

1958

Modern Treaties of Friendship, Commerce and Navigation

Herman Walker Jr.

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Walker, Herman Jr., "Modern Treaties of Friendship, Commerce and Navigation" (1958). *Minnesota Law Review*. 1491.
<https://scholarship.law.umn.edu/mlr/1491>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

MODERN TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION

HERMAN WALKER, JR.*

The bilateral "treaty of friendship, commerce and navigation" is one of the most familiar instruments known to diplomatic tradition. The title, commonly used to describe a basic accord fixing the ground-rules governing day-to-day intercourse between two countries, designates the medium *par excellence* through which nations have sought in a general settlement to secure reciprocal respect for their normal interests abroad, according to agreed rules of law.¹

The precise content of the instrument as treaty-type, and the manner in which that content is treated, has varied from era to era depending on the needs of the time, the usages of the countries involved and the foreign policy objectives in view.² In United States practice, however, it has evolved into a comprehensive charter of relations in the domain of private affairs. In the course of that evolution, it has figured repeatedly in the conduct of American foreign relations from the earliest days, and with all manner of nations, beginning with the treaty of Amity and Commerce with France in 1778 and continuing into the present. The number of such treaties concluded by the United States runs well over a hundred.³ This discussion focuses on the sixteen that have been signed since 1946.⁴

*First Secretary of Embassy, Foreign Service of the United States, Paris. This article is without official attribution.

1. Leading writers on international law do not seem to have commented extensively on this treaty function. But see Fiore, *International Law Codified and Its Legal Sanction* 373-74 (Borchard trans., 1913).

2. For a brief discussion of the historical development of treaties of this type (sometimes known as "commercial" treaties, a term which also can refer to instruments of lesser scope), see Culbertson, *Commercial Treaties*, 2 *Encyc. Soc. Sci.* 24-31 (1930). Summaries of their purposive evolution in United States policy may be found in Setser, *Treaties to Aid American Business Abroad*, 40 *Foreign Commerce Weekly* 3 (September 11, 1950); *Commercial Treaty Program of the United States*, U.S. Dept. of State Pub. 6565 (1958).

3. The treaty with France, 1778, 8 Stat. 12, T.S. No. 83 was next followed by those with the Netherlands 1782, 8 Stat. 32, T.S. No. 249; Sweden 1783, 8 Stat. 60, T.S. No. 346; and Prussia 1785, 8 Stat. 84, T.S. No. 292 even prior to the Constitutional Convention. A convenient compilation of treaty texts, prepared under Senate auspices, is the four volume *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1776-1909)* (2 vols.) Malloy ed.; 1910-1923, Redmond ed.; 1923-1937, Trenwith ed.). The Trenwith volume contains a table from which can be readily derived a chronological compilation of treaties of this type, under whatever variant title.

4. *Republic of China*, 1946, 63 Stat. 1299, T.I.A.S. No. 1871; *Italy*, 1948, 63 Stat. 2255, T.I.A.S. No. 1965, (Supplemented by Agreement of Sept. 26, 1951, Sen. Exec. H., 82d Cong., 2d Sess.); *Uruguay*, 1949, (Sen. Exec. D., 81st Con., 2d Sess.); *Ireland*, 1950, 1 U.S. Treaties & Other Int'l Agreements 785, T.I.A.S. No. 2155; *Columbia*, 1951, (Sen. Exec. M., 82d Cong., 1st Sess.,

I. SCOPE AND CONTENT

In United States practice, although "friendship" is attributed an honored place in the title and although the conclusion of a treaty presupposes friendliness and good-will between the signatories, these treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though "commerce" and "navigation" complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are "commercial" in the broadest sense of that term; and they are above-all treaties of "establishment," concerned with the protection of persons, natural and juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.

Their current preoccupation with these matters has been especially responsive to the contemporary need for a code of private foreign investment; and their adaptability for use as a vehicle in the forwarding of an investment aim follows from their historical concern with establishment matters. Familiar elements in them stood ready to be amplified and reconditioned to meet contemporary needs and circumstances.⁵ The pattern formed by the series of sixteen signed since 1946 is accordingly distinguished in complexion from that formed by the several different series concluded in past eras.⁶

withdrawn from Senate June 30, 1953); *Ethiopia*, 1951, 4 U.S. Treaties & Other Int'l Agreements 2134, T.I.A.S. No. 2864; *Israel*, 1951, 5 U.S. Treaties & Other Int'l Agreements 550, T.I.A.S. No. 2948; *Greece*, 1951, 5 U.S. Treaties & Other Int'l Agreements 1829, T.I.A.S. No. 3057; *Denmark*, 1951, (Sen. Exec. I., 82d Cong., 2d Sess.); *Japan*, 1953, 4 U.S. Treaties & Other Int'l Agreements 2063, T.I.A.S. No. 2863; *Federal Republic of Germany*, 1954, 7 U.S. Treaties & Other Int'l Agreements 1839, T.I.A.S. No. 3593; *Haiti*, 1955, (Sen. Exec. H., 84th Cong., 1st Sess., withdrawn from Senate Aug. 8, 1957); *Iran*, 1955, T.I.A.S. No. 3853; *Nicaragua*, 1956, (Sen. Exec. G., 84th Cong., 2d Sess.); *Netherlands*, 1956, T.I.A.S. No. 3942; *Korea*, 1956, T.I.A.S. No. 3947. The treaties with Ethiopia and Iran represent considerably abridged versions and vary also from the others in that they contain provisions on consular rights. A subject matter usually dealt with in separate conventions, by current United States practice. The Uruguay example also has a variant detail in its title: "Economic Development" in lieu of "Navigation."

5. See Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956).

6. The 12 treaties in the last-preceding series, the period between the two World Wars, beginning with the German treaty of 1923, 44 Stat. 2132, T.S. No. 725, usually carried a number of articles dealing with consuls, consistent with their scheme of devoting the major part of their space to trade and shipping. By contrast, the major part of the significant establishment rights, now usually spread over a dozen articles, was covered in a single article which was given the lead position. *Id.* at art. I.

Nevertheless, this pattern is at the same time of a kind with its predecessors, and in the same direct line of evolution, having the same broad design and covering generally the same subject-matter. There has taken place merely a shift in internal emphasis away from trade and shipping, and that which is ancillary to trade and shipping, a shift facilitated by the recent development of alternative instruments for dealing with international trade.⁷

Because of their common identification with common objectives all sixteen of the current series show close kinship, but no two of them of course are identical. The several units of the series each reveal numerous variations, especially in their secondary details, owing to having each been negotiated free-will with a different country and having taken account of individual differences in viewpoint and condition. They differ particularly in that, subsequent to the first two (China, 1946 and Italy, 1948) the model form used to initiate negotiations was completely recast in the interest of compactness, greater clarity and legal sufficiency, and completeness of content. Further, the form used in another two of them (Ethiopia, 1951 and Iran, 1955) represents a specially abridged edition.⁸ The universality of the program—as witness the geographical spread, the variety in size and circumstance of the countries involved, and the avowed willingness of the United States to treat equally all like-minded countries—demands flexibility along with adherence to a common core of purpose, orientation and basic content.

With the accretion of precedent and experience in framing acceptable norms, the later ones tend towards a greater display of uni-

7. The executive trade-agreement device, originally authorized by the Trade Agreements Act of 1934, 48 Stat. 943, 19 U.S.C. §§ 1351-54 *rev.*, 1948, 62 Stat. 1053, 19 U.S.C. §§ 1360-67. This type of agreement provides a flexible framework within which specific concessions in rates of duty can be reciprocally negotiated, item-by-item. Originally, the negotiating program was bilateral; but since 1947 the negotiations and agreements reached have been principally under the aegis of the multilateral General Agreement on Tariffs and Trade 61(5)(6) Stat. A3, A2054 T.I.A.S. No. 1700. 37 countries, accounting for approximately 80 per cent of the world's international trade, now adhere to the GATT.

8. These abridgements were occasioned, on the one hand, by the lack of any practical need for negotiating certain provisions or elaborations of provisions occurring in the standard form of the treaty that could be regarded as having secondary consequence or as largely irrelevant to relations with the countries concerned and, on the other hand, by the desire to use the treaty as a vehicle for dealing with the essentials of diplomatic and consular status. For synopses of the content of typical recent treaties and comparison with that of the Ethiopia and Iran treaties, see tables in *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess., 6-17 (1953); *Commercial Treaties with Iran, Nicaragua, and the Netherlands, Hearing before the Senate Committee on Senate Foreign Relations*, 84th Cong., 2d Sess., 5-9 (1956).

formity; the following synoptical outline of normal content follows the later rather than the earlier examples:

- Preamble, general purposes.
- Entry, movement and residence of individuals.
- Liberty of conscience and communication.
- Protection of persons from molestation and police malpractices.
- Protection of acquired property.
- Standing in the courts.
- Right to establish and operate businesses.
- Formation and management of corporations.
- Non-profit activities.
- Acquisition and tenure of property.
- Tax treatment.
- Administration and exchange controls.
- Rules on international trade and customs administration.
- Rules governing the state in business.
- Treatment of ships and shipping.
- Transit of goods and persons.
- Reservations, definitions and general provisions.
- Settlement of disputes.
- Procedural clauses.
- Protocol, an appendix of varying length, containing material construing and clarifying the treaty text, and making accommodations to take account of individual situations.⁹

This broad framework allows room for serving a variety of subsidiary interests, for which no other practicable medium may be available, or the regulation of which raises complications not readily overcome by the normal rules of the treaty, or with respect to which the other party to the negotiation may cherish a particular interest. Thus, a detailed scrutiny of signed treaties would show that, in addition to the subject matter outlined above, the treaty also has been used as a vehicle for dealing with a number of special questions, such as: freedom of reporting, social security, commercial arbitration, commercial travelers, marine insurance and restrictive business practices.¹⁰ On the other hand, just as some of these special

9. The Protocol, by serving *inter alia* as a convenient vehicle in attending to special variations or preoccupations of individual countries, reduces the amount of deviation between treaties, with respect to general outline, basic content and array of principles. It also serves as a bulletin board for posting certain tenets of construction which are considered desirable to record formally but which may lead to mischievous inferences of being substantive additions rather than precautionary explanations, if they are integrated into the rule to which they relate.

10. Freedom of reporting and restrictive business practices are examples of particular subjects of interest to the United States on which satisfactory multilateral progress under United Nations auspices has been wanting. See, e.g., on freedom of reporting, *Report of the United States Delegates to the United Nations Conference on Freedom of Information*, U.S. Dept. of State Pub. 3150 (1948); on restrictive business practices, Domke, *The United*

features are not to be found in earlier examples of the series, so there are missing from the later ones provisions on compulsory military service and the practice of the professions, dropped because of domestic developments.¹¹

II. THE RULES OF TREATMENT

The attribute these treaties share which gives consistency to their pattern, even more than the similarity of their subject matter, is the way in which that subject-matter is molded into concrete provisions. The considerations determining the character of the rules applicable to the various topics covered are several. In the first place, the protective objects in view require firm rules of law, established on a relatively stable basis. These treaties are normally concluded for an initial period of ten years certain and indefinitely thereafter, unless and until terminated upon the giving of one year's formal notice.¹² Durability requires in turn that the commitments be essentially reasonable. Both this and the long list of subjects covered demand rules framed in terms of principles that remain valid regardless of an unpredictable future. Being occupied with essential principles of equity and fair treatment, their negotiation does not provide an arena for the trading of concessions or the bargaining for an

Nations Draft Convention on Restrictive Business Practices, 4 Int. & Comp. L. Q. 129 (1955). Marine insurance (a post-1952 development) and commercial arbitration illustrate subjects requiring special handling. See, e.g., discussion on marine insurance in *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess., 36-37 (1952); and, for arbitration, Walker, *Commercial Arbitration in United States Treaties*, 11 Arb. J. (n.s.) 68 (1956). Social Security exemplifies a subject of practical interest to the other countries rather than to the United States. See, *Analysis of the Social Security System, Hearings before a Subcommittee of the House Committee on Ways and Means*, 83d Cong., 1st Sess., 174-75 (1953).

11. For an interesting explanation, from a mainly European point of view, of some of the factors involved in United States military service policy, see Probst, *International Demarcation of Compulsory Military Service with Special Emphasis on the Swiss-United States Situation*, 45 Geo. L. J. 60 (1956). For the relationship between selective service legislation and treaty provisions on military service, see particularly *Petition of Moser*, 182 F.2d 734 (2d Cir. 1950), *rev'd sub nom. Moser v. United States*, 341 U.S. 41 (1951); *United States v. Rumsa*, 212 F.2d 927 (7th Cir. 1954); *United States v. Gredzens*, 125 F. Supp. 867 (D.C. Minn. 1954); *Ex parte Blazekovic*, 248 F. 327 (D.C. Mich. 1918); *Summertime v. Local Board*, Div. No. 10, 248 F. 832 (D.C. Mich. 1917); *Ex parte Larrucea*, 249 F. 981 (D.C. Cal. 1917). Domestic policy considerations affecting treaty provisions on the practice of professions are brought out in: *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess., 35-40 (1952); *Commercial Treaties, Hearings before a Subcommittee of the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess., 28 (1953).

12. The 1815 treaty with Great Britain, 8 Stat. 228, T.S. No. 110, is still in force, and there are examples only less venerable with other countries, e.g., Columbia, 1846, 9 Stat. 881, T.S. No. 54.

array of tangible *quid pro quos*. Negotiable rule-making, entailing freely accepted limitations upon sovereign liberty of action, cannot therefore exceed in intensity that which nations consider to be compatible with international comity and internal law-making dignity.

The lively debate recently attending the proposed constitutional amendment with which Senator Bricker's name is associated has underscored the weightiness of this consideration. As the treaty of friendship, commerce and navigation is the classic example of an instrument having potential or actual impact on domestic law, a great deal was heard of these treaties during the course of that debate. Opponents of the proposed amendment were fearful lest it frustrate the government's ability effectively to negotiate them in future; proponents contended these fears were ill-founded.¹³ But if the concurrence of both sides on their desirability and acceptability as law of the land¹⁴ attests to the judiciousness with which treaty provisions have been fitted into the known fabric of United States law, the issue likewise exemplifies a concern not confined to the United States. Other countries as well scrutinize carefully the way treaty commitments affect their internal law. Accordingly, the successful development of a treaty program of world-wide applicability entails the construction of an equation in which must be reconciled the need for positive, universally tenable rules of law, with the equal need for moderation and a spirit of accommodation within a distinctive framework of basic purpose.

These considerations have led to the extensive use of so-called contingent standards as the cornerstone of rule-making. A contingent standard is, as its name implies, one that defines the treatment provided in relative terms. The specific content of the treatment, at any given point of time and in connection with any given

13. The former view was frequently urged by both private and government witnesses. For a typical general expression thereof see the subcommittee minority report, S. Rep. No. 412, 83d Cong., 1st Sess., 45 (1953). For the latter view, see testimony of Senator John W. Bricker, *Treaties and Executive Agreements, Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 1 and S.J. Res. 43*, 83d Cong., 1st Sess., 8 (1953), and in *Treaties and Executive Agreements, Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 1*, 84th Cong., 1st Sess., 297-98 (1955); also testimony of Dr. George A. Finch, *id.* at 506.

14. The Senate roll-call vote, on the question of advice and consent to ratification of a group of five of them at a time when the controversy was at its height, was virtually unanimous in favor, 99 Cong. Rec. 9316-17 (1953). The Congress as a whole contemporaneously displayed a favorable disposition towards these treaties by calling for an acceleration of the program for their negotiation. See Section 7(k) of Mutual Security Act of 1952, 66 Stat. 146, 22 U.S.C. § 1667 (1952), amending Section 516(d) of the 1951 Act (65 Stat. 382). This provision was revised and reenacted by Section 413(b)(2) of the Mutual Security Act of 1954, 68 Stat. 847, 22 U.S.C. § 1933 b(2) (Supp. IV, 1952).

subject, is determinable not from a reading of the treaty itself, but by reference to an exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective.

There are two principal contingent standards: the "most-favored nation" clause and the "national treatment" clause. The former assures non-discrimination as compared with other aliens or alien things; the latter, as compared with citizens of the country and national things.¹⁵ Which of these clauses is made applicable to a given subject can make a great deal of difference in the strength of the treaty assurance vouchsafed. Under past regimes of extraterritoriality, where aliens enjoyed special status, most-favored-nation treatment often meant privileged treatment and was accordingly a standard sought in preference to national treatment in many situations. But such situations are exceptional in the present era, dominated as it is by ideas of nationalism, self-determination and the sovereign equality of all nations.¹⁶ The most-favored-nation rule can now, therefore, imply or allow the status of alien disability rather than of favor. In applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy. The hallmark of the current treaty program is the advanced degree to which it espouses the rule of national treatment; and the achievement of this standard, in turn, is beset by the obstacles growing out of the nationalism and *etatisme* of the age.

There is also a certain margin for the play of non-contingent standards, or "absolute" rules, in the formulation of treaty provisions. This is rule-making in independent terms, without reference to the treatment given to others. Although non-contingent standards, because of their implication of definiteness might at first blush appear to provide the avenue to provisions of maximum positiveness and efficacy, the utility of the approach is in fact quite limited. The scope of these treaties is such that, to be manageable, their content of rules must be stated essentially in a summary or simple fashion. A

15. As typically defined in the treaties: "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." Korea treaty, 1956, T.I.A.S. No. 3947, art. XXII, Para. 1. Similarly, *mutatis mutandi*, for most-favored-nation treatment, with the pole of reference being "any third country" in lieu of "such Party" *id.* at para. 2.

16. For the passing of remaining vestiges of classic extraterritoriality, see Young, *The End of American Consular Jurisdiction in Morocco*, 51 Am. J. Int'l L. 402 (1957). For a special-situation modern examples of extraterritorial jurisdiction, see Rouse and Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, 51 Am. J. Int'l L. 29 (1957).

summary contingent rule has definiteness, because its content is measured against a determinable pole of reference. But a summary non-contingent rule may often be considerably less than so, when reduced to language of agreement between nations of unlike faculties of appreciation and different cultural and juridic backgrounds. The need for avoiding rigidity—freezing today's wisdom into tomorrow's folly—can not, in our international tower of Babel be served by the same semantics that have so successfully kept the American Constitution abreast of the times; *raisonnable* is not the "reasonable" of American jurisprudence, nor is our "due process of law" faithfully translatable into a foreign language.

An attempt to construct a treaty primarily in non-contingent terms can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the two-fold reason that prudent governments will wish escapes for future contingencies and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country. Contingent standards, by contrast, carry built-in automatic equalization and adjustment mechanisms. Therefore, the non-contingent standard generally finds its best utility in a few contexts in which, no contingent standard being adequate, some recognizable body of applicable international law and terms of art has nevertheless evolved;¹⁷ it is also used at times *faute de mieux*, or to suggest a general guide-post of behavior *en principe*, or to solve some special problem.

III. THE CHOICE OF APPLICABLE STANDARD

The varying considerations that govern the choice and cast of the standard or standards applicable, subject to subject, may be illustrated by a few concrete major examples, which will indicate the range of the differences to which treaty provisions need to be adapted.

A. *Entry of Individuals.*

Being concerned with the "whole man" as it were, these treaties start their rule-making at the beginning—the point at which an individual, a company, a consignment of goods, or a ship, identified

17. It is possible to use international law itself, by name, as a standard in commercial treaties. See Wilson, *The International Law Standard in Treaties of the United States* 87-105 (1953).

by national ties with one of the signatory countries, appears at the threshold of the other.

As concerns natural persons, rights-of-entry cannot, by definition, be assured on a national treatment basis. Moreover, because of our selective immigration control and the differential national origins quota feature of our immigration law, the United States is not in a position to agree to a most-favored-nation treatment clause. Therefore, the approach devised takes the form of a non-contingent rule which positively assures the reciprocal admission, and indefinite sojourn, of individuals who function in an international commerce or investment capacity.¹⁸ Because it is positive, this commitment is subjected to the reserved right of each country to exclude or expel particular individuals who are deemed undesirable for health, morality or security reasons.

A commitment so framed tends to be a least common denominator, for the entry-control policies of other governments usually do not involve national-origin quotas; and the selection they practice tends to be exercised less at point of entry than at the point of gainful occupation within the country. The problem for them is not necessarily solved by the wording of the entry-clause, as such, but focuses upon the provision dealing with the business and occupational rights of admitted persons, especially as they might affect the national labor market and the petty trades. The United States objective, generally speaking, is to establish the principle of national treatment in this connection.¹⁹ Therefore, the safeguards which the United States side can adequately provide for by careful

18. Present statutory authority for these "treaty trader" and "treaty investor" clauses is contained in Section 101(a)(15)(E) of the Immigration and Nationality Act of 1952, 66 Stat. 168, 8 U.S.C. § 1101 (1952). The former was included in the Immigration Act of 1924 (43 Stat. 155), and the "treaty investor" provision was introduced in the course of the extensive revision of the immigration laws which resulted in the Act of 1952. Hence provisions on treaty investors appear only in treaties concluded since 1952. For comment see Wilson, "Treaty Merchant" Clauses in Commercial Treaties of the United States, 44 Am. J. Int'l L. 145 (1950); "Treaty Investor" Clauses in Commercial Treaties of the United States, 49 Am. J. Int'l L. 366 (1955).

19. The standard rule is: "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain . . . within the territories of the other Party. . . ." (Korea treaty, *op. cit. supra* note 15 at art. VII, para. 1 as well as ". . . with respect to engaging in scientific, educational, religious and philanthropic activities . . ." *id.* at art. VIII, para. 2. There is an express reservation allowing alienage restrictions as to "transport, communications, public utilities, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources." *Id.* at art. VII, para. 2. Moreover, the practice of the professions is not included in the recitation of rights for which commitments are undertaken (*e.g.*, Netherlands treaty, 1956, T.I.A.S. No. 3942, Protocol para. 8. See note 11, *supra*).

framing of the entry-clause²⁰ must be sometimes paralleled by an understanding regarding the other country's administration of its occupational permit system.²¹

B. *Entry of Goods.*

The entry of goods is placed under the regime of the traditional most-favored-nation treatment clause, the national treatment clause being patently inapplicable, so long as nations maintain tariffs and other differential regulations upon products of foreign origin. This most-favored-nation clause is now in the unconditional form, and has been since the United States abandoned the cumbersome "conditional" form in 1922-23.²²

The securing of non-contingent commitments regarding duties (for example, the fixing of rates of duty) is not the function of a general, long-term treaty, but rather of "trade agreements" especially devised for that purpose and subject to revisions on short notice. It is, however, possible to establish certain positive rules with regard to administrative practices; and the treaties have been a vehicle for treating a number of these (for example, public notice of new or changed requirements, so that traders can be informed and forewarned; and procedures whereby the decisions of customs officers can be appealed).²³

20. By affirmative description, the assured entry right is limited to those falling in a defined international trader or investor category; and the maintenance of occupational restrictions attached to limited visas (*e.g.*, temporary tourist or student visas) is left unambiguous, through insertion of an understanding that: "Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance." Korea treaty, *op. cit. supra* note 15 at art. XXI, para. 4.

21. *E.g.*, Federal Republic of Germany, 1954, 7 U.S. Treaties & Other Int'l Agreements 1839, T.I.A.S. No. 3593, Protocol para. 8: "With reference to Article VII, paragraph 1, a Party may apply regulations under which alien employees within its territories are required to have employment permits; but, in keeping with the objectives of that paragraph, such regulations shall be administered in a liberal fashion as to nationals of the other Party." Wording of this sort, which emphasizes compliance with procedure without impairment of main substance, is made possible by the circumstance that, as a practical matter, Americans do not typically go abroad to seek work in the kinds of capacity that local occupational restrictions are primarily designed to protect.

22. The unconditional form of the most-favored-nation clause is the usual rule of international practice in commercial matters, *e.g.*, GATT, 1947, 61(5)(6) Stat. A3, A2054, T.I.A.S. No. 1700, art. I. Under it, all advantages and rights accorded any third country accrue automatically, in contrast with the "conditional" regime whereunder such advantages, if accorded in return for a compensation, accrued only on payment of an equivalent compensation. An understanding that the most-favored-nation clauses of the current series of treaties are in principle unconditional is generally set forth in their preambles. For materials illustrating the policy considerations involved

In dealing with trade there are a number of special problems for which a simple most-favored-nation clause does not, in and of itself, provide a solution. Among them are the following, for each of which special provision has been necessary: (1). Quantitative restrictions are often, in current practice, a more important control over imports than the tariff. Countries often administer them through allocations by country of origin; that is, giving named countries fixed allotments rather than opening the total amount to all comers on a competitive, first-come first-served basis. What does most-favored-nation treatment mean in a country allotment situation?²⁴ (2). State-trading, or the control of imports by a state-controlled monopoly, has come to have an important part in the commercial practices of many countries. The conduct of import trade thus by entity, rather than by rules of generally applicable law concerning rates of duty and amounts under quantitative regulations, escapes the prescriptions of a most-favored-nation clause, which is an objective rule of the game rather than a code of conduct for an entity.²⁵ (3). In a day when administered controls have been necessitated by balance-of-payments difficulties, and when the controls have to necessarily distinguish between sources of supply according to the respective availabilities of "soft" and "hard" currencies, a simple most-favored-nation rule breaks down. It must be supplemented by specially-drafted provisions which make a realistic adjustment to this phenomenon, in a mutually agreeable manner.²⁶ (4). Finally, the emergence of international (*e.g.*, the General Agreement on Tariffs and Trade) and regional (*e.g.*, the Benelux and the new Common Market) organizations concerned with trade, have again necessi-

in the shift to the unconditional form, see 1 Foreign Relations of the United States 1923, 121-31 (1938); 2 Foreign Relations of the United States 1924, 183-92 (1939). See also Culbertson, *Reciprocity 167-70, 238-79* (1937).

23. *E.g.*, Korea treaty, *op. cit. supra* note 15 at art. XV, para. 1, 2.

24. The rule sought is a pro-rating according to the amount of the commodity supplied historically ("during a previous representative period"). *E.g.*, *id.* at art. XIV, para. 3(b); GATT, *op. cit. supra* note 22 at art. XIII, para. 2(d), second sentence.

25. The rule sought is to oblige state-trading and monopolistic entities to conform in their external purchases and sales to exclusively "commercial considerations," that is, to act without favor or discrimination in keeping with the aim of the most-favored-nation treatment principle. *E.g.*, Korea treaty, *op. cit. supra* note 15 at art. XVII, para. 1; GATT, *op. cit. supra* note 22 at art. XVII, para. 1(b).

26. The solution allows quantitative restrictions to be applied in a manner deviating from the rule of non-discrimination, to the extent they can be rationally justified by state-of-reserves considerations (*e.g.*, the need for closely managing limited holdings of convertible currencies, notably dollars). For wording, see, *e.g.*, Korea treaty, *supra* at art. XIV, para. 7. Compare GATT, *supra* at art. XIV, and Annex J, for a more elaborate attempt to regulate the complex problem posed by exchange difficulties and the accompanying phenomenon of inconvertibility and tight currency controls.

tated the formulation of exceptions to the simple bilateral most-favored-nation rule. These exceptions have been designed, on the one hand, to avoid treaty interference with their proper and successful functioning and, on the other, to assure that essential United States interests will be safeguarded.²⁷

C. *Entry of Ships.*

In the field of international shipping, owing to the evolution of international practice among major shipping powers, it has been possible to espouse the rule of national treatment as the preferred standard to apply to the entry of ships and their cargoes into the ports and harbors of each country.²⁸ The spreading of this rule through a network of treaties is calculated to build a dam against retrogression to flag discrimination²⁹ which the United States and other maritime nations struggled hard to overcome during the course of the nineteenth century.³⁰ The simple national treatment rule even here, however, is not unattended by complications arising from the fact that the United States, in company with other countries, does subsidize its own merchant marine and cannot agree to extend equal subsidies to foreign flag vessels. The solution to this problem has been through careful framing of the scope of the

27. A reservation for a true customs union (*e.g.*, the Benelux) insulating the trade between the members thereof from the ambit of the most-favored-nation clause, is customary. *E.g.*, Korea treaty *supra* at art. XIV, para. 6(c). A reservation to assure that the commitments of the treaty do not interfere with the functioning of the GATT, so long as the United States is party thereto, is also standard at present. *E.g.*, *id.* at art. XXI, para. 3. But the emergence of a new and untried integration entity such as the Common Market (Treaty of Rome, signed March 25, 1957, establishing a European Economic Community between France, Germany, Italy and the Benelux countries. Rome, 1957, 51 *Am. J. Int'l L.* 865 (1957)) poses potential problems for U.S. trade interests for which no simple formula is adequate. For an endeavor to provide prudently for future contingencies in this connection, see Exchange of Notes attached to the Netherlands treaty, T.I.A.S. No. 3942 at 49-52 (1956).

28. For a brief general discussion of navigation provisions in treaties see Hawkins, *Commercial Treaties and Agreements: Principles and Practice* 34-44 (1951).

29. The term "flag discrimination" refers to the policy of requiring by law or regulation that particular types of cargo or portions of a country's foreign trade be carried by vessels flying the national flag. This policy may be embodied in a variety of restrictive measures, perhaps the most common is the "50-50 law" dividing cargoes equally between national and foreign vessels. The "50-50 law" also may be applied by bilateral agreement between the two contracting parties to divide carriage of the foreign trade equally between the vessels of each. For a brief summary of discriminatory shipping practices affecting the United States merchant marine, see Corter, *United States Shipping Policy*, 122-26 (1956).

30. For early United States policy, see Setser, *The Commercial Reciprocity Policy of the United States 1774-1829* (1937).

national treatment clause, in a manner obviating the need for exceptions or express qualifications.³¹

D. Entry of Capital.

There remains the major question of the entry of investment capital and the establishment of corporations. Here, in distinction to persons, goods and ships, there is no tangible form appearing at the border. The entry of capital and corporations is a more elusive phenomenon that takes concrete form in connection with pursuing a purpose within the country. The "entry" problem, therefore, is very closely interlinked with the rule governing the right of establishing a business or making a lucrative investment: the right of the alien interest to enjoy major participation in the economic life of the country. Because of the present-day importance of the corporate form of doing business, and of the powerful aggregates of capital that can be assembled under the corporate form for investment purposes, the way in which this question is resolved can become one of decisive importance in the negotiation of a treaty.

Historically, treaties were concerned at best only to a limited extent with the rights of corporate enterprise; and the devising of workable rules to deal with them has been an outstanding contribution of the post-1946 treaties.³² The rule which is in principle sought is that of national treatment. This implies, in effect, the policy of the "open door" for foreign investment. Though this is a policy in line with general American practice since the earliest days, both as to our receptivity toward foreign capital coming here and our attitude toward the movement of American capital abroad, it is one not attributed universal acceptance. The development of bilaterally agreed rules on the subject are accompanied by several special prob-

31. By rule of construction (*i.e.*, the rule of the treaty does not affect the conditions which the Government, in its proprietary capacity, might choose to stipulate in connection with lending or granting its own money), a national law reserving to carriage by national flag vessels of a certain percentage of government-financed cargo, is also saved without express reservation. A case in point is the Act of August 26, 1954 (68 Stat. 832, 46 U.S.C. § 1241 (Supp. IV, 1952)) which amended the Merchant Marine Act, 1936, 49 Stat. 2015 to require that as a general rule at least 50 per cent of foreign aid cargoes shall be carried in privately owned United States flag vessels. An earlier law (Public Resolution 17 (1934) 48 Stat. 500, 15 U.S.C. § 616(a) (1952)) requires that in general 100 per cent of cargoes financed by Export-Import Bank loans be transported in United States flag vessels, but, because of exceptions provided in the law, in practice United States vessels carry approximately 50 per cent of such cargoes. See Gorter, *op. cit. supra* note 29 at 106-08. This legislation is to be distinguished from the "50-50 laws" of certain countries which apply to cargoes for private account.

32. For a discussion of this subject, see Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373 (1956).

lems. On the United States side, there are two major ones. First, despite the historical liberality of American law toward the foreign investor, there are certain sensitive lines of business, specially affected with a public interest, in which the law or administrative regulation has developed either latent or actual restraints on alien participation. These have been designed to preclude the possibility of alien control (*e.g.*, deposit banking, domestic air transport, radio-communications).³³ However, the legal policies of other countries often manifest like tendencies, so that a consensus normally is easily established concerning a minimum list of activities to be reserved from the national treatment standard as to the right of establishment.

The problem which tends to be peculiar to the United States arises from the prerogatives enjoyed by our states over the admission of out-of-state corporations for domestic business. It is national policy that the treaty power should respect this state prerogative. This restraint on the latitude of the national government to assume national treatment commitments undoubtedly figured among the reasons explaining the lack of provisions on corporations in past United States treaties. The opportunity for pursuing the subject in the post-1946 treaties came with the devising of a special "federal clause," which assimilates the alien corporation to the corporations of sister states.³⁴ Both are equally "foreign" in jurisprudence generally, and are so considered for treaty purposes. The treaty alien is thereby assured of treatment on a par with the bulk of his actual competitors in interstate and intra-state commerce. In the context of an economy which operates in fact preponderantly on an interstate basis, and enjoys as such constitutional protection against state harrassments, this solution assures a quantum of rights sufficiently

33. See note 19, *supra*, for a typical reservation. Examples of federal statutes thus saved include: the Civil Aeronautics Act of 1938 (52 Stat. 978, 1005, 49 U.S.C. § 401(13), 521(b)(1) (1952)—domestic airlines); the Communications Act of 1934 (48 Stat. 1086, 47 U.S.C. § 310 (1952)—radio broadcasting licenses); the Federal Power Act of 1920 (41 Stat. 1065(d), 16 U.S.C. § 797(e) (1952)—licenses for water power facilities on public lands and navigable streams). The reciprocity requirements of the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. § 181 (1952)) involve a special situation and are treated separately in the Protocol. See, *e.g.*, Korea treaty *op. cit. supra* note 15 at Protocol, para. 6. For explanation of the special nature of these requirements, see the discussion of their origin in De Novo, *The Movement for an Aggressive American Oil Policy Abroad, 1918-1920*, 61 Am. Hist. Rev. 854, 870-72 (1956).

34. Typical wording goes: "National treatment accorded under the provisions of the present Treaty to companies of the Republic of Korea shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America." Korea treaty, *supra* at art. XXII, para. 4.

ample to render it a negotiable one—acceptable alike to the foreign country and the United States Senate. It has made possible the reciprocal provision for national treatment vis-a-vis countries willing to accept the national treatment principle as a matter of their own general policy.

Negotiating compromises have been necessary in the measure that other countries have not been prepared to undertake formal commitments concerning the establishment of alien-controlled investments in their territories. Some countries insist that their national interest requires retention of freedom of action in determining what alien-controlled investments they will permit from time to time in the future. The right of these countries to retain this sovereign right uncommitted must be respected. There is no useful purpose to be served, from the point of view either of the prudent investor or of harmonious international relations, in attempting to use these treaties as a vehicle for forcing countries to agree to allow investments they do not want. The so-called right to “screen” foreign investments is hence recognized explicitly or implicitly in a number of treaties that are considered otherwise satisfactory. There is a great variation in the way this is done, because it is a highly individual affair. The aim is to attain as much clarification of the country's intended policies as may be practicable and, especially, to guarantee duly established investors against subsequent discrimination. The failure to find a welcome as to entry is of much less importance than would be a failure, once having entered and invested in good faith, to be protected against subsequent harsh treatment.

Aside from countries that require retention of general screening prerogatives, there are certain others prepared to accept in general the concept of national treatment, subject to a reservation related to balance-of-payments difficulties. Because of past and current experience with exchange shortage problems, they do not wish to be committed to accept investments likely to engender demands for foreign exchange (*e.g.*, for remittance of earnings) disproportionate to the constructive contribution the investments are calculated to make to visible national production. The consequent screening reservations adopted in some of the treaties are in terms open to a certain latitude of interpretation because of the difficulty of formulating precise criteria by which cause can be objectively correlated to effect.³⁵ In purport and intent, however, they are limited and

35. See, *e.g.*, Korea treaty *supra* at Protocol, para. 7: “Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, para-

qualified, leaving the emphasis on national treatment as the major rule in the treaty text.

However, all the treaties assure national treatment to permitted investments. If there is full or qualified exception to the national treatment rule to allow the screening of an investment at its point of initiation, there is no recognized impairment of the standard as concerns post-initiation treatment. For while practical treaty negotiating objectives must concede the notion of selectivity and differential control on entry of investments, its historical protective role would be lost if it began admitting the legitimacy of discriminating against investments legally present in the territory. There is also a supplementary, cumulative most-favored-nation treatment rule covering all aspects of an investment activity.³⁶

E. Acquisition of Interests.

One of the corollaries to the rules concerning the establishment and activities of persons, natural or juridical, is the right to acquire. The underlying right of establishment logically carries with it "necessary and proper" ancillary rights; and the national treatment rule, if recognized for the underlying right, would normally be supposed to carry over to the things ancillary thereto.³⁷ But a couple of apparent ancillary rights, both describable under the rubric "acquisition" of property, raise particular problems. The subject is therefore handled independently for this reason, as well as for the reason that provision for property acquisition has been traditionally a feature of treaties, whether or not in connection with business or investment, and that acquisition of property does not require physical presence in the country.

The regulation of property tenure figures among the normal prerogatives of the states; and various of the states have in past made plain their desire to restrict alien tenure in one degree or

graph 2." The provision so referred to reads: "Neither Party shall impose exchange restrictions . . . except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. . . ." Thus the reservation, though leaving a considerable margin of appreciation as concerns what or what may not be "necessary," is susceptible of being invoked, in any event, only when the country's monetary reserves are in a fragile situation requiring careful management.

36. This means both (a) that most-favored-nation treatment is assured in those exceptional instances where it might be more advantageous than national treatment, and (b) that at least most-favored-nation treatment is assured in situations not covered by the national treatment commitment.

37. For a case applying the famous doctrine of *McCulloch v. Maryland*, 18 U.S. (4 Wheat.) 316 (1819), in a treaty context, see *Jordan v. Tashiro*, 278 U.S. 123 (1928).

another.³⁸ The development of a viable and acceptable United States treaty policy has therefore had to resolve the dilemma posed by the need for respecting state prerogatives, on the one hand, and, on the other, for obtaining definite reciprocal commitments in effectuation of the international objectives in view. The accommodation devised contains two elements: (1). The first is a reciprocal commitment for national treatment in the acquisition and tenure of such leaseholds as might be necessary to the carrying out of any treaty-authorized purpose (*e.g.*, residence or a factory site). Since appropriately drawn lease arrangements can afford a reasonable degree of security, the indispensable access to property required for the conduct of a treaty-recognized business or investment is thus assured. (2). However, as to tenure of property over and above this and as to acquisition of title in all cases, a so-called "de facto reciprocity" formula is offered. Through this formula, first appearing in the 1937 treaty with Siam,³⁹ the American abroad is in principle assured national treatment. But this assurance is subjected to the proviso that this quantum of treatment may be withheld to the extent that the laws of the state of his domicile (state of charter, in case of a corporation) contain alien disabilities.⁴⁰ The states thus retain their basic legislative freedom, to which is linked the responsibility for deciding what treatment their citizens will obtain in the foreign country. A most-favored-nation rule does not preclude the extension of the national treatment provision contained in one of the

38. For recent surveys of existing State restrictions in this field, which differ in some particulars, see 1 Powell on Real Property 372-404 (1949); McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Calif. L. Rev. 7, 21-24, 59-60 (1947); Blumrosen, *Constitutional Law—Equal Protection—Validity of State Restraints on Alien Ownership of Land*, 51 Mich. L. Rev. 1053, 1055-57 (1953). For relationship of State restrictions to treaty provisions on this subject, see Blythe v. Hinckley, 180 U.S. 333 (1901); Geofroy v. Riggs, 133 U.S. 258 (1890); Hauenstein v. Lynham, 100 U.S. 483 (1879); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

39. 53 Stat. 1731, T.S. No. 940.

40. A typical example of the formula is as follows: "Nationals and companies of the United States of America shall be accorded, within the territories of the Kingdom of the Netherlands, national treatment with respect to acquiring by purchase, lease, or otherwise, and with respect to owning, occupying and using land, buildings and other real property. However, in the case of any such national domiciled in, or any such company constituted under the laws of, any State, Territory or possession of the United States of America that accords less than national treatment to nationals and companies of the Kingdom of the Netherlands in this respect, the Kingdom of the Netherlands shall not be obligated to accord to such national or company treatment more favorable in this respect than such State, Territory or possession accords to nationals and companies of the Kingdom of the Netherlands." Netherlands Treaty, 1956, T.I.A.S. No. 3942, art. IX, para. 2. In a number of treaties, this formula does not appear, the obligations of the other party being variously framed in a less extensive manner.

mid-nineteenth century treaties that remains still in force.⁴¹

By contrast, as to personalty, whether tangible or intangible, both national treatment and most-favored-nation treatment are cumulatively provided. But this is subject to a necessary qualification: namely, an exception allowing restraints to be maintained to prevent alien acquisition of shares in enterprises to a degree in conflict with the reservations maintained concerning certain sensitive fields of activity above cited.⁴²

The provisions on acquisition also extend to the right to buy into, or to buy up existing domestic corporations, in order to open to the treaty-investor an alternative to operating through the form of a direct branch. Provision for this right and its companion, the right to form a domestic corporation, has occasioned an interesting development in international jurisprudence, in that the giving of treaty protection to the alien-controlled domestic corporation means that the signatory country has assumed an international obligation vis-a-vis one of its own creatures, and has recognized the right of the other signatory to intervene in behalf thereof. In view of what a learned scholar has ascertained to be the probable state of international law in this respect,⁴³ this obligation has not been left to implication in the treaties' wording.

F. Protection of Persons and Property.

Probably the most important purpose a treaty is designed to serve—even more than the settling of rules to govern entry, establishment, acquisition, and the conduct of business—is the protection of persons, property and other acquired interests from ill-usage and spoliation. Here, national treatment and most-favored-nation treatment with regard to protection of the laws, access to the courts,⁴⁴

41. Treaty of 1853 with Argentina, 10 Stat. 1009, T.S. No. 4, art. IX. At that epoch, several other treaties, not now in force, signed with countries of the Western Hemisphere contained this rule, e.g., Salvador, 1850, 10 Stat. 891, T.S. No. 308. But the policy of not safeguarding State laws was not extended elsewhere even then. For an account of a contemporary European treaty that had to be renegotiated because the American plenipotentiary had not observed this policy, see 5 Miller, *Treaties and Other International Acts of the United States of America* 868-69, 878-81, 891-94 (1937), concerning the Treaty of 1850 with Switzerland, 11 Stat. 587, T.S. No. 353.

42. See note 19, *supra*. This exception is to close the technical loophole of allowing aliens to acquire an interest in corporations engaged in reserved "sensitive" activities, by purchasing stock through the national treatment right to acquire personalty.

43. Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Corporations*, 26 Brit. Yr. Bk. Int'l L. 257 (1949) says that "*ex hypothesi*, no state can intervene on behalf of a corporation against its own government."

44. Further on this particular subject, see Wilson, *Access to Courts Provisions in United States Commercial Treaties*, 47 Am. J. Int'l L. 20 (1953).

and so on, while of course generally provided, are not sufficient.⁴⁵ Certain non-contingent principles that immunize the treaty alien and his property from possible vagaries of national law and administration are also needed. This is a reflection of the basic standard of treatment that enlightened international practice in countries owe to their alien guests. Thus, in addition to other rules, it is provided that the treaty alien, in the peaceful pursuit of his lawful occasions, shall enjoy freedom of movement, freedom of conscience, and freedom of communication; that he shall be extended the "most constant security and protection" by the authorities, and not be subject to molestations; and that, if placed in custody, he shall enjoy the right of having his consul immediately notified, be promptly informed of the charges against him, receive a prompt trial with benefit of competent counsel, and be always treated humanely.⁴⁶ His property cannot be searched or seized except for due cause and in lawful and reasonable manner.

Most importantly, any sequestration or expropriation must be accompanied by prompt, just and effective compensation: that is, convertible valuta representing the worth of the property, paid expeditiously.⁴⁷ This is an especially valuable right in a day when nationalizations, often entailing great losses to the private owners, has tended to become not uncommon. The provision is given force through the use of words that have meaning in international jurisprudence, and by a provision for the submission of otherwise unresolvable disputes to the International Court of Justice (a submission provision which, in fact, applies to all parts of the treaty).⁴⁸

IV. CONCLUDING REMARKS

The traditional treaty of friendship, commerce and navigation, which in its recognizable modern form found its most widespread

45. For a general discussion of the national treatment status of aliens under the law in the United States, see Gibson, *Aliens and the Law* (1940). Basically, a treaty serves to embody in the form of reciprocal commitment the fundamental protections aliens receive as a matter of course under the Constitution and laws of the United States.

46. These matters are given the emphasis of simple assertion, and early mention in the organization of the treaty, *e.g.*, Korea treaty, 1956, T.I.A.S. No. 3947, art. II, para. 2, and art. III, prefaced by a general admonition for equitable treatment at all times. *Id.* at art. I.

47. "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken. . . ." Korea treaty, *supra* at art. VI, para. 4.

48. This important "compromissory clause" is found in standard form in the Korea treaty *supra* at art. XXIV, para. 2. It is also standard for this provision to be preceded by a consultation clause designed to facilitate the settlement of difficulties before they develop into disputes. *Id.* at para. 1.

use during the nineteenth century and the first third of the present one, has continued to enjoy a place in the diplomacy of the United States in the post-World War II years of international affairs. This is because it affords a ready-made and versatile medium capable of adaptation to present needs, for the satisfaction of which no suitable alternative medium has yet been devised, notwithstanding the latter-day proliferation of multilateral organizations and new techniques for approaching the world's economic problems. The need is present because private persons and business continue to venture abroad—indeed are encouraged to venture themselves and their capital abroad, where they require the protection of their government—in a world divided into independent sovereign states not yet subject to an adequate corpus of international law of recognized applicability to the area of the treaty's major concern. This area has historically been a concern of these treaties: the rights and status of the person, and of his property and enterprise.

The intergovernmental regulation of these rights, by the establishment of reciprocally binding rules of law, requires a certain community of ideals regarding the respect for private property, the dignity of the individual, and the degree to which the foreigner should be allowed to participate in the economic life of the country. It also requires mutual forbearance, and an interest in undertaking formal long-term commitments towards the foreigner, binding as against internal legislative and administrative freedom. The outward limits of any treaty to which the United States subscribes are accordingly set by the extent of the rights it is willing to accord in face of its own state and federal legislation, just as the inner limits are set by what are considered to be the minimal provisions of an efficacious treaty.

The technical tasks presented by a negotiation, though often taxing upon the ingenuity, are solvable when there exists reciprocal willingness on the level of principle in the margin lying between these two limits. The lack of a sufficiently worldwide consensus on this level of principle still seriously clouds the prospects for any satisfactory multilateral code of protection for foreign investment, as is sometimes advocated. Yet at no time in history have Americans had a heavier stake of business and other interests in foreign countries. Meanwhile, the traditional bilateral approach offers the opportunity, in the context of a general regulation of relations commencing with the idea of "friendship," to accomplish step-by-step such progress as is now possible in building international rules of law for the protection of persons and their legitimate interests abroad.