign investors are generally unaware of the rights provided to them by these treaties with respect to their investments in the United States.

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3. Germany is one of the most important sources of foreign investment in the United States. In 2014, German investors acquired U.S. businesses valued at more than $70 billion, second only to Canada in terms of mergers-and-acquisitions activity. Daniel Michaels & Shayndi Raice, *German Firms Go on U.S. Buying Spree: Flurry of M&A Activity Has Ramped up over Past Week*, WALL ST. J. (Sept. 22, 2014), http://www.wsj.com/articles/german-firms-go-on-u-s-buying-spree-1411407164. According to OECD statistics, the total stock of German foreign direct investment in the United States in 2013 was $208 million, or 7.5% of total FDI stock in the United States. Dutch FDI stock in the United States in 2013 was even higher, at $274 million, or nearly 10% of total FDI stock in the United States (Dutch investment in the U.S. is higher than German investment most likely because of tax-related factors). *OECD.Stat*, ORG. FOR ECON. COOP. & DEV., stats.oecd.org (select "globisation" tab; then select "FDI statistics according to Benchmark Definition 4th ed."; then select "FDI positions;" then select "FDI positions by partner country BMD4;" then select "inward and outward FDI by partner country"; then select "United States" under "Reporting country;" then select "2013" under "year") (last visited Mar. 21, 2017). The massive amounts of German and Dutch FDI in the United States is important because it suggests that large number of German and Dutch investors enjoy the theoretical protections of FCN-based international investment law.

As a note of caution, we emphasize that we are *not* challenging the view that the FCNs have generally fallen into desuetude. We recognize that the treaties are no longer negotiated and that private parties rarely invoke them in litigation. As a practical matter, the FCNs *have* been eclipsed by investment chapters in free trade agreements and by BITs and these latter instruments are likely to remain the most important source of privately enforceable international economic law rights.[4] Our goal is not so much to claim that FCNs are important in practice so much as to suggest that they *can* be important. FCNs, as "law in the books," offer foreign investors accessible, enforceable international law rights in U.S. courts. While the treaties may not feature much in the "law in action," there is no inherent reason why they cannot play more of a role in protecting investors than they currently seem to play.[5] FCN treaties may be forgotten, but they need not be irrelevant.

The Article proceeds as follows. Part I offers an overview of the U.S. FCN regime. Part II addresses several important doctrinal hurdles that our argument must overcome, including the issue of whether the FCN treaties are

4. *See* James McIlroy, *NAFTA's Investment Chapter—An Isolated Experiment or a Precedent for a Multilateral Investment Treaty*, 3 J. WORLD INV. 127, 135 (2002) ("From the U.S. perspective, Chapter 11 [the investment chapter of the North American Free Trade Agreement,] grew out of a long tradition of first, treaties of Friendship, Commerce, and Navigation (FCN treaties), or Treaties of Amity, and later, bilateral investment treaties (BITs). This was not a trend peculiar to the United States. In fact, looking from the vantage point of the year 2000, more than 1,500 bilateral investment treaties have been signed."). The United States is currently a party to over 40 FCNs. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2016 (2016), https://www.state.gov/documents/organization/264509.pdf. Generally speaking, the United States has tended to negotiate *either* FCNs *or* BITs with foreign nations. It is currently a party to both types of agreements with only six countries—Argentina, Bolivia, Croatia, Estonia, Honduras, and Latvia. John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 329 n.120 (2013). The United States is a party to an FCN and a free trade agreement (FTA) containing an investment chapter with only five countries—Colombia, Costa Rica, Honduras, Oman, and South Korea. *Free Trade Agreements*, INT'L TRADE ADMIN., http://trade.gov/fta/ (last visited Mar. 21, 2017) (indicating existing FTAs).

5. Some scholars have argued that requiring foreign investors to bring treaty claims in domestic courts before proceeding to international arbitral tribunals is normatively desirable. *See* 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, 4 (2006) (arguing that "the best way to resolve investment disputes between developed countries is to marry the advantages of direct claims with those of the local remedies rule, allowing foreign investors to enforce their own rights under a treaty but requiring them to do so in domestic courts first"); *id.* at 6–7 (arguing that allowing foreign investors to bring treaty-based claims in domestic courts (1) shows respect for sovereignty, (2) provides opportunities for redress against low-ranking officers before the dispute is taken to an international level, (3) allows disputes to be resolved at a lower cost, (4) protects the host state against abuses of diplomatic protection, and (5) depoliticizes investment disputes).

self-executing and provide a private right of action. Part III provides an overview of the main substantive provisions in FCNs, along with short illustrations as to how those provisions might be invoked in domestic litigation. Part IV addresses a handful of doctrinal and practical challenges to our argument.

## II. A BRIEF OVERVIEW OF FCNS

It is traditional to trace the origins of the U.S. FCN treaty to the 1778 Treaty of Amity and Commerce between France and the United States.[6] FCN-type treaties involve promises of favorable treatment toward the nationals (and, later, to the nationals and companies) of the other party, especially regarding the conduct of international business.[7] In practice, the subject matter of the treaties can be eclectic, dealing with issues involving customs duties, navigation rights, access to courts, religious liberties, the enforceability of arbitration agreements, freedom from uncompensated expropriation, and any number of other issues.[8] The treaties are thus "commercial" treaties, but only in the broadest of senses.[9]

Our focus in this Article is on what might be called the "last wave" of FCN treaties—those promulgated since the end of World War II. These last-wave treaties tend to follow a similar model, to be more purely "commercial" in nature, and to contain investment-related provisions analogous to those contained in modern bilateral investment treaties. The last-wave FCNs, unlike their earlier counterparts, were intended in large part to encourage and protect foreign investment.[10] In that regard, one of the main innovations of the new FCNs was their explicit coverage of corporations.[11] Prior commercial treaties tended to provide rights only to foreign natural persons.[12] The expansion of coverage to corporate entities was critical given that the major

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6. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce, and Navigation*, 42 MINN. L. REV. 805, 805 (1958) (tracing FCN treaties to the Treaty of Amity). For a modern overview of the treaties, and a discussion of their disuse, see generally Coyle, *supra* note 4.

7. *See* Coyle, *supra* note 4, at 311, 313–314.

8. *See id.* at 311–15.

9. *See id.* at 314–15.

10. On that aim, see Herman Walker Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 229 (1956).

11. *Id.* at 232–33 ("international investment in modern times is predominantly by corporate, rather than individual enterprise . . . [t]he first task in developing a treaty pattern after the late War, consequently, was to devise ways of providing adequately for the rights of corporations").

12. H.P. Connell, *United States Protection of Private Foreign Investment Through Treaties of Friendship, Commerce and Navigation*, 9 ARCHIV DES VÖLKERRECHTS 256, 265–66 (1961).

actors in the modern international economy increasingly were corporations and not individual traders.[13]

Beginning in 1946, and until the FCN program was wound down in 1968, the U.S. government successfully negotiated more than twenty last-wave FCNs. Most of these treaties remain in force today. The Appendix lists the in-force FCNs and provides summaries of their investment-related provisions.[14] Significantly, a good proportion of the FCNs involve partner states that are highly economically developed, including a number of members of the European Union: Germany, the Netherlands, Italy, and Benelux.

While the investment-related content of the FCN treaties varies somewhat when comparing the earlier to later versions, that content is nonetheless stable and consistent enough to offer a handful of useful generalizations. First, FCN treaties provide a right to compensation in the event of an expropriation of foreign property.[15] Second, FCN treaties require the host state to treat the investor "fairly and equitably."[16] Third, FCN treaties extend to investors a right to receive "full" or "constant" "protection and security."[17] Fourth, FCN treaties provide protection from "unreasonable" or "discriminatory" treatment.[18] Fifth, FCN treaties generally require that covered foreign investors enjoy "national treatment"—that they be treated as favorably as domestic investors.[19] Sixth, and finally, FCN treaties generally require that covered foreign investors enjoy "most favored nation" treatment—that they

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13. *See* Walker, *supra* note 6, at 232–33.

14. *See infra* Appendix.

15. *See, e.g.*, Treaty of Friendship, Commerce and Navigation with Protocol and Exchanges of Notes, Ger.-U.S., art. V, ¶ 2, Oct. 29, 1954, 7 U.S.T. 1839 [hereinafter U.S.-Ger. FCN] (discussing compensation for government "taking[s]").

16. *See, e.g.*, *id.* at 1841 ("Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.").

17. *See, e.g.*, *id.* at 1844 ("Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.").

18. *See, e.g.*, *id.* ("Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.").

19. Unlike modern BITs, which generally provide an overarching right to national treatment, the last-wave FCNs tended to provide a right to national treatment on a more limited issue-by-issue basis. *See* Walker, *supra* note 6, at 232. For example, the Germany-U.S. FCN provides for national treatment on such specific issues as "the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment." U.S.-Ger. FCN, *supra* note 15, 7 U.S.T. at 1843.

be treated as favorably as investors from other states who enjoy better-than-national treatment.[20]

We discuss the meaning and import of several of these promises in Part IV. For the moment, the important point is that these provisions provide international-law-based limitations on the ability of host state governments to treat investors in ways that fall below either an objective or relative standard.[21] In the case of promises of fair and equitable treatment or of full protection and security, the FCN is best interpreted as guaranteeing to the foreign investor a so-called "minimum standard of treatment." This minimum may, however, be greater or more stringent than whatever standard of treatment is provided by domestic law.[22] Indeed, the very point of minimum-standard provisions is to protect the foreign investor against domestic legal treatment that is inferior to international norms. By adopting objective minimum standards, the U.S. FCNs, like their younger BIT cousins, reject Calvo's famous but controversial claim that foreign investors are only entitled to be treated as well (or as poorly) as domestic subjects.[23] While FCN treaties often contain promises of "national treatment"—a relative standard—the effect of objective standards like fair and equitable treatment is to insure against the possibility that national treatment will not be good enough.[24] In practice, this means, for example, that through the FCN treaties the U.S. government may have promised foreign investors that they will be protected against government interference in their investments even where the government behavior at issue would be permitted vis-à-vis U.S. citizens under the U.S. Constitution.[25]

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20. *See, e.g.*, U.S.-Ger. FCN, *supra* note 15, 7 U.S.T. at 1845 ("Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article."). The indicated paragraphs deal with official searches of premises and property, freedom from "unreasonable or discriminatory" measures, and compensation for "taking" of property. *Id.* at 1844–45.

21. Walker, *supra* note 6, at 232.

22. *See* Connell, *supra* note 12, at 266.

23. Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 205–07 (1950).

24. *See* Margaret Clare Ryan, Glamis Gold, Ltd. v. The United States *and the Fair and Equitable Treatment Standard*, 56 MCGILL L.J. 919, 928 (2011).

25. For investment law insiders, our claim that the FCN treaties may offer protections that go beyond those available under U.S. domestic law may be somewhat controversial. It is widely recognized in international investment law circles that the U.S. government has made concerted efforts in recent years to prevent investment law tribunals from interpreting investment treaties in expansive ways. As part of those efforts, the U.S. government has modified its model BIT text to include various caveats, qualifiers, and limitations, and in the case of NAFTA Chapter 11, it has

Unlike modern investment treaties, U.S. FCNs do not contain investor-state dispute settlement. Instead, they provide for state-to-state arbitration before the International Court of Justice (ICJ) to settle disputes about treaty interpretation and application.[26] U.S. FCN dispute-settlement procedures have been invoked before the ICJ three times.[27] Only once, however, was the ICJ called upon to resolve an investment dispute—the famous *ELSI* case brought under the U.S.-Italy FCN.[28] This state of affairs means that we have little in the way of authoritative direct international jurisprudential guidance as to what the promises contained in FCNs mean. On the other hand, one of our key arguments is that the language of FCN treaties was intended to, and does, reflect common understandings of the rights of foreign investors—the same rights routinely included in modern investment treaties. Indeed, in many cases FCNs use the same language as modern BITs in expressing the standards of treatment extended to investors. This means that we can draw upon the rich academic literature on international investment law, and on the now-abundant—and growing—international jurisprudence interpreting and

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resorted to a controversial formal "interpretation" that critics argue is an improper modification of the treaty. *See generally* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 47–48 (2001) (discussing and critiquing the interpretative-note controversy). Moreover, in investment treaty litigation, U.S. government attorneys have taken the position that certain BIT provisions, like the "fair and equitable treatment" clause, were always intended by the U.S. government to be understood and applied very narrowly. A key aspect of the U.S. strategy has been to argue for a quite restrictive understanding of both the content of customary international law (which certain BIT and FCN provisions are said to reflect) and to argue that customary standards are largely frozen, and not susceptible to evolution through the common-law-like process of investment treaty arbitration. The net effect of these arguments, if valid, would be to make customary international investment law, as reflected in BITS and potentially in FCNs as well, no more favorable—and perhaps even weaker—than U.S. domestic law. The U.S. position has been severely criticized on doctrinal and policy grounds. *See, e.g.*, Ryan, *supra* note 24, at 951–53 (rejecting a arbitral tribunal award adopting the U.S. position as "complex and uncertain" and against the weight of previous case law); Stephen M. Schwebel, *Is* Neer *Far from Fair and Equitable?*, 27 ARB. INT'L 555, 555–58 (2011) (arguing that the U.S. government's arguments as to the correct meaning of fair and equitable treatment are unsound). The underlying debate is complex, and we do not attempt to resolve it here. Our sense, though, is that the better argument is that customary international law, as reflected in BITs and FCNs, has and continues to evolve in ways that raise the very real possibility that FCN and BIT protections may be more favorable to investors than domestic law. For an overview of the debate that supports our sense, see generally W. Michael Reisman, *Canute Confronts the Tide: States Versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID REV. 616 (2015).

26. Coyle, *supra* note 4, at 315.

27. *Id.*

28. *See id.* at 315, n.63; Sean D. Murphy, *The* ELSI *Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391, 391–93 (1991).

applying BITs, to supply workable meaning to otherwise vague FCN provisions.

We can also draw upon a report prepared by officials in the U.S. State Department—which we refer to throughout the Article as the "State Department Report" or the "Report"—that contains article-by-article, paragraph-by-paragraph annotations on the model text of the last-wave FCNs.[29] This report is *the* definitive account of what the individuals tasked with drafting and negotiating these treaties on behalf of the U.S. government understood their terms to mean.[30] And yet it has attracted virtually no attention among legal scholars and is all-but-unknown to practicing attorneys. In this Article, we rely extensively upon the Report in our attempt to unearth the meaning of the provisions in the FCNs relating to investment protection.

## III. THE STATUS OF FCNS UNDER U.S. LAW

The ability of foreign investors to invoke the FCN treaties in U.S. court depends critically on the status of the treaties under U.S. law. Although Article VI of the U.S. Constitution famously declares treaties to be the "supreme Law of the Land," a long line of U.S. jurisprudence limits the ability of private parties to access and enforce treaty-based rights in domestic litigation. In this Part we discuss three potential doctrinal barriers to reviving the FCN: (1) the distinction between self-executing and non-self-executing treaties; (2) the requirement that treaties provide a private right of action; and (3) a potentially unfavorable U.S. Supreme Court decision, *Sumitomo Shoji America, Inc., v. Avagliano*, that suggests that the FCNs do not apply to domestically incorporated subsidiaries of foreign investors.[31] We argue that none of these doctrinal barriers to an FCN revival pose a serious problem for our argument. A long line of jurisprudence and scholarly commentary treats the FCNs as self-executing. Strong textual and other evidence suggests that the treaties create a private right of action. And a careful reading of the *Sumitomo* decision establishes the limited (and, for our purposes, irrelevant) scope of its holding.

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29. *See* CHARLES H. SULLIVAN, U.S. DEP'T OF STATE, STANDARD DRAFT TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION 98 (1981) [hereinafter STATE DEPARTMENT REPORT] (on file with author).

30. *Id.* at 59 ("The main purpose of these annotations is to provide information as to the intent of the negotiators and as to their understanding of the meaning of particular treaty provisions as developed and explained in the course of negotiations.").

31. Sumitomo Shoji America, Inc., v. Avagliano, 457 U.S. 176, 188 (1982).

### *A. FCNs as Self-Executing Treaties*

Not all treaties are automatically effective as federal law upon ratification. Unless a treaty is "self-executing," domestic implementing legislation is necessary for that treaty to be judicially enforceable.[32] The underlying logic and application of the self-executing-treaty doctrine is complex and has shifted in recent years. We do not aim to provide a full treatment here.[33] The basic idea, however, is that even though a treaty may be the "supreme Law of the Land," that treaty is not enforceable in domestic court unless the treaty drafters intended that it be so.[34] There is a significant body of treaty practice and academic commentary suggesting all of the last-wave FCNs are self-executing.

The U.S. Supreme Court has opined that at least some FCNs are self-executing. In the 2008 case of *Medellin v. Texas*, the Court confronted the question of whether a judgment of the International Court of Justice (ICJ) was directly enforceable as domestic law in state court.[35] In holding that it was not, Chief Justice Roberts, writing for the majority, emphasized that the fact "that an ICJ judgment may not be automatically enforceable in domestic courts does not mean the particular underlying treaty is not. Indeed, we have held that a number of the 'Friendship, Commerce, and Navigation' Treaties . . . are self-executing—based on 'the language of the[se] Treat[ies].'"[36] In support, Chief Justice Roberts cited Supreme Court cases dealing with the 1953 U.S.-Japan FCN, the 1881 U.S.-Serbia FCN, and the 1923 U.S.-Germany FCN.[37]

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32. Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008).

33. For an overview of the doctrine and its complexities, see DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 295–318 (2016); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131; David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2230–48 (2010).

34. A number of difficult issues hide inside this nutshell summary of the doctrine. For example, is it the intent of the state parties to the treaty, or the intent of the U.S. President and Senate, that matters? And absent any clear indication of intent, should we presume the treaty to be self-executing, or should the presumption run the other way? These and other unsettled issues are discussed in Bradley, *supra* note 33, at 131–33.

35. *Medellin*, 552 U.S. at 498.

36. *Id.* at 520–21.

37. *Id.* at 521; *see also* Jordan v. Tashiro, 278 U.S. 123, 128–29 (1928) (applying a 1911 FCN-type treaty between the U.S. and Japan to overturn application of California's Alien Land Law to block the incorporation of a hospital by Japanese nationals); Asakura v. City of Seattle, 265 U.S. 332, 341–43 (1924) (treating the same type treaty as self-executing to overturn a local ordinance barring a Japanese national from operating as a pawnbroker).

While the Court's statement here was pure dicta—none of the mentioned FCNs was relevant to the *Medellin* litigation—Justice Robert's assertion that FCNs are generally self-executing is buttressed by a voluminous amount of lower-court jurisprudence, by academic scholarship, and by an analysis of Senate committee reports.

FCN treaties have served as the basis for private litigation against U.S. government defendants on many occasions over the years.[38] Some of these applications of FCNs are relatively recent. In a long-running dispute between an American investor and an Iranian dairy company, for example, the investor cited the 1955 Treaty of Amity (in essence a last-wave FCN) between the United States and Iran as providing it with an expropriation claim against the Iranian government.[39] While most private claims against Iran resulting from the Iranian Revolution were shunted into the Algiers Accords process, in this case the plaintiff was raising claims based upon actions by the Iranian government that occurred after the Algiers Accords' cut-off date.[40] In concluding that this treaty was self-executing, the D.C. Circuit observed that the Treaty "explicitly creates property rights for foreign nationals" and that it also "contemplates judicial enforcement of th[ese] rights."[41] Accordingly, the court found a clear intention by the parties for the treaty to be enforceable domestically absent implementing legislation.[42]

A number of other FCNs have made an appearance in U.S. litigation over the past few decades. In each case, the courts have either implicitly accepted the treaties as self-executing without any comment or discussion or expressly declared them to be self-executing. Some of those cases involve the treaty's

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38. *See, e.g.*, Schieffelin & Co. v. United States, 424 F.2d 1396, 1398–1400 (C.C.P.A. 1970); Select Tire Salvage Co. v. United States, 386 F.2d 1008, 1013 (Ct. Cl. 1967); State v. Tagami, 234 P. 102, 106 (Cal. 1925); Baldwin-Lima-Hamilton Corp. v. Superior Court of S.F., 208 Cal. App. 2d 803, 820 (Cal. Ct. App. 1962); Cura v. Liquor Control Comm'n, 4 Conn. Supp. 343, 344 (Conn. Super. Ct. 1936); Mizugami v. Sharin W. Overseas, Inc., 615 N.E.2d 964, 965 (N.Y. 1993); Magnani v. Harnett, 14 N.Y.S.2d 107, 110–11 (N.Y. App. Div. 1939); Giovannetti v. Conte Equip. Co., 24 Pa. D. & C.2d 505, 508 (Pa. Cty. Ct. 1960).

39. *See* McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1078 (D.C. Cir. 2012).

40. McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1104 (D.C. Cir. 2001). The Treaty of Amity's role in the pre-Algiers Accord litigation is discussed in Robert M. McGreevey, *The Iranian Crisis and U.S. Law*, 2 NW. J. INT'L L. & BUS. 384, 401–08 (1980).

41. *McKesson*, 271 F.3d at 1108; *see also McKesson*, 672 F.3d at 1072 (holding that the Treaty of Amity is self-executing but that the treaty drafters intended that it be enforced through bilateral international between its signatories).

42. *McKesson*, 271 F.3d at 1107–08.

trade-related national treatment obligations.[43] Others involve its provision on the recognition of arbitral awards.[44] Others involve customs-related matters.[45] In a surprisingly large number of cases during the 1980s, foreign parties (or their domestically incorporated subsidiaries) invoked the FCNs as a defense when they were alleged to have violated U.S. laws relating to employment discrimination.[46] The basic argument was that an FCN provision allowing foreign companies to hire persons "of their choice" for certain higher-level positions allowed the companies to discriminate in favor of their own nationals.[47] This defensive use of the FCN's freedom-to-employ clause was eventually largely foreclosed by the U.S. Supreme Court in a case that we discuss in more detail below. Importantly, though, these cases were never dismissed on the grounds that the treaties were not self-executing. Indeed, a number of courts have expressly recognized that these treaties are self-executing.[48]

Finally, in a set of cases involving the U.S. recognition of foreign-court judgments, two circuits have held that private parties may invoke the "access

43. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1263, 1266 (E.D. Pa. 1980) (recognizing that the U.S.-Japan FCN is self-executing in the context of a claim of a violation of the Treaty's national treatment provision).

44. *See, e.g.*, *In re* Fotochrome, Inc., 377 F. Supp. 26, 29–30 (E.D.N.Y. 1974), *aff'd sub nom.* Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 517–18 (2d Cir. 1975) (recognizing that U.S.-Japan FCN is self-executing in the context of the obligation to enforce a Japanese arbitral award); Or.-Pac. Forest Prods. Corp. v. Welsh Panel Co., 248 F. Supp. 903, 910 (D. Or. 1965) (citing the U.S.-Japan FCN as a ground for enforcing a contractual agreement to arbitrate in Japan).

45. *See, e.g.*, Am. Express Co. v. United States, 472 F.2d 1050, 1060–61 (C.C.P.A. 1973) (applying the U.S.-Italy FCN to an MFN-related customs dispute).

46. Ventress v. Japan Airlines, 486 F.3d 1111, 1118 (9th Cir. 2007) (adopting a narrow construction of the freedom-to-employ clause in the U.S.-Japan FCN); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1147 (3d Cir. 1988) (same as to U.S.-Korea FCN); Wickes v. Olympic Airways, 745 F.2d 363, 368 (6th Cir. 1984) (same as to U.S.-Greece FCN). For a somewhat more favorable discussion of the FCN defense to employment discrimination claims, see *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1059 (5th Cir. 1998) and *Fortino v. Quasar Co.*, 950 F.2d 389, 392–394 (7th Cir. 1991). For a general overview of the litigation over this issue, 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) and Judith A. Miller, Comment, *Title VII and the FCN Treaty: The Exemption of Japanese Branch Operations from Employment Discrimination Laws*, 7 B.C. INT'L & COMP. L. REV. 67 (1984).

47. *See, e.g.*, *Wickes*, 745 F.2d at 368 ("[T]he 'of their choice' language . . . creates a broad exception to the labor and employment discrimination laws of the United States . . .").

48. Ghaleb Nassar Al-Bihani v. Obama, 619 F.3d 1, 15 (D.C. Cir. 2010); McKesson v. Islamic Republic of Iran, 539 F.3d 485, 488 (D.C. Cir. 2008); Blanco v. United States, 775 F.2d 53, 60 (2d Cir. 1985); Spiess v. C. Itoh & Co., 643 F.2d 353, 356 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

to justice" provisions of FCN treaties in order to obtain recognition of foreign judgments under legal standards applicable to the recognition of the judgments of other states of the United States.[49] The practical import is to render the enforcement of foreign judgments much easier than would otherwise be the case, as recognition actions for sister court judgments may enjoy significantly longer statutes of limitations and will not be subject to the heightened standards that U.S. courts typically apply in deciding whether to recognize foreign judgments.[50] While these cases were wrongly decided on the merits—the FCN access-to-courts provisions were never intended to apply to judgment-recognition actions—none of these courts at issue questioned whether the parties were entitled to invoke the FCN.[51] Rather, their self-executing nature was assumed.

A significant amount of case law thus establishes that FCN-type treaties are self-executing.[52] Scholars routinely assume the treaties are self-executing as well, albeit without significant analysis.[53] Their assumptions are buttressed

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49. *See* Otos Tech Co. v. OGK Am., Inc., 653 F.3d 310, 312–13 (3d Cir. 2011); Daewoo Motors Am., Inc. v. Gen. Motors Corp., 459 F.3d 1249, 1259 (11th Cir. 2006); Sik Choi v. Hyung Soo Kim, 50 F.3d 244, 248 (3d Cir. 1995); Vagenas v. Cont'l Gin Co., 988 F.2d 104, 107 (11th Cir. 1993).

50. *Otos Tech Co.*, 653 F.3d at 312.

51. John F. Coyle, *Friendship Treaties ≠ Judgments Treaties*, 112 MICH. L. REV. FIRST IMPRESSIONS 49, 54 (2013) (arguing that the cases were wrongly decided because the FCN access-to-courts provisions were never intended to apply to judgment-recognition actions).

52. While the cases discussed above are federal, state courts have, on occasion, applied FCN-type treaties as if they were self-executing. *See, e.g.*, *In re* Heikich Terui, 200 P. 954, 956 (Cal. 1921) (applying an early U.S.-Japan FCN-type treaty in a habeas proceeding); Maiorano v. Baltimore & O. R. Co., 65 A. 1077, 1078 (Pa. 1907) (interpreting the "most constant protection and security" provision of an early U.S.-Italy treaty).

53. Bradley, *supra* note 33, at 140 ("It seems likely after *Medellin* that treaties that fall within established lines of self-execution precedent, such as bilateral treaties granting aliens property or business rights, will continue to be treated as self-executing."); *see also* Dodge, *supra* note 5, at 13 ("U.S. courts have held [the FCNs] to be 'self-executing,' in the sense that 'they are binding domestic law of their own accord, without the need for implementing legislation.'"); Murphy, *supra* note 28, at 398 ("In the post-World War II era, litigants have invoked FCN treaties frequently in domestic cases. . . ."); Joseph J. Norton, *Doing Business and U.S. Commercial Treaties: The Case with the Member States of the EEC*, 5 CASE W. RES. J. INT'L L. 4, 25 (1972) (noting that FCNs establish "binding obligations . . . many of which can be enforced in the municipal courts"); Silver, *supra* note 46, at 770 n.33 ("The FCN treaties were self-executory, and constituted domestic law immediately upon ratification."); Michael P. Van Alstine, *Federal Common Law in the Age of Treaties*, 89 CORNELL L. REV. 892, 924 (2004) ("The most distinguished tradition of self-executing treaties is found in the protection of foreign citizens' rights in the United States. From the first years of the new Constitution—indeed, even before the United States began concluding treaties of 'amity, commerce and navigation.' The very purpose of these treaties was to secure reciprocal property and procedural rights for foreign citizens. These self-executing treaties now protect the rights of citizens of some sixty countries with regard to

by the Restatement (Third) of Foreign Relations Law, which states that "[p]rovisions in treaties of friendship, commerce, and navigation, or other agreements conferring rights on foreign nationals, especially in matters ordinarily governed by State law, have been given effect without any implementing legislation, their self-executing character assumed without discussion."[54]

This position also seems supported by the principal legislative history of the post-war FCNs. The Department of State explained its post-war FCN program to the U.S. Senate Subcommittee of the Committee on Foreign Relations in a series of hearings in 1952 and 1953. At the 1953 hearing, Senator Hickenlooper brought up the question of the treaties' self-executing nature—but only twice, and only in regard to two specific treaty provisions. Hickenlooper was first concerned that an FCN provision dealing with "restrictive business practices" might be read to permit Congress to legislate in such a way as to infringe upon the authority of sub-federal units to regulate monopolies.[55] Hickenlooper's concern was essentially one of whether the FCN treaties would alter what he believed to be the proper Constitutional balance between federal and state authority on the issue of competition policy. The Department of State responded by emphasizing that "this clause" was not "self-executing," as it established only an intergovernmental obligation to "consult" and to "to take such action as each party deems appropriate, in its own discretion and in its own way."[56] Hickenlooper affirmed his own understanding that the clause "is considered to be non-self-executing, and it conveys no authority to the Executive, unless it is implemented by statute."[57]

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their personal and commercial interests in the United States."); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 718–19 (1995) ("Thus, it is often said that treaties of friendship, commerce, and navigation are self-executing.").

54. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, reporters' note 5 (AM. LAW INST. 1987).

55. *Commercial Treaties: Hearing Before the Subcomm. of the Comm. on Foreign Relations*, 83rd Cong. 20 (1953) (statement of Sen. Hickenlooper).

56. *Id.*

57. *Id.* In fact, in 1957 a U.S. subsidiary of a Japanese company tried to invoke a similar clause in the U.S.-Japan FCN as a defense to a "criminal action charging a conspiracy in restraint of interstate and foreign commerce in Japanese wire nails." United States v. RP Oldham Co., 152 F. Supp. 818, 820 (N.D. Cal. 1957). The District Court rejected this argument, though not on the ground that the provision was non-self-executing. Rather, the District Court held that the provision, by its own terms, only applied to "Japanese" companies, and not to U.S.-incorporated subsidiaries. *Id.* at 823. The reasoning here is identical to that employed subsequently by the U.S. Supreme Court in the *Sumitomo* decision, discussed *infra*.

Hickenlooper also expressed concern that Article VII of the U.S.-Italy FCN, dealing with nationals who had accumulated benefits under both countries' old-age and survivor's benefit systems, might "be effective without further congressional action."[58] Hickenlooper asked the Department of State if it would have any objection to the Senate's understanding that Congressional action would in fact be required as to the effectiveness of any "agreement relating to social security matters" in connection with the Italian treaty. State confirmed that it had "no objection" to such an understanding. While neither Hickenlooper nor State explained why, legally speaking, Article VII should require additional Congressional action to be effective, Article VII, by its own terms, seems to only exhort the Contracting Parties, on an inter-governmental level, to "adhere" to a certain understanding of how the dual-benefit issue should be resolved in principle.[59] As such, the social security article, like the restrictive-business-practices article discussed in the prior paragraph, does not establish the kind of clear individual right that has traditionally been viewed as self-executing.[60] Moreover, in apparent response to Hickenlooper's concerns, the Parties added a "protocol of exchange" to the treaty in 1961 that clarified, in somewhat cryptic manner, the non-self-executing nature of Article VII.[61]

The relevance or meaning of this exchange is debatable, of course. Whether Hickenlooper or State claimed a belief that a particular provision of an FCN is or is not self-executing may, or may not, have any relevance to a determination that the provision is, in fact, self-executing. Whether Hickenlooper's statements and State's responses really matter to the question depends upon one's theory of how a treaty's self-executing nature should be determined. We think that the legislative history supports the view that the FCN treaties were understood by key U.S. individuals and institutions as *generally* being self-executing. Hickenlooper's concerns with the FCN program focused on (what he viewed as) the non-self-executing nature of particular treaty provisions that rather vaguely addressed inter-state

58. *Commercial Treaties: Hearing Before the Subcomm. of the Comm. on Foreign Relations*, 83rd Cong. 21–22 (1953) (statement of Sen. Hickenlooper); *see* Italy Friendship, Commerce, and Navigation Treaty, It.-U.S., art. VII, Feb. 2, 1948, 12 U.S.T. 131 [hereinafter U.S.-Italy FCN].

59. U.S.-Italy FCN, *supra* note 58.

60. *Id.* at 136, 138.

61. The protocol of exchange says that "it is understood that the entry into force of the arrangements mentioned in Article VII, paragraph 1, of the said agreement [the U.S.-Italy FCN] is subordinate in any case to the fulfilling on the part of the United States of America of its provisions of statute and on the part of the Italian Republic of its constitutional requirements." U.S.-Italy FCN, *supra* note 58, 12 U.S.T. at 140.

obligations rather than individual rights.[62] Moreover, the fact that State thought it necessary to add a special protocol establishing the non-self-executing nature of the social security provision suggests that the treaty parties understood the other provisions, absent such a protocol, as likely being self-executing.

In sum, numerous cases hold or act as if the U.S. FCNs are self-executing; academic commentary routinely assumes that they are self-executing; and what little "legislative" history exists suggests that most clauses in the treaties were understood as being self-executing as well. A U.S. court decision holding that the FCN treaties are *not* in fact self-executing would be contrary to history and precedent in this area.[63]

### *B. FCNs and Private Rights of Action*

The fact that a treaty is self-executing does not, of course, mean that that treaty may always be enforced by private plaintiffs in U.S. courts. The treaty must also create a private right of action that allows a private individual to bring suit.[64] Most treaties do not create such a right and U.S. courts are generally reluctant to infer them.[65] As the U.S. Supreme Court recently

62. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 106, cmt. b (AM. LAW INST., Discussion Draft, 2015); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. h (AM. LAW INST. 1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing.").

63. We are not able to provide a comparative analysis of the self-executing nature of FCNs in non-U.S. jurisdictions, but there are some suggestions in the literature that at least some FCN partners treat the treaties as enforceable domestically. Norton, *supra* note 53, at 25 n.23 (discussing a German court decision on the legal status of the U.S.-German FCN); Lawrence Preuss, *On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties*, 51 MICH. L. REV. 1117, 1130 (1953) (describing Italy as having passed an implementing statute making the U.S.-Italy FCN domestically effective).

64. *See* Cornejo v. Cty. of San Diego, 504 F.3d 853, 856–57 (9th Cir. 2007) ("While a treaty must be self-executing for it to create a private right of action enforceable in court without implementing domestic legislation, all self-executing treaties do not necessarily provide for the availability of such private actions.") (quoting Renkel v. United States, 456 F.3d 640, 643 n.3 (6th Cir. 2006)). In cases where a treaty is deemed not to create a right of action, a plaintiff may look to federal statutes—such as Section 1983 or Section 702 of the Administrative Procedures Act—that provide a private right of action where a violation of federal law has occurred. *See* Carlos Manuel Vàzquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–55 (1992). Since the evidence that the FCNs create a private right of action is so robust, we see no need to rely on these statutes to support our argument.

65. Oona Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 90 (2012) ("The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action.").

observed: "[T]he background presumption is that 'international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private right of action in domestic courts.'"[66] In the case of the FCNs, however, there is a significant body of judicial practice and academic commentary indicating that FCNs *do* create a private right of action. Accordingly, we believe that these treaties can provide the legal basis for a foreign national to bring suit in a U.S. court in order to assert investment rights granted by the treaty.

When a treaty does not expressly address the issue of whether a private right of action exists, the courts must "look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action."[67] The last-wave FCNs do not speak directly to the question of whether they give rise to a private right of action. They do, however, guarantee that foreign nationals and companies will have the right to access U.S. courts on the same terms as U.S. nationals:

> Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice . . . within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done.[68]

This "access-to-courts" provision suggests that the treaty drafters intended to confer a private right of action to foreign nationals and companies seeking to enforce other rights arising under the treaty. This reading derives support from the commentary set forth in the State Department Report:

> The basic intent of the [access-to-courts clause] is to make provision for judicial remedies for aliens on a liberal basis broadly representative of the course of United States jurisprudence and supportive of the principles of international law. It is an essential element of the treaty because of the critical nature of the support it gives to the other provisions of the treaty. The treaty is a legal document and *nondiscriminatory access to judicial remedy is the*

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66. Medellin v. Texas, 552 U.S. 491, 506 n.3 (2008) (alteration in original) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 907, cmt. a (AM. LAW INST. 1987)).

67. Gross v. German Found. Indus. Initiative, 549 F.3d 605, 616 (3d Cir. 2008) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)).

68. Amity, Economic Relations, and Consular Rights, Iran-U.S., art. III, ¶ 2, Aug. 15, 1955, 8 U.S.T. 899 [hereinafter Iran-U.S. FCN]; Friendship and Commerce, Pak.-U.S., art. V, ¶ 1, Nov. 12, 1959, 12 U.S.T. 110 [hereinafter Pakistan-U.S. FCN].

> *first line of legal protection when rights granted by other treaty provisions are called into question*.[69]

The fact that the State Department viewed the access-to-courts provision as a "first line of legal protection" when "rights granted by other treaty provisions are called into question" strongly suggests that the drafters of the last-wave FCNs intended they be interpreted to grant a private right of action to foreign nationals.

While the U.S. Supreme Court has never expressly recognized that FCNs create a private right of action for foreign nationals, it has recognized this fact implicitly on a number of occasions. In the case of *Asakura v. City of Seattle*, for example, Seattle had enacted an ordinance making it illegal to issue a pawnbroking license to a non-citizen.[70] In response, a Japanese pawnshop owner who stood to lose his license sued the city.[71] He argued that the ordinance violated a provision in the 1911 U.S.-Japan FCN that granted Japanese nationals the right to "carry on trade" on the same terms as U.S. citizens.[72] The Washington Supreme Court ruled in favor of the city.[73] The U.S. Supreme Court reversed.[74] It held that the ordinance violated the treaty and could not be enforced against the plaintiff.[75] In rendering its decision, the Court did not expressly hold that the treaty created a private right of action. The outcome in the case is, however, difficult to explain if the FCN did *not* confer a private right of action upon the Japanese plaintiff.

Another case in which the U.S. Supreme Court implicitly recognized the existence of a private right of action is *Jordan v. Tashiro*.[76] In *Jordan*, several Japanese nationals had sought to form a California corporation to operate a hospital.[77] The Secretary of State in California refused to file the articles of incorporation because he believed that the state's Alien Land Law did not permit Japanese nationals to form corporations for this purpose.[78] The incorporators then sought a writ of mandamus to compel the Secretary to file the articles.[79] They argued that the 1911 U.S.-Japan FCN gave them the ability to "carry on trade" in the United States and that this right necessarily

69. STATE DEPARTMENT REPORT, *supra* note 29 (emphasis added).
70. Asakura v. City of Seattle, 265 U.S. 332, 339–40 (1924).
71. *Id.*
72. *Id.*
73. *Id.* at 340.
74. *Id.* at 344.
75. *Id.* at 343.
76. Jordan v. Tashiro, 278 U.S. 123 (1928).
77. *Id.* at 124.
78. *Id.*
79. *Id.* at 124–25.

included the ability to form corporations.[80] The California Supreme Court ruled in favor of the plaintiffs and ordered the Secretary to file the articles.[81] The U.S. Supreme Court affirmed.[82] In *Jordan*, as in *Asakura*, the Court made no express reference to a private right of action. Again, however, it is difficult to make sense of the outcome unless the Court implicitly recognized the existence of a private right of action under the treaty.

Those scholars who have considered the issue have generally concluded that FCNs provide for a private right of action. José Alvarez has argued that "FCNs typically grant a private right of action, at least in U.S. courts."[83] Oona Hathaway has observed that "[e]ven during the post-World War II era, courts held that [FCNs] created judicially enforceable private rights of action."[84] David Sloss has argued that "[m]odern friendship, commerce, and navigation treaties . . . typically include an express private right of action."[85] One of us has argued elsewhere that "FCN treaties continue to provide a private right of action to foreign plaintiffs in U.S. courts."[86] A student note published in the *Harvard Law Review* concluded that "FCN Treaties should be construed to confer a private right of action."[87] The scholarly consensus on this issue is thus consistent with the case law of the U.S. Supreme Court and the interpretive gloss on the treaty text set forth in the State Department Report.[88]

There is, however, at least one recent case in which an FCN was held *not* to create a private right of action. In *McKesson Corp. v. Islamic Republic of Iran*, the D.C. Circuit was called upon to decide whether the Treaty of Amity between the United States and Iran gave rise to a private right of action for a *U.S. citizen* to sue *Iran* in U.S. court.[89] This posture was somewhat unusual.

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80. *Id.* at 125–26.

81. *Id.* at 126.

82. *Id.* at 130.

83. José Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 12, n.66 (1996).

84. Hathaway et al., *supra* note 65, at 94.

85. 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 (2006).

86. Coyle, *supra* note 4, at 335 n.142.

87. Note, *Standing Under Commercial Treaties: Foreign Holding Companies and the Unitary Tax*, 97 HARV. L. REV. 1894, 1896 (1984).

88. *See* Volodarskiy v. Delta Air Lines, Inc., 987 F. Supp. 2d 784, 790 (N.D. Ill. 2013) (observing that the Iran-U.S. Amity FCN "expressly authorized . . . claims" to be brought in U.S. court) (emphasis omitted).

89. McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 487 (D.C. Cir. 2008). In reaching this conclusion, the D.C. Circuit contradicted its earlier decision that the treaty in question *did* create a private right of action. *See* McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1108 (D.C. Cir. 2001).

In the vast majority of FCN cases, the plaintiff is a *foreign national* who is seeking to sue a *U.S. governmental entity* in U.S. court. This article is principally concerned with the issue of whether the treaty creates a private right of action for foreign plaintiffs, and so *McKesson* is of only limited relevance to our argument. In light of the overbroad langauge set forth in *McKesson*, however, we feel compelled briefly to explain why *McKesson* poses no serious obstacle to the revival of the FCN.

The underlying claim in *McKesson* stemmed from allegations that Iran had expropriated a U.S. company's ownership interest in a dairy located in Iran.[90] The D.C. Circuit held that although the treaty was self-executing, it did not provide a private right of action for the U.S. citizen plaintiff.[91] While the treaty directly benefitted the U.S. company—McKesson—by declaring that "property shall not be taken except for a public purpose," the court held that the treaty left open "the critical question of *how* McKesson is to secure its due."[92] The court observed that the Treaty of Amity did not "explicitly call[] upon the courts for enforcement" and that it lacked a "textual invitation to judicial participation" in resolving this dispute.[93] Accordingly, the court concluded that "the President and the Senate intended to enforce the Treaty . . . through bilateral interactions between its signatories."[94]

This analysis is difficult to square with the text of the treaty, which contained the standard access-to-courts provision:

> Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice . . . within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done.[95]

This language suggests that the treaty drafters intended that at least *some* disputes arising under the treaty would be resolved through domestic litigation. This suggestion is confirmed by a number of statements in the State Department Report. First, the Report characterizes the access-to-courts provision in the FCN treaty as "the *first line of legal protection* when other treaty rights are violated."[96] Second, the Report notes that a treaty provision relating to expropriation was intended to serve as a "point of reference

90. *McKesson*, 539 F.3d at 487.
91. *Id.* at 488–89.
92. *Id.* at 489.
93. *Id.* at 489–91.
94. *Id.* at 491.
95. Iran-U.S. FCN, *supra* note 68, 8 U.S.T. at 902–03.
96. STATE DEPARTMENT REPORT, *supra* note 29 (emphasis added).

for . . . *the courts* in determining whether such compensation is just."[97] Third, the Report notes that a treaty provision relating to inheritance sought to "overcome[] the *common law* bar to inheritance of real property."[98] Fourth, the Report observes that "[t]he experience with disputes arising out of [FCNs] is that they are settled almost without exception through diplomatic channels or, in cases where differences or misunderstandings do not reach the level where diplomatic cognizance is required, by *adjudication in domestic courts*."[99] These and other passages from the Report tend to undercut the D.C. Circuit's assertion that the treaty drafters did not intend for its provisions to be enforced by U.S. courts.

The court's assertion that the President and the Senate intended the treaty to be enforced exclusively through "bilateral interactions" is also difficult to reconcile with historical precedents.[100] As discussed above, the Supreme Court was perfectly willing to adjudicate disputes arising under the 1911 U.S.-Japan FCN in *Asakura* and *Jordan*. It adjudicated a dispute arising under the 1953 U.S.-Germany FCN in *Clark v. Allen*.[101] It adjudicated a dispute arising under the 1881 U.S.-Serbia FCN in *Kolovrat v. Oregon*.[102] It adjudicated a dispute arising under the 1953 U.S.-Japan FCN in *Sumitomo Shoji America, Inc. v. Avagliano*.[103] In none of these cases did the Court suggest that the FCN was intended to be enforced exclusively through state-to-state negotiations at the international level.[104] The D.C. Circuit's assertion that the President and Senate intended that the Treaty of Amity be enforced

97. *Id.* at 118 (emphasis added).

98. *Id.* at 181 (emphasis added).

99. *Id.* at 331 (emphasis added). This provision suggests that the State Department did not view the treaty provision calling for the submission of disputes to the International Court of Justice as the sole and exclusive remedy for any breach of the treaty. A different section of the Report confirms this interpretation: "Article XXIV(2) [providing for submission of disputes to the ICJ] does not establish an absolute commitment to submit all treaty disputes to the International Court of Justice. The absolute commitment is to submit all treaty disputes to peaceful means of settlement." *Id.* at 330–31.

100. McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 491 (D.C. Cir. 2008).

101. Clark v. Allen, 331 U.S. 503, 507 (1947).

102. Kolovrat v. Oregon, 366 U.S. 187, 188–90 (1961).

103. Sumitomo Shoji Am., Inc., v. Avagliano, 457 U.S. 176, 179–80 (1982).

104. The D.C. Circuit cites to none of these cases in *McKesson*. *McKesson*, 539 F.3d 485. A federal district court in the District of Columbia that *did* cite these decisions concluded that the Treaty of Amity created a right of action. *See* Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) ("[T]he right of individuals and companies to enforce a private right of action in a United States court under the property protection provisions of a treaty of friendship, commerce, and navigation has consistently been upheld.").

exclusively through "bilateral interactions between its signatories" fails to acknowledge this.

The D.C. Circuit ultimately concludes that the Treaty of Amity "does not provide a cause of action."[105] To the extent that this statement may be read to state that the treaty does not create a private right of action for a *U.S.* plaintiff to sue a *foreign governmental entity* in U.S. court, its conclusion is (perhaps) defensible. This was the reading of the treaty proffered by the U.S. government in its *amicus* brief and there is some support for this view in past judicial practice.[106] However, to the extent that the language in the court's decision might be read to support the more sweeping proposition that an FCN does not create a private right of action for a *foreign* plaintiff to sue a *U.S. governmental entity* in U.S. court, this proposition is untenable. It is in tension with the text of the treaty. It is inconsistent with prior decisions rendered by the U.S. Supreme Court. It is contrary to the views of most scholars. And it derives no support from the commentary in the State Department Report.

In summary, while the issue is perhaps not so clear-cut as in the case of self-execution, the weight of the evidence supports the conclusion that FCNs create a private right of action for foreign nationals to bring lawsuits against U.S. governmental entities in U.S. courts.

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105. *McKesson*, 539 F.3d at 491.

106. Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 795 (E.D.N.Y. 1978) ("[The FCNs] do not confer a private right of action for violation of their terms on nationals of one party within their own country. Thus, even assuming that the treaties do create a private right of action . . . such right would pertain only to nationals of one party within the territory of the Other party."); Brief for United States as Amicus Curiae Supporting Appellees at 4, McKesson v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008) (No. 07-07113), http://www.state.gov/documents/organization/138803.pdf ("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."). This reading also derives support from the fact that the access-to-courts provision stipulates that such access is granted to "[n]ationals and companies of either High Contracting Party . . . within the territories of the other High Contracting Party." *See, e.g.*, *supra* text accompanying note 68. There is, however, at least one prior case suggesting that U.S. plaintiffs had a right of action against a foreign government in a U.S. court under an FCN. *See* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422, 427–28 (6th Cir. 1984) (holding that the U.S.-Ethiopia FCN treaty's expropriation clause provided a guiding principle of international law that was "susceptible to judicial interpretation" and sufficient to establish an exception to the "act of state doctrine," under which a U.S. court would normally refuse to judge the legality of a foreign state's conduct within its own border). An earlier panel decision by the D.C. Circuit had also held that the U.S.-Iran Treaty of Amity *did* create a private right of action for U.S. citizens. *See* McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1108 (D.C. Cir. 2001) (rejecting the argument that FCN only "confers a right of action on an Iranian citizen in a U.S. court").

### C. *Solving the Sumitomo Problem*

The case of *Sumitomo Shoji America, Inc. v. Avagliano* is widely (and correctly) read as posing a barrier to the invocation of the last-wave FCN treaties in U.S. litigation.[107] We clarify here, however, that the decision's scope of application is actually relatively narrow and that the decision does little to impact the ability of foreign investors to invoke the treaties against U.S. governmental entities in domestic litigation.

In *Sumitomo*, a Japanese corporation's New York-incorporated and wholly-owned subsidiary was sued by private litigants for violating U.S. civil rights law that prohibited nationality-based discrimination in hiring.[108] Sumitomo's defense was that its freedom to hire whoever it chose—even in a discriminatory manner—was protected by the 1953 U.S.-Japan FCN.[109] Article VIII(1) of that treaty stated that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[110] Sumitomo argued that the "of their choice" language exempted the company from U.S. civil rights law that would impose limitations on the company's discretion to reserve certain positions for Japanese nationals.[111] Sumitomo's claim to an FCN-based exemption from U.S. anti-discrimination law—and similar claims by other companies—was highly controversial, as evidenced by the raft of law review articles that the litigation spawned.[112]

In *Sumitomo*, the Second Circuit, citing diplomatic correspondence, State Department regulations, and the overall aim of the FCN program "to protect foreign investments generally," held that Sumitomo, even though a U.S.-incorporated entity, could in theory benefit from the freedom-to-hire provision.[113] The Supreme Court reversed. The Court emphasized that Article VIII(1), by its own terms, only applies to "nationals and companies of either Party…within the territories of the other Party." Under Article XXII(3), "[c]ompanies constituted under applicable laws and regulations within the

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107. *Sumitomo*, 457 U.S. 176.

108. *Id.* at 178.

109. *Id.* at 179.

110. Treaty of Friendship, Commerce and Navigation, Japan-U.S., art. VIII, ¶ 1, Apr. 2, 1953, 4 U.S.T. 2063 [hereinafter Japan-U.S. FCN].

111. *Sumitomo*, 457 U.S. at 182.

112. *See supra* note 46.

113. Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 555–57 (2d Cir. 1981), *rev'g* 473 F. Supp. 506 (S.D.N.Y. 1979). Neither the Second Circuit nor the district court discussed the question of whether the treaty was self-executing.

territories of either party shall be deemed companies thereof."[114] Because Sumitomo was incorporated in the U.S., it was a U.S. company, not a Japanese one, and was thus not operating "within the territories of the other Party." While a Japanese company operating in U.S. territory through a *non-incorporated branch office* might enjoy the right under Article VIII(1) to hire the employees of its choice, that right did not extend to *domestically incorporated subsidiaries* under the "literal language" of the treaty stating that the nationality of the "company" was to be determined by its place of incorporation.[115]

The Supreme Court's decision in *Sumitomo* would have major consequences for our argument if the decision stood for the principle that the last-wave FCN treaties *generally* apply only to branches of foreign corporations and not to domestically incorporated subsidiaries. This is because foreign investors in the U.S. tend to prefer to invest through domestically incorporated subsidiaries for both tax and liability reasons. But *Sumitomo*'s basis in the literal text of Article VIII(1) actually helps our argument, as the main substantive provisions of FCNs—those that grant traditional international investment law rights—are framed much more broadly than are the freedom-to-hire provisions. To see why this is so, consider the following provision from the U.S.-Germany FCN:

> *Property of nationals and companies of either High Contracting Party, including interests in property*, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law.[116]
>
> Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, *and to their property, enterprises and other interests*.[117]

Note that these articles accord special treatment to nationals and companies *of the other party*. Under *Sumitomo*, the article should be read as extending the right only to foreign-incorporated "companies," and not to domestically incorporated subsidiaries. In other words, it is the *foreign* "national" or "company" in which the right is vested. Under *Sumitomo*, the domestically incorporated subsidiary does not itself possess the right to the most constant protection and security or to fair and equitable treatment, and

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114. Japan-U.S. FCN, *supra* note 110, 4 U.S.T. at 2079–80.
115. *Sumitomo*, 457 U.S. at 183.
116. U.S.-Ger. FCN, *supra* note 15, at 7 U.S.T. at 1844.
117. *Id.* at 1841.

thus almost certainly cannot, itself, invoke the standard in litigation. But the foreign national or company can still invoke *its* right to the most constant protection and security and to fair and equitable treatment in cases where the standard has been violated against its domestically incorporated subsidiary.[118] This is because the treaty requires the host state to provide such treatment *to the foreign national or company's "property . . . including interests in property"* and its *"property, enterprises and other interests."* Those categories necessarily include domestically incorporated subsidiaries, which are, by definition, the "property" of the foreign party.[119]

The difference, then, between fair and equitable treatment provisions and the freedom-to-hire provision at issue in *Sumitomo* is that the FCNs expressly extend the scope of application of the fair and equitable treatment standard to property, broadly defined, held by the foreign party in the territory of the other party, regardless of the legal form in which the property is held. In contrast, the freedom-to-hire provision in *Sumitomo*, by its own terms, only granted the freedom to hire to the foreign company itself, and not to the foreign company's "property" broadly construed. In *Sumitomo*, neither the domestically incorporated subsidiary nor the Japanese parent corporation had any right under the FCN to challenge the application of U.S. employment law to the subsidiary. But under the typical fair and equitable treatment provision, the foreign parent corporation necessarily has the right to challenge host state treatment of its "property" that violates the standard.

The implication of this point is of great importance for our argument. As described in the next Part, the last-wave FCNs routinely grant important substantive rights to foreign nationals and companies that expressly extend to their property held abroad, regardless of the legal form in which it is held.

## IV. FCNS AND INVESTMENT PROTECTION

In this Part we describe how a foreign investor may be able to use the substantive rights contained in last-wave FCN treaties to access the protections of international investment law in domestic litigation. We first

118. In one recent case, a federal district court in New York failed to appreciate this distinction. *See In re* 650 Fifth Ave. & Related Props., 777 F. Supp. 2d 529, 574 (S.D.N.Y. 2011) ("Nothing in the Treaty states that protections for corporations incorporated in Iran also apply to corporations controlled by Iran but organized under the laws of the United States.").

119. *Cf.* STATE DEPARTMENT REPORT, *supra* note 29, at 123 ("The intent of the term 'indirectly' is to ensure that the ultimate beneficiary United States owner receives just compensation . . . . A case in point would be the property of an expropriated corporation of the treaty partner owned in turn by a third party corporation the stock of which is owned by United States citizens.").

present a doctrinal discussion of three common FCN provisions that provide investors with (1) freedom from inequitable, unreasonable, or discriminatory treatment; (2) constant protection and security; and (3) compensation for expropriation. Our aim in this Part is to detail the ways in which a foreign investor *could* use an FCN treaty in domestic litigation in defense of its rights as in investor. To our knowledge, the FCN treaties have never been invoked in litigation in this way against a governmental entity in the United States. The failure of foreign investors to take advantage of their FCN-based rights may indicate that these rights are rarely violated. Alternatively, it may indicate widespread ignorance about the treaties and their legal significance.

The Appendix provides a summary of the last-wave FCNs which remain legally in force. The Appendix indicates whether each of the treaties contains one of the provisions mentioned in the prior paragraph. Note that most of the treaties contain the substantive core provisions of modern investment treaties. In the pages below, we provide relatively brief descriptions of each of the standards and seek to illustrate how they might prove useful to foreign investors in the United States.

### *A. Equitable, Reasonable, and Non-Discriminatory Treatment*

#### 1. Fair and Equitable Treatment

Many of the last-wave FCNs provide for either "fair and equitable" or "equitable" treatment. The earlier treaties exclude the word "fair" from the standard, though we have no firm evidence as to why that is the case.[120] Our sense of the early post-war FCN program is that the treaty drafters had not yet settled on standard formulations for the promises that the treaties would contain. Whether the negotiators understood "equitable" to mean the same thing as "fair and equitable" is not entirely clear, but we think the best answer is that they probably had the same basic underlying concept in mind—something like the international minimum standard of "fair" treatment

120. The State Department Report sheds no light on the issue as to why the formulations differ. It states merely that the grant of "equitable treatment" is "not intended to serve as a third standard in addition to national treatment and most-favored-nation treatment" and that "[t]he functions of the concept of equitable treatment are to serve as a guiding principle in cases where the exact terms of a given treaty provision do not furnish complete and definitive guidance." STATE DEPARTMENT REPORT, *supra* note 29, at 67.

embodied in modern fair and equitable treatment clauses.[121] "Equitable" by definition embodies a sense of "fairness,"[122] and the modern practice of referring to the standard as one of "fair *and* equitable" treatment is probably best viewed as an example of the law's well-known tolerance for terminological redundancies.[123]

The fair and equitable treatment standard is routinely viewed by academics and practitioners as the broadest of the traditional absolute standards found in modern BITs.[124] Dolzer has described it as "directly linked to the fundamental moral and legal grounding of the notion of fairness, anchored in a universally accepted sense of justice, but also in classic rules of customary law governing the protection of foreign nationals and

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121. In fact, Professor Vandevelde (who was involved in the development of the U.S. BIT program) traces the origins of modern fair and equitable treatment provisions to their predecessors in U.S. FCNs and other instruments, and argues that tribunals have developed a "unified theory" of the standard that minimizes the relevance of differences in the text or context of the various articulations. Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 44 (2010).

122. The Oxford English Dictionary defines "equitable" as "1. Characterized by equity or fairness. a. Of actions, arrangements, decisions, etc.: That is in accordance with equity; fair, just, reasonable." OXFORD ENGLISH DICTIONARY (2d ed. 2000).

123. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 123 (2008) ("The general assumption appears to be that 'fair and equitable' must be considered to represent a single, unified standard. Indeed, it has been opined that there is no difference between 'equitable' and 'fair and equitable.'"). The U.S. Department of State has also suggested that the two formulations are legally equivalent. MARIAN NASH, 2 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 2652 (1995). Foster traces the history of "equitable treatment" as a standard to be applied in international commerce to Article 23(e) of the League of Nations Covenant. George K. Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L. 1095, 1127 (2012). Foster suggests that the Covenant's drafters used the term as a "shorthand for the treatment to which foreigners are entitled under customary international law"—e.g., as the same "minimum standard of treatment" that the modern formulation of fair and equitable treatment is said to represent. *Id.* Other scholars agree that "equitable" and "fair and equitable" refer to the same standard. *See* Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 MAX PLANCK Y.B. UNITED NATIONS L. 609, 625–26 (2006); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRITISH Y.B. INT'L L. 99, 111–12 (1999).

124. Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 10 (2013) ("[T]he [fair and equitable treatment] rule is certainly the broadest of all of them, susceptible to cover a much wider range of activities than other rules. Accordingly, investment lawyers representing claimants naturally seek to tailor their cases and their arguments so that they will be subsumed under the [fair and equitable treatment] standard."). Absolute standards can be contrasted with "relative" standards, such as most favored nation or national treatment. The latter are relative in the sense that the level of treatment that the covered investor is entitled to enjoy depends on the level of treatment that other investors (domestic or foreign) are entitled to enjoy.

companies."[125] In that sense it serves as a catchall guarantor that a foreign national or company will be treated by the host state in a way that comports with minimum international standards of good faith and justice. What this means in practice, of course, is debatable, and will be highly fact and context dependent. International law scholars have, however, identified a number of situations that implicate fair and equitable treatment.[126] First, and probably most importantly, the standard may serve to guarantee the foreign investor a meaningful level of stability and consistency in the host state's legal order, especially where the investor has "legitimate expectations" of such stability. Second, it may establish a minimum level of due process as to governmental decisions affecting the investment. Third, it may require the government to be transparent in its decision-making. Fourth, it may protect the investor against arbitrary or xenophobic measures, and against harassment by government officials. As Dolzer points out, the scope of potential application of the standard is wide:

> [T]he types of actions which affect the foreign investor's interests have turned out to be very broad, ranging from tax matters to contractual issues, from tariff regulations to the conduct of renegotiation, from open communication among state and investor, including to the organization of a bidding process. In all such areas, and multiple others, issues of fair treatment may arise . . . .[127]

That said, it is important to note that the U.S. government has recently begun to advocate for a narrower conception of fair and equitable treatment that links the standard to the customary international law minimum standard of treatment of aliens.[128] In particular, the U.S. government argues that fair and equitable treatment, as used in U.S. BITs, is meant to reflect the standard announced in the famous 1926 *Neer* arbitration, which held that customary international law required states to avoid treating aliens in ways that amounted to "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency so far short of international standards that every reasonable and

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125. *Id.* at 12.

126. These situations are distilled from Dolzer, *supra* note 124, at 20–32. In his "unified theory" of fair and equitable treatment, Vandevelde argues that tribunals have used it to establish investor rights to "reasonableness, consistency . . . nondiscrimination and transparency." Vandevelde, *supra* note 121, at 52.

127. Dolzer, *supra* note 124, at 32.

128. *See id.* at 13 ("What is well-known is that the United States has turned to a narrow approach. What has received less attention is that China, with the most BITs worldwide except for Germany, has adopted the widest possible approach, that is, an unqualified version of [fair and equitable treatment].").

impartial man would readily recognise its insufficiency."[129] Moreover, the U.S. government has taken the position that customary international law has not evolved, and cannot without great difficulty evolve, away from this historical standard.

As we have noted above, however, the U.S. government's attempt to fix the standard to a historically frozen version of *Neer* has been controversial.[130] The U.S. government's arguments have also been made exclusively in the context of interpreting NAFTA Chapter 11 or CAFTA, and not in the context of FCNs.[131] We think that it is at least questionable as to whether the narrow U.S. view of Chapter 11's minimum standard of treatment—even if legally correct in the case of NAFTA—is also necessarily applicable to the contextually and textually distinct provisions in the (much earlier) FCNs. In other words, it is possible that fair and equitable treatment, as it exists in FCNs, may have a different meaning (or a different propensity to evolve) than does fair and equitable treatment as used in NAFTA. It is also possible that the U.S. position on what fair and equitable treatment means would be unconvincing to a U.S. court interpreting a U.S. FCN. In either case, it remains possible that an FCN-based right to fair and equitable treatment includes protections that mean something closer to the broad standard as articulated modern arbitral awards,[132] rather the narrow version articulated in the *Neer* case.

### 2. Unreasonable or Discriminatory Measures

The post-war FCNs also generally forbid the host state from taking any "unreasonable or discriminatory measures that would impair the legally acquired rights or interests" of foreign investors in "the enterprises which they have established or in the capital, skills, arts or technology which they have supplied."[133] The purpose of this provision, according to the State

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129. MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 49 (2013) (quoting the *Neer* award).

130. See the discussion *supra* note 25.

131. *See, e.g.*, R.R. Dev. Corp. v. Republic of Guat., ICSID Case No. ARB/07/23, Award, ¶ 212–36 (June 29, 2012), http://www.italaw.com/sites/default/files/case-documents/ita1051.pdf.

132. For example, the award in *Technicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB (AF)/00/02, Award (May 29, 2003), 10 ICSID Rep. 134 (2006), is frequently cited as the most important and persuasive articulation of a broad standard of fair and equitable treatment as it is said to exist in modern, evolved customary international law. *See* Dolzer, *supra* note 124, at 14.

133. *E.g.* Treaty of Friendship, Commerce and Navigation, Den.-U.S., art. VI, ¶ 4, Oct. 1, 1951, 12 U.S.T. 908.

Department Report, is to "offer[] a basis in rather general terms for asserting protection against excessive governmental interference in business activities or particular activities not specifically covered by the treaty."[134] In particular, this language sought to guard against the possibility that a host government would enact rules that were non-discriminatory on their face but that were applied in a discriminatory manner.[135]

With respect to "unreasonable" measures, international arbitral tribunals interpreting similar language in bilateral investment treaties have held that measures taken by a host state are "unreasonable" when they "lack a reasonable relationship to some rational policy."[136] Other tribunals have held that that "unreasonable" measures are essentially the same as "arbitrary" measures and that either standard is violated when an action is "done capriciously, without reason."[137] With respect to arbitrariness, the International Court of Justice has observed that "[i]t is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[138] At the same time, the ICJ has cautioned that the mere fact that an action is unlawful under domestic law does not by itself make it arbitrary. In the court's artful phrase: "Arbitrariness is not so much something opposed to *a* rule of law, as something opposed to *the* rule of law."[139]

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134. STATE DEPARTMENT REPORT, supra note 29, at 115.

135. *Id.*; *see also* Michael Brandon, *Legal Aspects of Private Foreign Investment*, 18 FED. B.J. 298, 331 (1958) (arguing that the discriminatory treatment provisions in the post-war FCNs establish "indirectly" a version of the vested rights doctrine, under which "a state [may] not take unreasonable or discriminatory measures that would impair the rights of aliens which have been acquired in full compliance with the laws existing at the time of such acquisition").

136. AES Summit Generation Ltd. v. Republic of Hung., ICSID Case No. ARB/07/22, Award, ¶ 10.1.1 (Sept. 23, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

137. Nat'l Grid P.L.C. v. Arg. Republic, Case No. 1:09-cv-00248-RBW, Award, ¶ 197 (UNCITRAL Arb. Trib. 2008), http://www.italaw.com/sites/default/files/case-documents/ita0555.pdf.

There is some scholarly debate on this issue. *Compare* Christoph H. Schreuer, *Protection Against Arbitrary or Discriminatory Measures*, *in* THE FUTURE OF INVESTMENT ARBITRATION 183, 183 (C.A. Rogers & R.P. Alford eds., 2009) ("There does not appear to be a relevant distinction between the terms 'arbitrary', 'unjustified' and 'unreasonable' in this context. Rather, the terms seem to be used interchangeably."), *with* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 303 (2009) (arguing that "arbitrary is not to be equated with . . . unreasonable") (internal quotations omitted).

138. Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J Rep. 15, ¶ 128 (July 20).

139. *Id.* (emphasis added); *see also Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 3, 53 U.N. GAOR Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) ("The characterization of an act of a State as internationally wrongful is governed by

With respect to "discriminatory" measures, the ICJ had occasion to interpret the meaning of the term specifically in the context of the U.S.-Italy FCN in the *ELSI* case.[140] The ICJ held that a decision by an Italian municipality to requisition property owned by a U.S. company was non-discriminatory—and hence not a violation of the treaty—because it was made without regard to the nationality of the shareholder. In support of this conclusion, the ICJ noted that several other requisition orders had previously been entered by the same municipality against companies wholly owned by Italian nationals.[141] This approach is generally consistent with that of the many international investment tribunals that have been asked to evaluate whether a particular measure was discriminatory. These tribunals have generally held that "state conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification."[142]

It is an open question whether treaty language prohibiting the host state from imposing "unreasonable or discriminatory" measures on foreign investors is strictly necessary where the treaty in question also states that these investors are entitled to "equitable" treatment. Some tribunals have held that any state action that is unreasonable or arbitrary is by nature inequitable.[143] Other tribunals have found that a particular measure was inequitable without finding that it was arbitrary or discriminatory.[144] With respect to the "unreasonable or discriminatory" language contained in the FCNs, it is tempting to conceptualize these provisions as restating and amplifying other treaty provisions. The State Department Report indicates, however, that these provisions were "considered as additional to rather than in replacement of investment-oriented provisions framed in specific terms."[145]

### 3. Law in Action

To illustrate how these treaty provisions might prove useful to a foreign company doing business in the United States, consider the following

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international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

140. U.S. v. It., 1989 I.C.J. at ¶ 122.

141. *Id.*

142. Saluka Investments BV v. Czech Republic, IIC 210, Partial Award, ¶ 313 (Perm. Ct. Arb. 2006).

143. NEWCOMBE & PARADELL, *supra* note 137, at 301 (citing cases).

144. *Id.*

145. STATE DEPARTMENT REPORT, *supra* note 29, at 115.

example. In recent years, U.S. prosecutors have brought an increasing number of criminal charges against foreign corporations for antitrust violations, environmental crimes, and violations of the Foreign Corrupt Practices Act ("FCPA").[146] In 2008, the German company Siemens entered into a plea bargain agreement with federal prosecutors in which it pled guilty to violations of FCPA accounting requirements and agreed to pay more than $800 million in fines to the U.S. government.[147] In 2009, the Swiss bank UBS AG signed a deferred prosecution agreement with federal prosecutors in which it agreed to pay $780 million in fines and to divulge the names of U.S. clients who had utilized its services to avoid paying U.S. taxes.[148] While sizable, these fines have attracted relatively little attention because the underlying conduct by the firms in question was clearly blameworthy. When one looks at the actions of federal prosecutors in the aggregate, however, there emerges a clear disparity between the size of the fines typically assessed on *U.S. firms*, on the one hand, and the size of the fines typically assessed on *foreign firms*, on the other.

One survey of data reported by the U.S. Sentencing Commission between 2000 and 2008, for example, found that the average fine paid by foreign firms was nearly $17.8 million.[149] The average fine paid by U.S. firms, by comparison, was only $3.8 million.[150] A separate survey of data regarding foreign firm convictions found that the average fine assessed on foreign firms was $38.1 million. The average fine paid by U.S. firms, by contrast, was only $11.4 million.[151] This disparity cannot be explained by the fact that the foreign firms were larger or otherwise more culpable than similarly situated U.S. firms; a regression analysis of these data found that higher fines corresponded with firms that were public and foreign.[152] Even more damning, that same regression found that "for otherwise comparable firms, a foreign firm will receive a fine that is on average 22 times larger (between 12 and 41 times larger) than the fine of a domestic firm."[153]

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146. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1777 (2011).

147. *Id.* at 1786–87.

148. *Id.* at 1815.

149. *Id.* at 1810.

150. *Id.*

151. *Id.*

152. *Id.* at 1812.

153. *Id.* Garrett advances several possible explanations as to why foreign firms may pay higher fines for reasons *other* than discriminatory treatment by federal prosecutors. *Id.* at 1813–14. In light of the disparity in the size of the fines assessed, however, it seems quite plausible that discrimination against foreign firms may play at least some explanatory role.

Notwithstanding the fact that the U.S. generally offers a positive investment climate for foreign capital, this disparity raises serious questions whether (1) the United States is living up to its promise to accord "fair and equitable" treatment to foreign companies, and (2) the United States has adopted "unreasonable or discriminatory measures" that have the effect of impairing the legally acquired rights or interests of foreign companies. If a foreign company wanted to bring suit challenging this disparity when a fine is levied against it, the FCN offers a potential avenue through which the suit might be brought.

### *B. Constant Protection and Security*

#### 1. State Protection Against Violence

All of the post-war FCNs contain a version of what today is known as the "full protection and security" standard of treatment. While the precise language used varies somewhat from FCN to FCN, the standard formula is a guarantee of "most constant protection and security."[154] According to the State Department Report, the intent of this provision was to "commit the government to that measure of security which its legal, judicial and protective agencies are capable of ensuring."[155] The Report also states that "this commitment extends to government protection against violence or persecution at private hands."[156]

There is some debate in the academic literature (and as between arbitral tribunals) as to what this standard actually entails and how it relates to the minimum standard of treatment due to aliens under customary international law.[157] The narrow view is that the standard is meant only to reflect customary international law norms relating to the protection of investors' physical security.[158] Thus, for example, a state may have an obligation to exercise due

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154. The "most constant protection and security" formulation is also found in the Abs-Shawcross Convention of 1960 (Art. 1), and in the Energy Charter Treaty (Art. 10). The U.S. Department of State has suggested that the two formulations (constant and full) are legally equivalent. NASH, *supra* note 123.

155. STATE DEPARTMENT REPORT, *supra* note 29, at 84.

156. *Id.*

157. For an overview of the debate, see generally Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?*, 2011 INT'L INST. SUSTAINABLE DEV. BEST PRAC. SERIES 1, 9.

158. The link between full protection and security provisions and physical security dates back at least to the late 1800s. Moore, for instance, discusses the "most constant protection and

diligence in the use of its military and police forces in order to protect an alien investor's property from physical damage from the violent acts of third parties, such as secessionists, mobs, or criminals. The broader view of full protection and security sees the standard as extending beyond mere physical protection. In this view, a promise of protection may entail the state's commitment not to harass or otherwise impermissibly interfere with the investor, or his investment, through the use of political, legal, or regulatory processes.[159] In the broad view, full protection and security may overlap extensively with fair and equitable treatment, providing the investor with a right, reflective of an "international minimum standard," to be free of unwarranted government interference in the use and enjoyment of its investment.[160]

In its 2012 Model BIT, the United States seems to limit the full protection and security standard to the narrow view. It is said, in the treaty text, to require "each Party to provide the level of police protection required under customary international law."[161] The concept of "police protection" is undefined, but it may be read as suggesting that the Model BIT's full protection and security provision is intended to be limited to the kinds of physical security that "police" typically provide.[162] On the other hand, the equivalent provisions in FCNs are not accompanied by this arguably limiting language, and the U.S. government has argued that the relevant provision in the US-Italy FCN should be interpreted broadly to apply to unreasonable delay in court proceedings. In the *ELSI* decision, the ICJ implicitly accepted

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security" provision in an older U.S.-Italy treaty as protecting Italian citizens in the United States against "mob violence." John Bassett Moore, *Responsibility of Governments for Mob Violence*, 5 COLUM. L. TIMES 211, 214 (1892).

159. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 149–50 (2008) (describing the broad view of full protection and security as the "contemporary" view, and as providing "guarantees against infringements of the investor's rights by the operation of laws and regulations of the host state"). For a broad application, see *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 386 (July 14, 2006).

160. For this argument, see generally Foster, *supra* note 123.

161. Model Bilateral Investment Treaty, U.S., Art. 5(2)(b), 2012.

162. On the other hand, the quoted language from the 2012 US Model BIT doesn't say whether the full protection and security standard might impose *other* (unstated) obligations beyond "police protection." *Id.* Moreover, Foster convincingly argues that the 2012 U.S. Model BIT language misleadingly suggests that it reflects a customary international law understanding of full protection and security, when in fact custom reflects a much broader conception. Foster, *supra* note 123, at 1155.

this broader interpretation, even as it declined to find that the standard had been violated.[163]

The notion that the FCNs express a broader standard than the one set forth in the 2012 Model BIT is buttressed by language in the State Department Report stating that the "most constant protection and security" language was intended to "go[] beyond the international law standard" and that the Office of the Legal Adviser "considered the treaty provision stronger than any universally accepted international law rule."[164] It also derives support from historical studies of the full protection and security standard to date. For example, Professor Foster argues convincingly that international jurists and U.S. government officials have long understood the protection-and-security standard as representing a minimum standard of treatment that goes well beyond mere physical security.[165] Of most relevance here, Foster quotes a U.S. State Department publication from the 1950s explaining the use of such provisions in post-war FCNs as providing U.S. investors with "protection" from a broad class of "special hazards," including "unfavorable laws or juridical conditions."[166] Foster more generally concludes that protection-type standards were widely intended and understood in a way that overlaps significantly with fair and equitable treatment, though with a somewhat subtle distinction: the latter focuses on the state's duty of good faith in its interactions with the investor; the former focuses on the state's duty of good faith (or due diligence) as to the provision of a "legal system" adequate to protect the investor against unfair treatment, whether at the hands of third parties or at the hands of the government itself.[167]

### 2. Law in Action

To illustrate how the "most constant protection and security" provision might prove useful to a foreign national or company doing business in the United States, consider the following example. On April 29, 1992, riots

163. Elettronica Sicula S.P.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 15, ¶¶ 108–12 (July 20).

164. STATE DEPARTMENT REPORT, *supra* note 29, at 112.

165. Foster, *supra* note 123, at 1155.

166. *Id.* at 1133.

167. *Id.* at 1137; *see also* TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW 61 (2013) ("[T]he [full protection and security] standard has evolved, over the span of at least one millennium, into an obligation of due diligence to accord legal protection and security to foreign investors and their investments regardless of the forms of property involved and regardless of whether a civil disturbance or some other kind of criminal trespass is underway.").

engulfed South-Central Los Angeles after a jury acquitted four police officers of using excessive force in the arrest and beating of a motorist. The riots lasted for six days. Looting and arson were widespread and ultimately caused more than one billion dollars in property damage.[168]

A significant amount of this property damage was inflicted upon shops owned by Koreans and Korean-Americans.[169] In the decades preceding the riots, the businesses in the poorest areas of the city—grocery stores, liquor stores, car repair shops, dry cleaners, etc.—had come to be dominated by Korean immigrants. When the rioting began, these shops came under attack by rioters who were resentful of the Koreans' economic success.[170] In the face of these attacks, Korean shop owners called the police and begged for assistance. They did not receive it.

One Korean shop owner reported that "when our shops were burning we called the police every five minutes; no response."[171] Another stated that at the time the attack began, four police cars were present. Once the gunfire started, however, "the L.A.P.D. ran away in half a second. I never saw such a fast escape. I was pretty disappointed."[172] A third told a reporter that: "We called the police and nobody showed up. There was a fire burning across the street for three hours and nobody came."[173] If one of these Korean shop owners had wished to bring a lawsuit against the City of Los Angeles or the L.A.P.D. for breach of the treaty obligation to provide "constant protection and security" to their persons and property, the U.S.-Korea FCN would have permitted them to do precisely that.

### *C. Compensation for Expropriation*

Virtually all of the post-war FCNs state that the "property" of foreign nationals and companies "shall not be taken . . . except for a public purpose,

168. Melissa Pamer, *Los Angeles 1992 Riots: By the Numbers*, NBCLA (Apr 20, 2012, 6:37 PM), http://www.nbclosangeles.com/news/local/Los-Angeles-1992-Riots-By-the-Numbers-148340405.html.

169. Seth Mydans, *Riot in Los Angeles: Pocket of Tension; A Target of Rioters, Koreatown is Bitter, Armed, and Determined*, N.Y. TIMES (May 3, 1992) http://www.nytimes.com/1992/05/03/us/riot-los-angles-pocket-tension-target-rioters-koreatown-bitter-armed-determined.html?pagewanted=all (noting that more than 800 Korean-owned shops suffered some damage).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

nor shall it be taken without the prompt payment of just compensation."[174] These treaties further provide that "[s]uch compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken."[175] The treaties address the *Sumitomo* problem by stipulating that the right to compensation shall extend to "interests held directly or indirectly" by foreign investors.[176] Even if the expropriated property is owned by a domestically incorporated subsidiary, in other words, the foreign company will have a cause of action for expropriation. In their broadest sense, these provisions seek to ensure that foreign investors will be fully compensated in the event that a governmental entity in the United States takes their property for a public purpose. In a narrower sense, these provisions seek to operationalize and make concrete certain long-standing rules of international law relating to the rights of aliens who invest in foreign nations.

#### 1. Property

FCNs do not define the term "property." In the context of interpreting the Treaty of Amity between the United States and Iran, the U.S.-Iran Claims Tribunal has held that this term encompasses "any right which can be the object of a commercial transaction, i.e. freely sold and bought, and thus has a monetary value."[177] The Tribunal also concluded that the term does not sweep broadly enough to include claims for "personal injuries."[178] It is generally accepted that the term "property" in international investment law is not limited exclusively to tangible property but also includes "a broad range of intangible assets of economic value to an investor."[179] These intangible assets include contract rights, shares of companies, intellectual property, and business concessions.[180]

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174. *See, e.g.*, U.S.-Japan FCN, *supra* note 110, 4 U.S.T. at 2068–69.

175. *Id.*

176. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, Belg.-U.S., art. XXI, ¶ 4, Feb. 21, 1961, 14 U.S.T. 1284.

177. Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (1987); Haddadi v. U.S., 8 Iran-U.S. Cl. Trib. Rep. 20, 22 (1985); Rankin v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 135, 148 (1987).

178. *Id.*

179. August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 410 (Peter Muchlinski et al. eds., 2008).

180. *Id.*

2. Takings for a Public Purpose

When a foreign investor's property is "taken" by the host state government, FCNs confer certain rights upon the investor.[181] The State Department Report states that the term "taken" is synonymous with "expropriation" and that this concept covers both direct and indirect expropriations: "The concept of taking is considered as covering, in addition to physical seizure, a wide variety of whole or partial sequestrations and other impairments in or uses of property [and] includes use of the property by the government for a public purpose without formal transfer of ownership."[182] A leading treatise on international investment law similarly states that: "It is on the whole undisputed that the prohibition of expropriation of foreign property, both under customary international law and under applicable treaty law, covers not only formal takings but also indirect expropriation."[183] The precise line between permissible regulation and impermissible takings is not always clear. As one arbitral tribunal has written in interpreting the U.S.-Ukraine BIT:

> It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an "indirect" expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, *i.e.* the product of discernment, and not the printout of a computer programme.[184]

While it may not always be easy to determine whether an indirect expropriation has occurred, such an act is actionable under all of the last-wave FCNs. In addition, these treaties stipulate that foreign investors shall be accorded most-favored-nation treatment with respect to matters relating to

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181. *See generally* George Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585 (1994) (discussing what constitutes a "taking" in context of U.S.-Iran FCN).

182. STATE DEPARTMENT REPORT, *supra* note 29, at 116.

183. Reinisch, *supra* note 179, at 420–21.

184. Generation Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶ 20.29 (Sept. 16, 2003), 44 ILM 404 (2005).

expropriation.[185] To the extent that the U.S. BITs contain expansive language relating to takings of property for a public purpose, whether direct or indirect, foreign investors may access these provisions through the FCNs.

In theory, the requirement that a governmental taking be for a "public purpose" serves to limit the power of the host state to expropriate the property of a foreign investor. In practice, states are not meaningfully constrained by this provision. As Pedro Martinez-Fraga and Ryan Reetz have observed: "What sparse pronouncements exist on 'the jurisprudence of public purpose in international law' are mostly inconclusive and merely suggest that, although not without limits, States enjoy wide discretion in determining what constitutes public purpose."[186] In this respect, the international jurisprudence is generally in line with the jurisprudence of the U.S. Supreme Court, which has taken a similarly expansive view of what constitutes a public purpose in litigation under the Takings Clause of the U.S. Constitution.[187]

#### 3. Just Compensation

The term "just compensation" provides guidance to courts and tribunals called upon to decide precisely *how much* a state must pay when property is taken. The State Department Report notes that this term was chosen because it "has a strong content of meaning, built up through judicial decisions, arbitral awards, treaty practice, and the writing of publicists."[188] The U.S.-Iran Claims Tribunal had occasion to interpret the meaning of "just compensation" in the context of the Treaty of Amity on several occasions. The U.S. arbitrators on the Tribunal generally took the view that the treaty required that Iran pay "full compensation" to U.S. investors for property expropriated by the Iranian government.[189] Under this standard, U.S. investors were entitled to lost profits as well as the book value of the expropriated assets.[190] The Iranian arbitrators, by contrast, took the view that

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185. *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, Ir.-U.S., art. VIII, ¶ 3, Jan. 21, 1950, 1 U.S.T. 785.

186. PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA 6 (2015).

187. Kelo v. City of New London, 545 U.S. 469, 479 (2005) (observing that "this Court long ago rejected any literal requirement that condemned property be put into use for the general public"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 95–109 (1986) (presenting empirical evidence suggesting that U.S. courts rarely find that there was no "public use" in takings cases).

188. STATE DEPARTMENT REPORT, *supra* note 29, at 117.

189. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 461–62 (2004).

190. *Id.* at 463.

"just compensation" merely required the expropriating government to pay the net value of the property.[191] They argued that the "just compensation" standard did not cover lost profits.[192] The neutral arbitrators—who were overwhelmingly European—were generally supportive of the "full compensation" norm in principle but often found reasons to reduce the amount of compensation in practice.[193] The European arbitrators would, for example, often cite changes in the Iranian economy after 1979 as a reason to reduce the expected value of future profits owed to the U.S. investors.[194]

The State Department Report generally tracks the position of the U.S. arbitrators when it comes to the question of what constitutes "just compensation." The Report states that "just compensation" is compensation that is "sufficient to place the owner in approximately the same financial position as . . . he was in before the taking."[195] This standard presumably includes compensation for lost profits.[196] The Report also takes the position that "just compensation" covers partial takings.[197] In partial takings cases, the Report states, the host government must pay to the foreign investor "a full approximation of the amount by which the taking impaired the value of the property."[198] It also notes that some partial taking must be "compensated at full market value because the partial taking constituted such a grave impairment of the remainder of the property as to render it useless or valueless to the owner."[199]

#### 4. Full Equivalent of the Property Taken

Finally, FCNs typically state that the compensation paid to the investor shall "represent the full equivalent of the property taken." The Report notes that this language is intended to serve as a "point of reference for . . . the courts in determining whether such compensation is just."[200] This language is

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191. *Id.* at 462.
192. *Id.*
193. *Id.*
194. *See, e.g.*, Thomas Earl Payne v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 157 (1986); Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 226–28 (1984).
195. STATE DEPARTMENT REPORT, *supra* note 29, at 117.
196. *See* Starett Hous. Corp. v. Iran, Final Award, 16 Iran-U.S. Cl. Trib. Rep. 112, 201 (1983).
197. STATE DEPARTMENT REPORT, *supra* note 29, at 117.
198. *Id.*
199. *Id.*
200. *Id.* at 118.

significant for two reasons. First, it strongly suggests that—contrary to the D.C. Circuit's analysis in *McKesson*—the drafters of the FCN envisioned that foreign investors would be able to have a private right of action in U.S. courts to enforce their rights against expropriation under the treaty. Why else would a treaty provision relating to expropriation need to serve as a point of reference for courts? Second, the language makes clear that compensation based on the *initial* value of the investment is inadequate.[201] The appropriate time to assess the value of the property taken is at the time of the taking rather than the time when the investment was made.

#### 5. Law in Action

At first glance, the utility of these particular treaty provisions may not seem obvious. The U.S. Constitution already provides legal protections against expropriation via the Takings Clause. Virtually every state constitution contains a similar provision.[202] Why would a foreign investor need to invoke a treaty when domestic law already provides similar legal protections? The answer to this question lies in the fact that the protections afforded by the treaty are sometimes *more robust* than the protections afforded by purely domestic law. This point is most clearly illustrated when it comes to "indirect" expropriation or "regulatory" takings.

The U.S. Supreme Court held in *Penn Central* that courts must balance three factors in determining whether a regulatory taking has occurred under the U.S. Constitution: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation interferes with investment-backed expectations," and (3) "the character of the government action."[203] In theory, the test constitutes a neutral attempt to balance the interests of the government against the interests of private property owners.[204] In practice, the test typically results in a finding that no taking has occurred and that no compensation is owed to the property owner.[205] As one critic has noted: "In

201. *Id.*

202. Long v. City of Charlotte, 293 S.E.2d 101, 107 (N.C. 1982) ("Every state constitution, except North Carolina's, contains . . . provisions prohibiting the taking of private property for public use without just compensation.").

203. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

204. *See* Tipton F. McCubbins, *Regulatory Takings: What Did* Penn Central *Hold? Three Decades of Supreme Court Explanation*, 21 S. L.J. 177, 178 (2011) ("However, *Penn Central*'s importance is that it sets up a balancing test to determine whether the regulated property owner has been unfairly burdened and is therefore entitled to compensation.").

205. Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 844 n.55 (1989) (citing *Penn Central* for the proposition that

the decades since *Penn Central*, courts systematically have denied compensation for regulations that deprive property owners of their right to use their property. Some examples approach absurdity."[206]

The standard of protection for regulatory expropriations under international investment treaties, by contrast, is generally viewed as more robust than the standard of protection set forth in the Takings Clause.[207] As one scholar has noted:

> The definition of "investment" that is protected under [NAFTA] Chapter 11 is much broader than the real property rights and other specific interests in property that are protected under the Takings Clause. In addition, under Chapter 11, an investor may be entitled to compensation for a regulatory measure that has a "significant" or "substantial" impact on the value of an investment. Apparently, the degree of economic impact may be calculated with regard to only the directly affected portion of the property, an approach—known as conceptual severance—that the Supreme Court has repeatedly rejected in its takings jurisprudence.[208]

When the U.S. Congress became aware of this divergence between the treaty standard and the constitutional standard in 2002, it enacted a law directing U.S. trade negotiators to "ensur[e] that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States."[209]

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"[i]n practice, federal courts permit property owners to bear significant losses resulting from government regulation without requiring compensation").

206. *See* Steven Geoffrey Gieseler et al., *Measure 37: Paying People for What We Take*, 36 ENVTL. L. 79, 88 (2006).

207. Colleen Austin, *NAFTA "Regulatory Takings" vs. Fifth Amendment Compensatory Rights: Tipping the Scales in Favor of Foreign Investment*, 13 CURRENTS: INT'L TRADE L.J. 56, 58 (2004) ("NAFTA tribunals' interpretations thus far have exceeded the substantive scope of U.S. compensation requirements under the Fifth Amendment while removing the procedural limitations typically imposed on domestic takings claims."); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 143 (2003) ("NAFTA's Article 1110 and similar provisions do not merely 'internationalize' the Takings Clause of the Fifth Amendment of the U.S. Constitution, but rather extend the scope of potential regulatory takings claims in significant respects."); Anthony B. Sanders, *Of All Things Made in America, Why Are We Exporting the Penn Central Test?*, 30 NW. J. INT'L L. & BUS. 338, 358 (2010) ("Given the expansive reading of the 'tantamount to expropriation' language in Article 1110 of NAFTA [in *Metalclad*], it is very likely that no taking would have been found had the case been reviewed under U.S. law and the Fifth Amendment.").

208. Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 6 (2004).

209. 19 U.S.C. § 3802(b)(3) (2012).

These negotiators subsequently modified the text of the U.S. Model BIT to achieve this goal going forward.[210] However, these textual modifications do not affect treaties negotiated by the United States prior to 2002, a list of agreements that includes all of the last-wave FCNs.[211]

The choice available to foreign investors who believe that they have suffered a regulatory taking has long been viewed as binary. The investor may *either* bring a constitutional takings claim before a U.S. court *or* bring a treaty-based expropriation claim before an international arbitral tribunal.[212] There was no way—or so conventional wisdom held—for a foreign investor to invoke the enhanced protections afforded by the treaty in domestic litigation. The FCNs show that this conventional wisdom is incorrect. The FCNs contain protections against indirect expropriation that are potentially stronger than the protections afforded by the U.S. Constitution. At the same time, they are self-executing and give rise to a private right of action. They make it possible, at least in principle, for foreign investors to litigate regulatory takings claims in U.S. courts under FCNs that afford more protection to foreign investors than does the U.S. Constitution.[213]

## V. CHALLENGES TO REVIVING THE FCN

Viewed from the perspective of the foreign investor, the revival of the FCN offers a number of advantages. First, and most obviously, the FCNs offer protections to foreigners and foreign investment that go beyond what may be available purely as a matter of domestic law. Second, to the extent that international investment arbitrations are costly—and the available

210. Sanders, *supra* note 207, at 358–59.

211. *See id.* at 359–60 (illustrating the effect 19 U.S.C. § 3802(b)(3) had on the U.S. Model BIT).

212. A number of foreign investors have brought arbitral claims against the United States under Chapter 11 of NAFTA. *See, e.g.*, Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 15 (June 26, 2003), 7 ICSID Rep. 421, 427 (2005); Methanex Corp. v. United States, 44 I.L.M. 1345, 1345 (NAFTA Ch. 11 Arb. Trib. 2005); Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 2 (Oct. 11, 2002), 6 ICSID Rep. 182, 193 (2004).

213. At least one scholar has argued in favor of *requiring* foreign investors to exhaust their local remedies by bringing treaty-based claims in domestic courts before proceeding to international arbitration. *See* Dodge, *supra* note 5, at 29 ("If investment agreements between developed countries were enforceable in domestic courts, and if foreign investors were required to exhaust their local remedies before resorting to an international tribunal, a number of advantages would be gained: (1) sovereignty would be better protected than under NAFTA Chapter 11, (2) the appellate processes of domestic courts would be able to correct errors, and (3) a single forum would be able to hear and resolve all claims arising from an investment dispute.").

evidence suggests that they are increasingly so—these investors may find that litigating these disputes before U.S. courts is more cost-effective than arbitrating in an international forum.[214] Third, it may be more convenient to litigate than to arbitrate in some cases. Instead of traveling to some far-flung city for weeks at a time, party witnesses could simply walk or drive to the local courthouse. This is not to suggest that there are no advantages to international arbitration of investment disputes. The arbitrators may be more impartial than a U.S. judge, for example, when it comes to deciding whether an act of expropriation has occurred.[215] It is merely to point out that the revival of the FCN and the ability to litigate FCN-related disputes before U.S. courts is likely to be seen as advantageous to at least some foreign investors under some circumstances.

There are, however, a number of obstacles that would need to be overcome before the FCN revival outlined above could successfully occur. Perhaps the most significant obstacle is the well-documented reluctance on the part of U.S. judges to enforce rules of international law in the absence of a statute expressly directing them to do so.[216] In recent years, U.S. judges have generally shied away from recognizing treaties as self-executing.[217] They have also been increasingly reluctant to recognize private rights of action.[218] While this judicial ambivalence is not specifically directed towards FCNs, it presents a potential challenge to any attempt to revive the FCN as a source of individual rights in domestic courts.

A related problem is the fact that FCNs couch their promises to investors in language that is sometimes different from the domestic-law analogues with which U.S. judges are familiar.[219] The U.S. Constitution talks about

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214. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1275 (2009) ("[I]nvestment arbitration is extremely costly and time consuming.").

215. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 217 (3d ed. 2010) ("A foreign investor, justifiably in many instances, will not have confidence in the impartiality of the local tribunals and courts in settling any dispute that may arise between him and the host state.").

216. *See* John F. Coyle, *The Case for Writing International Law in to the U.S. Code*, 56 B.C. L. REV. 433, 442–62 (2015).

217. *Id.* at 442–47.

218. *Id.*

219. *See* William S. Dodge, *Local Remedies Under NAFTA Chapter 11*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION 37, 39 (Emmanuel Gaillard & Frédéric Bachand eds., 2011) ("Domestic law may duplicate the protections of [international investment law] in various ways—an expropriation of property may be a taking under domestic law; an expropriation of contractual rights may be a breach of contract; a denial of justice may be a violation of due process.").

"takings." International investment law talks about "expropriations."[220] U.S. law allows private parties to challenge legislative acts under a largely toothless "rational basis" standard[221] and to challenge bureaucratic action under a quite different "arbitrary and capricious" standard.[222] FCNs allow investors to challenge any government action, whether legislative or administrative, under a unitary "fair and equitable treatment" standard.[223] Judicial unfamiliarity with the language of international investment law may make it more likely for judges to restrict private access to the treaties. And even when the judge is willing to take a stab at understanding and applying the substantive FCN provisions, it may be too tempting to inappropriately conflate the content of international standards with weaker, and more familiar, domestic ones.[224]

Another potential obstacle to the revival is the fact that the FCNs are useful precisely because they give foreign investors rights that are *not* available to U.S. citizens. At least historically, U.S. courts have been reluctant to grant rights to foreign nationals while denying these same rights to U.S. citizens.[225]

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220. Been & Beauvais, *supra* note 207, at 59 (comparing U.S. takings jurisprudence with expropriations under NAFTA).

221. *See* Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 318–20 (1987).

222. Robert Loefflad, In the Matter of Bell Petroleum Services, Inc.*: Reviewing Removal Actions Under the Arbitrary and Capricious Standard of Review*, 7 VILL. ENVTL. L.J. 133, 135 (1996).

223. *See, e.g.*, U.S.-Ger. FCN, *supra* note 15, 7 U.T.S. at 1844; *see also* Anne Marie Martin, *Proportionality: An Addition to the International Centre for the Settlement of Investment Disputes' Fair and Equitable Treatment Standard*, 37 B.C. INT'L & COMP. L. REV. 58, 62–63 (2014) (discussing the fair and equitable treatment standard).

224. Some commentators have argued that the United States Supreme Court committed precisely this sin in *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014). *See* Jonathan Lim, BG Group v. Argentina*: Would ICSID Arbitration Have Been Different?*, KLUWER ARB. BLOG (Feb. 4, 2014), http://kluwerarbitrationblog.com/2014/02/04/bg-group-v-argentina-would-icsid-arbitration-have-been-different/. While this problem of judicial unfamiliarity or discomfort with international investment law is surely a real one, some also expect that it is one that will diminish in importance over time. This is so for two reasons. First, and unlike in the early days of the FCN program, there is now a large body of international arbitral jurisprudence and academic commentary that develops and explains the otherwise opaque meanings of international investment law's traditionally sparse formulations. This international jurisprudence can stand in for the lack of domestic jurisprudence interpreting and applying the FCNs. Second, law firms, through their investment-treaty practices, are increasingly expert in the intricacies of international law, and should be well equipped to educate judges as to its meaning and proper application.

225. *See, e.g.*, ITC Ltd. v. Punchgini, Inc.*,* 482 F.3d 135, 155–56 (2d Cir. 2007) (declining to recognize treaty right to "famous marks" for benefit of foreign trademark holder). The Alien Tort Statute—which states that only an "alien" may bring suits for torts committed "in violation of the law of the nations"—is the exception that proves the rule. 28 U.S.C. § 1350 (2012). Even in the case of the ATS, however, the exclusion of U.S. citizens has not gone unnoticed. *See* Kadic

In past FCN litigation, the foreign national or company has typically asked the court to enforce a treaty provision providing for national treatment in the face of a state or local law that discriminated against non-U.S. citizens.[226] Under our argument, foreign investors would be asking the courts to enforce a treaty provision according aliens rights that are superior to those enjoyed by U.S. citizens. While there are scattered historical precedents where U.S. courts granted aliens rights denied to U.S. citizens, some U.S. judges may prove resistant to the idea in practice.[227]

Still another obstacle that may complicate the project of reviving the FCN is sovereign immunity. In the United States, the state and federal governments generally enjoy sovereign immunity unless they have waived this immunity or consented to suit.[228] The Supreme Court has stated, albeit in *dicta*, that the Takings Clause amounts to a *de facto* waiver of federal sovereign immunity for suits in which a taking is alleged.[229] Although the

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v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995) ("Congress enacted the Torture Victim Act to codify the cause of action [under the ATS] recognized by this Circuit in *Filártiga, and to further extend that cause of action to plaintiffs who are U.S. citizens*.") (alteration in original) (emphasis added).

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

227. *See* Shell Petroleum, N.V. v. Graves, 570 F. Supp. 58, 64 (N.D. Cal. 1983) ("To extend the treaty language, by construction, specifically to protect Netherlands shareholders of U.S. corporations would in effect accord to those U.S. companies fortunate enough to have Netherlands companies or nationals among their shareholders *rights not accorded to corporations the shareholders of which are all United States citizens*. Such a result would be exactly contrary to the conclusion of a unanimous Court in *Sumitomo Shoji*.") (emphasis added). The *Shell* court misunderstands the scope of the *Sumitomo* decision and the nature of the FCNs. As the Ninth Circuit has noted: "[The FCNs] established certain non-contingent rules of treatment, which gave foreign employers a certain specified protection *without regard to whether the same protection was provided to host country businesses*." *Ventress*, 486 F.3d 1111 at 1115 (emphasis added) (internal quotations omitted) (citations omitted). Even after *Sumitomo*, a number of U.S. courts have recognized that FCN treaty provisions granting foreign companies the right to engage executives "of their choice" gives these companies certain exemptions from U.S. anti-discrimination laws that are denied to U.S. companies. *See* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1143 (3d Cir. 1988). These non-contingent rules of treatment are not limited to foreign businesses. In the late 1960s, an Argentine national successfully invoked the U.S.-Argentina FCN to avoid being drafted into the U.S. army. *See* Vazquez v. Attorney Gen. of U.S., 433 F.2d 516, 521–22 (D.C. Cir. 1970).

228. *See* U.S. CONST. amend. XI (state sovereign immunity); United States v. Mitchell, 445 U.S. 535, 538 (1980) (discussing federal sovereign immunity).

229. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987) ("The Solicitor General urges that the prohibitory nature of the Fifth Amendment combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the

Supreme Court has never addressed the issue, some scholars have argued that the Takings Clause also abrogates state sovereign immunity for constitutional takings claims.[230] If the takings claim were to be framed as a treaty violation, rather than a constitutional one, then it is unclear whether the state and federal governments could invoke sovereign immunity as a defense.[231] On the one hand, the Fifth Amendment could be read as a waiver of sovereign immunity with respect to treaty-based takings claims as well as constitutional ones. This argument derives support from the fact that the text of the standard treaty provision relating to takings closely tracks the text of the Fifth Amendment.[232] It derives further support from the fact that foreign sovereigns generally do not enjoy immunity in U.S. courts when they take property in violation of international law.[233] On the other hand, the Fifth Amendment could be read

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government. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."); Hughes Commc'ns Galaxy, Inc. v. United States, 26 Cl. Ct. 123, 145 (1992), *reversed*, 998 F.2d 953 (1993) (observing that "the taking of property by the sovereign for public use, though unquestionably an act of sovereignty, does not, under our Constitution, leave the sovereign immune from having to pay compensation for the taking"); T.O.F.C., Inc. v. United States, 683 F.2d 389, 393 (Ct. Cl. 1982) (concluding that the Fifth Amendment constitutes an "express waiver of sovereign immunity"); *see also* Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 724 n.126 (2000) (citing *First English* for proposition that "notwithstanding sovereign immunity, the Constitution 'dictates' a remedy for takings of property"); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 981, n.351 (2000) (citing *First English* for proposition that "the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation").

230. Eric Berger, *The Commission of the Takings and State Sovereign Immunity Doctrines,* 63 WASH. & LEE L. REV. 493, 498 (2006) ("[T]he Takings Clause does trump state sovereign immunity by automatically abrogating—or stripping—the immunity that states usually enjoy in actions at law.").

231. One issue that *is* clear is that treaty-based takings claims need not be brought in the Court of Federal Claims. *See* 28 U.S.C. § 1502 (2012) ("Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.").

232. *Compare* U.S. CONST. amend. V ("Nor shall private property be taken for public use, without just compensation."), *with* U.S.-Ger. FCN, *supra* note 15, 7 U.S.T. at 1844 ("Property . . . shall not be taken . . . except for the public benefit . . . nor shall it be taken without just compensation.").

233. 28 U.S.C. § 1605(a), (a)(3) (2012) ("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 *rights in property taken in violation of international law are in issue* and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.") (emphasis added).

to waive sovereign immunity only with respect to constitutional claims.[234] This argument derives support from the Supreme Court's repeated admonition that waivers of federal sovereign immunity must be "unequivocally expressed"[235] and the Court's consistent practice of "construing waivers of sovereign immunity narrowly in favor of the sovereign."[236]

The notion that the FCNs *themselves* waive federal sovereign immunity is implausible.[237] FCNs contain an express waiver of sovereign immunity for state-owned enterprises but not for states *qua* states.[238] The claim that the FCNs abrogate the sovereign immunity of state governments is also implausible.[239] There is a vigorous scholarly debate as to whether the treaty power may ever be used to abrogate state sovereign immunity under the Eleventh Amendment. Some scholars have argued that Congress may abrogate state sovereign immunity through the treaty power.[240] Others have

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234. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) (holding that the United States is immune from suit except to the extent that Congress has specifically waived its sovereign immunity by unequivocal codification; waiver of immunity will not be implied); Philip R. Trimble, *Foreign Policy Frustrated*—Dames & Moore*, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 370–77 (1984) (arguing that sovereign immunity bars the courts from reviewing "takings arguments that are premised upon international agreements").

235. United States v. Idaho *ex rel.* Idaho Dep't of Water Res., 508 U.S. 1, 6 (1993).

236. Lane v. Pena, 518 U.S. 187, 192, 200 (1996).

237. *Cf.* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 452 (D.C. Cir. 1990) (concluding that Iran did not waive its sovereign immunity when it ratified the Treaty of Amity with the United States).

238. U.S.-Ger. FCN, *supra* note 15, 7 U.S.T. at 1844 ("No enterprise of either party . . . which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities . . . claim or enjoy . . . immunity therein from . . . suit."); *cf.* Rosner v. United States, 231 F. Supp. 2d 1202, 1210–13 (S.D. Fla. 2002) (concluding that the U.S. government could assert sovereign immunity as a defense to a non-takings claim sounding in "customary international law").

239. Many states have their own rules relating to the waiver of sovereign immunity. *See, e.g.*, TEX. GOV'T CODE ANN. § 311.034 (West 2005) ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.").

240. Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L. REV. 1399, 1460–61 (2000) (observing that "state sovereignty has never been understood to extend to international affairs" and arguing that "the Eleventh Amendment would not appear to limit this aspect of Congress's Article I powers"); John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1038 (2000) (citing Reid v. Covert, 354 U.S. 1 (1957) as a "a useful source for the power to abrogate Eleventh Amendment state sovereign immunity through the Treaty Power").

argued that it may not.[241] On the whole, however, it is unlikely that a U.S. court would conclude that an FCN abrogates the sovereign immunity of state governments of its own force.

In any event, it is important to note that sovereign immunity only presents an obstacle with respect to suits against the United States or one of the several States; counties and municipalities do not enjoy sovereign immunity.[242] Even if a court were to conclude that the state and federal governments could assert sovereign immunity as a defense, FCNs could still serve as a useful check on the regulatory actions of U.S. counties and municipalities.

## VI. CONCLUSION

One of our aims in this Article has been to revive scholarly interest in the FCN treaties. But it has also been to revive *investor* interest in the FCNs. The FCNs are not historical relics. They remain in force, and they provide doctrinally meaningful legal guarantees to a vast amount of U.S. investment abroad and to foreign investment in the United States. While the FCNs have not played a prominent role in domestic litigation over the past half-century, it is easy to imagine how they might be relevant in future years. The U.S. government, and its sub-federal counterparts, interact with FCN-covered investors all of the time. To the extent that the government thinks in advance about the consequences of its actions toward foreign investors, it should at least consider the possibility that an FCN treaty might impose legally enforceable limitations on its freedom of action. Investors who feel mistreated by the government, moreover, should consider the availability of FCN-based causes of action when planning their legal responses. The U.S. government's treatment of Volkswagen in the wake of the diesel-emissions scandal is a recent case in point. Should Volkswagen—presumably covered by the US-Germany FCN—feel that the U.S. government, in imposing penalties and sanctions, has treated the company unfairly and inequitably, the FCN treaty should surely make an appearance in any resulting domestic-court litigation.

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241. *See* Mitchell N. Berman, Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1193–94 (2001) (arguing that the Supreme Courts has adopted an "expansive view of state sovereign immunity on a par with constitutional text and on a par with individual rights" and that "[u]nless and until that interpretation changes, the treaty power cannot prevail against it") (internal citation omitted); Carlos M. Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 715 (2002) (concluding that the federal "power to implement treaties is not exempt from the federalism limitations reflected in the doctrine of state sovereign immunity").

242. Lincoln Cty. v. Luning, 133 U.S. 529, 530–31 (1890).

In making the arguments outlined above, we do not express any normative view as to the continued vitality of the FCNs. From the perspective of the foreign investor, the FCNs are clearly a good thing. They provide an additional arrow in the investor's legal quiver, useful—in theory—as a weapon against shoddy government treatment. It is less clear whether the persistence of the FCN regime is a good thing from the perspective of U.S. governmental entities. If investors embrace the FCN in domestic litigation against the government, and if courts take the FCN provisions seriously, the government purse may feel the pinch of adverse judgments. More generally, investor discovery of the FCNs may prompt the government—and especially the U.S. Department of State—to more carefully consider how the FCN treaties fit, or should fit, into an increasingly complex system of free trade agreements and BITs. Does it make sense to maintain an FCN with Germany in light of the (currently proposed) investment chapter in the Transatlantic Trade and Investment Partnership? Should the FCNs be terminated individually, as replaced by more modern legal instruments? Should they be terminated *en masse* as a legal anachronism? These are questions for which there are no easy answers. But we hope that our Article spurs deeper thinking—by academics, by government officials, and by foreign investors—about the continued practical and theoretical relevance of the treaties of friendship, commerce, and navigation.

## APPENDIX: POST-WAR U.S. FCN TREATIES & KEY PROVISIONS[243]

| Treaty Partner | Date Signed | Citation | Expropriation | Fair (& Equitable) Treatment | Full Protection & Security | Arbitrary or Unreasonable Measures |
|---|---|---|---|---|---|---|
| Belgium | Feb. 21, 1961 | 14 U.S.T. 1284; T.I.A.S. 5432; 480 U.N.T.S. 149 | Art. IV(3) | Art. I (“equitable treatment”) | Art I(“effective prot.”); Art. III(1) (“full legal & judicial prot.”); Art. IV(1) (“constant sec.”) | Art. IV(2) (“unreasonable or discriminatory measures”) |
| Denmark | Oct. 1, 1951 | 12 U.S.T. 908; T.I.A.S. 4797; 421 U.N.T.S. 105 | Art. VI(3) | Art. I (“equitable treatment”) | Art. III(1) (“most constant prot. & sec. . . . req’d by int’l law”; Art. VI(1) (“most constant prot. & sec.) | Art. VI(4) (“unreasonable or discriminatory measures”) |
| Ethiopia | Sept. 7, 1951 | 4 U.S.T. 2134; T.I.A.S. 2864; 206 U.N.T.S. 41 | Art. VIII(2) | Art. VIII(1) (“fair & equitable”) | Art. VI(2) (“most constant prot. & sec.”); Art. VIII(2) (“most constant prot. & sec.) | Art. VIII(1) (“unreasonable or discriminatory measures”) |
| France | Nov. 25, 1959 | 11 U.S.T. 2398; T.I.A.S. 4625; 401 U.N.T.S. 75 | Art. IV(3) | Art. I (“equitable treatment”) | Art. I (“full legal & judicial prot.”) | Art. IV(1) (“impairment”; “measure of a discriminatory character”) |
| Germany | Oct. 29, 1954 | 7 U.S.T. 1839; T.I.A.S. 3593; 273 U.N.T.S. 3 | Art. V(4) | Art. I(1) (“fair & equitable”) | Art. III(1) (“most constant prot. & sec.”); Art. V(1) (“most constant prot. & sec.”) | Art. V(3) (“unreasonable or discriminatory measures”) |
| Greece | Aug. 3, 1951 | 5 U.S.T. 1829; T.I.A.S. 3057; 224 U.N.T.S. 279 | Art. VII(3) | Art. I (“equitable treatment”) | Art. IV(1) (“most constant prot. & sec.”); Art. VII(1) “most constant prot. & sec.”) | Art. VIII (“unreasonable or discriminatory measures”) |

243. Most of the FCNs in the Table also contain grants of national treatment and most favored nation treatment. However, unlike modern BITs, which tend to grant national and most favored nation treatment generally and broadly, the FCNs tend to make such grants in regard to specific, defined areas. One interesting issue—which we are not able to discuss here—is the extent to which FCN beneficiaries may be able to rely on most favored nation provisions to benefit from more favorable treatment extended to other investors in modern BITs, or, conversely, the extent to which the beneficiary of a modern BIT may be able to use the BIT’s most-favored-nation clause to access more favorable FCN protections.

| | | | | | | |
|---|---|---|---|---|---|---|
| Iran | Aug. 15, 1955 | 8 U.S.T. 899; T.I.A.S. 3853; 284 U.N.T.S. 93 | Art. IV(2) | Art. IV(1) ("fair & equitable") | Art. II(4) ("most constant prot. & sec."); Art. IV(2) ("most constant prot. & sec.") | Art. IV(1) ("unreasonable or discriminatory measures") |
| Ireland | Jan. 21, 1950 | 1 U.S.T. 785; T.I.A.S. 2155; 206 U.N.T.S. 269 | Art. VIII(2) | Art. V ("equitable treatment") | Art. II(1) ("most constant prot. & sec."); Art. VIII(2) ("most constant prot. & sec.") | Art. V ("unreasonable or discriminatory measures") |
| Israel | Aug. 23, 1951 | 5 U.S.T. 550; T.I.A.S. 2948; 219 U.N.T.S. 237 | Art. VI(3) | Art. I ("equitable treatment") | Art. III(1) ("most constant prot. & sec."); Art. VI(1) ("most constant prot. & sec.") | Art. VI(4) ("unreasonable or discriminatory measures") |
| Italy | Feb. 2, 1948 | 63 Stat. 2255; T.I.A.S. 1965; 79 U.N.T.S. 171; 9 Bevans 261 | Art. V(2) | - | Art. V(1) ("most constant prot. & sec."; "full prot. & sec. req'd by int'l law"); Art. V(3) ("prot. & sec." on MFN basis) | Art. XXIV(2) ("no arbitrary discrimination") |
| Japan | Apr. 2, 1953 | 4 U.S.T. 2063; T.I.A.S. 2863; 206 U.N.T.S. 143 | Art. VI(3) | - | Art. II(1) ("most constant prot. & sec . . . req'd by int'l law"); Art. VI(1) ("most constant prot. & sec.") | Art. V(1) ("unreasonable or discriminatory measures") |
| Korea | Nov. 28, 1956 | 8 U.S.T. 2217; T.I.A.S. 3947; 302 U.N.T.S. 281 | Art. VI(4) | Art. I ("equitable treatment") | Art. III(1) ("most constant prot. & sec. . . . req'd by int'l law"); Art. VI(1) ("most constant prot. & sec.") | Art. VI(3) ("unreasonable or discriminatory measures") |
| Luxemb-ourg | Feb. 23, 1962 | 14 U.S.T. 251; T.I.A.S. 5306; 474 U.N.T.S. 3 | Art. IV(3) | Art. I ("equitable treatment") | Art. I ("effective prot."); Art. III(1) ("full legal & judicial prot.; constant prot. . . . req'd by int'l law"); Art. IV(1) ("constant sec. . . . full legal & judicial prot.") | Art. IV(2) ("unreasonable or discriminatory measures" |

| Nether-lands | Mar. 27, 1956 | 8 U.S.T. 2043; T.I.A.S. 3942; 285 U.N.T.S. 231 | Art. VI(4) | Art. I(1) (“fair and equitable”) | Art. III(1) (“free from molestations of every kind”; “most constant prot. & sec.”; “prot. & sec. . . . req’d by int’l law”);<br>Art. VI(1) (“most constant prot. & sec.”) | Art. VI(3) (“unreasonable or discriminatory measures”) |
|---|---|---|---|---|---|---|
| Oman | Dec. 20, 1958 | 11 U.S.T. 1835; T.I.A.S. 4530; 380 U.N.T.S. 181 | Art. IV(2) | Art. IV(1) (“fair and equitable”) | Art. II(2) (“all poss. prot. & sec.”);<br>Art. IV(2) (“all poss. prot. & sec.”) | Art. IV(1) (“unreasonable or discriminatory measures”);<br>Art. V(2) (“discriminate . . . in the application of any laws…”) |
| Pakistan | Nov. 12, 1959 | 12 U.S.T. 110; T.I.A.S. 4683; 404 U.N.T.S. 259 | Art. VI(4) | Art. I (“equitable treatment”) | Art. III (“molestations of every kind”; “most constant prot. & sec.”);<br>Art. VI(1) “most constant prot. & sec.”) | Art. VI(3) (“unreasonable or discriminatory measures”) |
| Suriname | (Dutch treaty applied post-indep.) | See Dutch Treaty | See Dutch Treaty | See Dutch Treaty | See Dutch Treaty | See Dutch Treaty |
| Taiwan | Nov. 4 1946 | 63 Stat. 1299; T.I.A.S. 1871; 25 U.N.T.S. 69; 6 Bevans 761 | Art. VI(2) | - | Art. VI(1) (“most constant prot. & sec.”); (“full prot. & sec. req’d by int’l law”) | - |
| Thailand | May 29, 1966 | 19 U.S.T. 5843; T.I.A.S. 6540; 652 U.N.T.S. 253 | Art. III(2) | Art. III(1) (“fair & equitable”) | Art. I(2) (“most constant prot. & sec. . . . req’d by int’l law”);<br>Art. III(2) (“most constant prot. & sec.”) | Art. III(1) (“unreasonable or discriminatory measures”) |
| Togo | Feb. 8, 1966 | 18 U.S.T. 1; T.I.A.S. 6193; 680 U.N.T.S. 159 | Art. IV(2) | Art. IV(1) (“fair & equitable”) | Art. II(1) (“most constant prot. & sec. . . . req’d by int’l law”);<br>Art. IV(2) (“most constant prot. & sec.”) | Art. IV(1) (“unreasonable or discriminatory measures”) |