An Untold Story: The Use of FCN Treaties to Challenge Discriminatory State Statutes

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Introduction

TREATIES OF FRIENDSHIP, commerce, and navigation ("FCN treaties") are broad commercial and navigation treaties.[1] They proscribe guidelines illustrating the obligations that contracting parties owe one another as well as the rights each contracting state owes to the nationals of the other contracting state. Essentially, these treaties set forth the governing norms of interactions between the two countries involved.[2] Once a catalyst of foreign relations, FCN treaties have now taken a somewhat invisible side seat. However, after the Supreme Court of the United States' decision in *Bank Markazi v. Peterson*[3] and, perhaps more well-known, in the aftermath of the Trump Administration's termination of the Joint Comprehensive Plan of Action (more commonly referred to as the Iran Deal) in 2018, Iran sued the United States before the International Court of Justice ("ICJ"),[4] alleging violations of the 1955 Treaty of Amity, Economic Relations, and Consular Relations ("1955 U.S.-Iran Treaty of Amity").[5] This Treaty was the

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1. Herman Walker Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

2. John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 306 (2013).

3. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

4. Press Release, International Court of Justice, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) (Aug. 30, 2019), https://www.icj-cij.org/files/case-related/175/175-20190830-PRE-01-00-EN.pdf [https://perma.cc/7VJY-HZUM].

5. Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899 [hereinafter *1955 Iran-U.S. Treaty of Amity*].

product of an old alliance between Iran and the United States which, strangely, the United States never renounced following the events of the Iranian Hostage Crisis of 1979.[6] Considering the renewed spotlight on international FCN treaties, this Article analyzes the historical importance of FCNs, particularly how they were used in the past as an avenue for foreigners in the United States to contest the applicability of discriminatory state statutes to them.

First, this Article gives an overview of the literature concerning FCNs. Secondly, this Article provides a historical overview of FCN treaties, starting from their introduction to early American foreign policy during the American Revolution to their decline two centuries later due to the rise of bilateral investment treaties. Then, Section II explores the structure of FCN treaties, including the legal effect they carry. Then, Section III parses the different provisions of FCN treaties and how different subject matters were introduced during different time periods. Next, Section IV explains how FCN treaties provided a mechanism for foreigners to challenge discriminatory statute statutes, such as those concerning inheritance rights or the right to carry on a trade. Then, Section V explains how in 1971 the Supreme Court's decision in *Graham v. Richardson* foreclosed the need to rely on these FCN provisions for vindication of equal rights. Lastly, this Article concludes how FCN treaties were utilized to challenge discriminatory state statutes.

I. Literary Overview

Scholars have focused on FCN treaties. The literature surrounding these treaties often centers on their use as investment enhancing mechanisms or as precursors to bilateral investment treaties ("BITs"). Thus, the majority of the focus revolves around post-World War II FCN treaties. Dr. Kenneth Vandevelde formerly worked in the U.S. State Department at the Office of the Legal Adviser in the 1980s where he dealt with the drafting of the model negotiating texts of the BITs, he was also counsel to the negotiating teams. He has written extensively on the topic of investment law, many of his articles and books discussing FCN treaties. For example, Dr. Vandevelde analyzed the negotiating and drafting of post-World War II FCN treaties in depth, including the initiation of the new FCN treaty program, as well

6. Case Concerning United States Diplomatic and Consular Staff in Tehran, Advisory Opinion (U.S. v. Iran), 1980 I.C.J. 28, ¶ 54 (May 24).

as how those treaties were subsequently replaced by BITs.[7] He also wrote an article where he discussed what he termed as "the second wave" of U.S. investment treaties.[8] In that article, he drew on many comparisons between FCN treaties and their successors—BITs.[9]

Other scholars have written about FCN treaties in general, analyzing the structure and provisions of such treaties. Such examples include the late Harry C. Hawkins, formerly the Director of the Foreign Service Institute.[10] He addressed FCN treaties generally, separating and analyzing their provisions. Similarly, the late Dr. Herman Walker, Jr., who was the first Secretary of Embassy, Foreign Service of the United States, wrote an article[11] on FCN treaties. Both men worked in the U.S. government during the height of the negotiations of the FCN treaties.[12] Additionally, both works dealt with post-World War II FCN treaties.

Little literature focuses on the time period prior to the revamped FCN treaty series after the Second World War. Dr. Doron S. Ben-Atar, currently a history professor at Fordham University, looked to early FCN treaties. In his 1993 book,[13] he traced the late 18th century commercial policies and diplomacy of the United States, which involved an examination of the first U.S. commercial treaties—FCN treaties. Other scholars have focused on singular provisions of FCN treaties. For example, Catherine Sun analyzed the relationship of the U.S. laws regarding E-2 treaty investor visas, the current laws, and how that would be affected by proposed regulations.[14] E-2 treaty investor visas allow foreign investors to remain in the United States and oversee their investments.[15]

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7. *See generally* KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES (Oxford Univ. Press 2017).

8. *See* Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

9. *Id.*

10. *Harry C. Hawkins (1894-1983)*, OFF. HISTORIANS, https://history.state.gov/departmenthistory/people/hawkins-harry-c [https://perma.cc/U2M2-FMQR].

11. Walker, *supra* note 1, at 805.

12. *Harry C. Hawkins*, *supra* note 10; Wolfgang Saxon, *Herman Walker, 83, Professor and U.S. Foreign Officer, Dies*, N.Y. TIMES (May 13, 1994), https://www.nytimes.com/1994/05/13/obituaries/herman-walker-83-professor-and-us-foreign-officer-dies.html [https://perma.cc/2Y2Q-57CS].

13. *See* DORON S. BEN-ATAR, THE ORIGINS OF JEFFERSONIAN COMMERCIAL POLICY AND DIPLOMACY (St. Martin's Press, 1st ed. 1993).

14. *See* Catherine Sun, *The E-2 Treaty Investor Visa: The Current Law and the Proposed Regulations*, 11 AM. U. INT'L L. REV. 511 (1996).

15. *Id.* at 511–12.

Similarly, many FCN treaties contain a clause that states companies of one contracting party can give preference to the hiring of their own nationals when doing business in the territory of the other contracting party. A plethora of scholarly literature stemmed from the Supreme Court decision in *Sumitomo Shoji America Inc. v. Avagliano*.[16] The issue in that case was the interaction between Title VII and the FCN treaty provision which permitted foreign companies to favor their own nationals over others in employment. Sumitomo Shoji America, Inc. was a New York corporation and a wholly owned subsidiary of a Japanese company.[17] Plaintiffs—all of whom are past female secretaries[18] who worked at Sumitomo—sued Sumitomo under Title VII of the Civil Rights Act of 1964, claiming that the company's practice of hiring only male Japanese citizens for positions of executive, managerial, and sales positions went against the federal statute.[19] Sumitomo claimed it could choose its employees pursuant to an FCN treaty between the United States and Japan.[20] Sumitomo contended that it was protected under Article VIII of the FCN Treaty because it was a Japanese company.[21]

The 1953 Friendship, Commerce, and Navigation Treaty between Japan and the United States[22] reads that "[C]ompanies 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."[23] Under Article XXII(3), companies mean:

> [C]orporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.[24]

The Supreme Court reasoned that Sumitomo was incorporated under the laws of New York and thus, it is a company of the United

16. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982).

17. *Id.* at 178.

18. *Id.*

19. *Id.*

20. *Id.* at 179.

21. *Id.* at 182.

22. Treaty of Friendship, Commerce and Navigation, Japan-U.S., art. XXII, ¶ 3, Apr. 9, 1953, 4 U.S.T. 2063 [hereinafter *1953 Japan-U.S. FCN*].

23. *Id.* art. VIII, ¶ 1.

24. *Id.* art. XXII, ¶ 3.

States and not a company of Japan.[25] Therefore, Sumitomo could not invoke Article VIII of the Treaty because the Treaty was "available only to companies of Japan operating in the United States and to companies of the United States operating in Japan."[26] The Court further recognized that both the Japanese government and the U.S. government interpreted the Treaty not to cover companies "constituted under the applicable laws" of the other contracting state.[27]

The Court disagreed with Sumitomo. The primary purpose of the Treaty with Japan's corporation provisions (and others like it) "was to give corporations of each signatory legal status in the territory of the other party and to allow them to conduct business in the other country on a comparable basis with domestic firms."[28] The Court reasoned that this purpose is met by treating subsidiaries of foreign companies as domestic companies.[29] Therefore, the Supreme Court concluded that Sumitomo was a company of the United States and thus, Article VIII(1) of the Treaty with Japan did not apply.[30]

This Supreme Court case inspired many scholars.[31] For example, in an article,[32] Gerald D. Silver addressed the scope of the provision concerned in FCN treaties, like in *Sumitomo*. Silver analyzed both the "broad" and "narrow" views which would bar a cause of action against a company who exercised the treaty provision.[33] Similarly, another author addresses the same FCN provision in regard to a Seventh Circuit Court decision,[34] which "created a loophole" in the rule that an American subsidiary of a foreign company could not rely on the FCN treaty

25. Sumitomo Shoji Am., Inc., 457 U.S. at 182.

26. *Id.* at 183.

27. *Id.*

28. *Id.* at 186.

29. *Id.* at 188.

30. *Id.* at 189.

31. *See generally* Jennifer D. Fease, *The Importation of Sexism: A Cost-Benefit Approach to the U.S.-South Korea Friendship, Commerce and Navigation Treaty*, 38 VAND. J. TRANSNAT'L L. 825 (2005); Daniel H. Tabak, *Friendship Treaties and Discriminatory Practices*, 28 COLUM. J.L. & SOC. PROBS. 475 (1995); *and* Edward M. Melillo, *Post-War Friendship, Commerce and Navigation Treaties – Interpreting the Right of Foreign Treaty Employers in the United States to Engage in Selective Employment Discrimination "of their Choice": Is It Justified?*, 6 DEPAUL BUS. L.J. 101 (1994).

32. *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).

33. Silver gave an example of a Korean company, who fired an American woman in favor of a Korean man. Under the "broad view" all causes of action against the company would be barred, while the "narrow view" would allow the decision to be challenged in a Title VII lawsuit. *Id.* at 766.

34. Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

provision (like Article VIII(1) in the 1953 U.S.-Japan FCN).[35] This "loophole" recognized the right of a foreign corporation to control its American subsidiaries by being able to place "its own executives in management positions."[36] Further, a third author focused on the Second Circuit's "modified bona fide occupational qualification ("BFOQ") standard [which] best gives intent to the language and negotiating history of the Japan FCN."[37]

On a different provision, Professor George K. Foster addressed the provisions in both FCN treaties and later in BITs regarding "protection and security."[38] "Protection and security" provisions are prevalent in many FCN treaties. For example, the 1954 U.S.-German FCN Treaty states that "[n]ationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security."[39] Professor Foster addresses the conflicting views of what the provision requires and uses the Vienna Convention on the Law of Treaties to correct that controversy.[40]

Don C. Piper wrote an article discussing solely navigation provisions of FCN treaties.[41] Another provision often the subject of scholarly literature concerns "access to courts." A typical "access to court" provision states that "[n]ationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to . . . having access to the courts of justice and to administrative tribunals and agencies, in all degrees of jurisdiction, both in pursuit and in defense of their rights."[42] The interaction between an FCN treaty's provision of "access to courts" and *forum non*

35. Judith A. Potoka, *Reconsidering the Conflict Between Title VII and Treaties of Friendship, Commerce and Navigation: The Seventh Circuit Decision in Fortino v. Quasar*, 13 J.L. & COM. 179, 180 (1993).

36. *Id.*

37. Tram N. Nguyen, *When National Origin May Constitute a Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty As an Affirmative Defense to a Title VII Claim*, 37 COLUM. J. TRANSNAT'L L. 215 (1998).

38. 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 (2012).

39. *See* Treaty of Friendship, Commerce and Navigation Treaty, Ger.-U.S., art. III, Oct. 29, 1954, 7 U.S.T 1839.

40. Foster, *supra* note 38.

41. Don C. Piper, *Navigation Provisions in United States Commercial Treaties*, 11 AM. J. COMP. L. 184 (1962).

42. Treaty of Friendship, Commerce and Navigation, Ir.-U.S., art. VI, ¶ 1(c), Jan. 21, 1950, 1 U.S.T 785 [hereinafter *1950 Ir.-U.S. FCN*].

conveniens is often the subject of literature[43] as well as several court opinions.[44]

Many other scholars focus on the ICJ cases involving the interpretation of clauses in FCN treaties. For example, Michael Koehler analyzes the relationship between Iran and the United States.[45] In his article, he reviews the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran[46] noting that the treaty was the basis for the governing of U.S. and Iranian affairs.[47] There he outlined the current status of the Treaty and analyzed the ICJ cases between the United States and Iran, two of the three which concerned the interpretation of the 1955 Treaty of Amity.

Lastly, Professor John F. Coyle explored the status of FCN treaties in U.S. courts. In one article, he describes the status of FCN treaties in U.S. courts as "a useful study in the slow process of treaty obsolescence."[48] In that article Professor Coyle analyzes the disappearance of FCN treaties in U.S. courts, denoting that "conventional wisdom [was] that FCN treaties [were] historical relics."[49] In two of his other articles, one with Professor Yackee, Professor Coyle looks to FCN (and BITs) and their relationship with U.S. courts.[50]

However, the literature does not discuss the use of these FCN treaties for challenging statutes that discriminate against foreigners. Adam S. Hersh analyzed the constitutionality of the death benefit sys-

43. *See* Charles Eric Ruhr, *Forum Non Conveniens: A Review of Its Application in Past and Recent Cases*, 6 TULSA J. COMP. & INT'L L. 247 (1999); *see also* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663 (1992).

44. *See* Pollux Holding, Ltd. v. Chase Manhattan Bank, 329 F.3d 64 (2d Cir. 2003); Bonzel v. Pfizer, Inc., 439 F.3d 1358 (Fed. Cir. 2006); *In re* Ford Motor Co., 344 F.3d 648 (7th Cir. 2002); Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984); Morales v. Ford Motor Co., 313 F. Supp. 2d 672 (S.D. Tex. 2004); Intertec Contracting A/S v. Turner Steiner Int'l, S.A., 774 N.Y.S.2d 14 (App. Div. 1st Dept. 2004); Rivas v. Ford Motor Co., 17 Fla. L. Weekly Fed. D 611 (U.S. M.D. Fla. 2004).

45. *See* Michael Koehler, *Two Nations, A Treaty, and the World Court: An Analysis of United States-Iranian Relations Under the Treaty of Amity Before the International Court of Justice*, 18 WIS. INT'L L.J. 287 (2000).

46. 1955 Iran-U.S. Treaty of Amity, *supra* note 5.

47. Koehler, *supra* note 45, at 288.

48. Coyle, *supra* note 2, at 305.

49. *Id.* at 304.

50. *See* John F. Coyle, *The Great Vanishing: International Trade Agreements in U.S. Courts*, 95 N.C. L. REV. ADDENDUM 70 (2017); *see also* John F. Coyle & Jason Webb Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARZ. St. L.J. 61 (2017).

tems, one of the focuses of this paper.[51] However, he focused on the constitutionality of not allowing non-resident foreigners to bring a suit for death benefits, ultimately concluding that non-resident foreigners should be able to bring such a suit.[52] He did not focus on the use of FCN treaties and how they were used to strike down discriminatory state statutes. This is the topic of this Article. However, first, this Article gives a background on FCN treaties.

II. Historical Overview of FCNs

A. The Quest for U.S. Sovereignty and International Recognition: FCN Treaties Provided the Means for the United States to Gain its Independence, Achieve International Recognition and Build its Commercial Relations

The United States began entering into FCN treaties while it still consisted of the rebellious thirteen colonies who had yet to achieve their independence from Great Britain. The goal of these treaties was for the United States to gain international recognition as an independent state.[53] In 1778, the United States concluded two treaties with France. The first treaty the United States made was a Treaty of Amity and Commerce.[54] The second treaty with France was a Treaty of Alliance. These two treaties not only set up a friendly and commercial relationship between France and the thirteen colonies, it also represented an alliance that would help the United States gain its independence.

The United States' next FCN treaty was with the Netherlands in 1782, in which the Netherlands agreed to align itself with the thirteen colonies against Great Britain.[55] The United States also made an FCN treaty with Sweden. Sweden did not want to make a treaty with the United States until the initial articles between Great Britain and the

51. Adam S. Hersh, *Go Home, Stranger: An Analysis of Unequal Workers' Compensation Death Benefits to Nonresident Alien Beneficiaries*, 22 FLA. St. U.L. REV. 219 (1994).

52. *See generally id.*, concluding that "[i]f states are to honor the workers' compensation conditions imposed on employers and employees, they must provide equal compensation to dependents and beneficiaries without regard to where they are from or where they live." *Id.* at 238.

53. VANDEVELDE, *supra* note 7, at 57.

54. *Id.*

55. *See* Treaty of Amity and Commerce, Neth.-U.S., Oct. 8, 1782, 8 Stat. 32 [hereinafter *1782 Neth.-U.S. Treaty of Amity*].

United States were signed.[56] This treaty was important to the United States because it represented the first treaty signed by the United States with another nation that was not an American ally during the Revolutionary War.[57] Thus, the Founding Fathers and the Swedish government understood the "symbolic" representation the FCN treaty would have.[58] King Gustavus III of Sweden wanted Sweden "to be known as 'the first Power not at war with England that had sought [an] Alliance' with America."[59] The treaty with Sweden was signed in 1783.[60] These three treaties helped the United States gain its standing amongst the international community.[61] After signing the Treaty of Peace and becoming a member of the global community, the United States made FCN treaties with other nations, such as Prussia[62] and Spain.[63]

During the beginning and middle of the nineteenth century, the United States initially sought relations with the nations in Europe, but it also expanded its relations to newly de-colonialized Latin American countries. The United States focused on negotiating navigation provisions and access to foreign ports, especially those concerning neutrality rights and neutral trade with warring nations.[64] The negotiation of FCN treaties reduced during the Civil War. The United States tried to focus on the domestic market and imposed high tariffs on international trade in order to deter foreign trade.[65] However, after World War I, foreign commerce became the primary focus of FCN treaties.[66] According to Vandevelde, the United States made twelve treaties after World War I.[67] However, the Great Depression created an "inhospitable environment for negotiations" and thus, negotiations staggered.[68]

56. *The Swedish-American Treaty of Amity and Commerce, with Translation, 3 April [I.E. 5 March] 1783*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Franklin/01-39-02-0154 [https://perma.cc/77CZ-2MRK].

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. VANDEVELDE, *supra* note 7, at 57.

62. *See* Treaty of Amity and Commerce, Ger.-U.S., July 9, 1785, 8 Stat. 84.

63. *See* Treaty of Friendship, Limits, and Navigation, Spain-U.S., Oct. 27, 1795, 8 Stat. 138 [hereinafter *1795 Spain-U.S. Treaty of Friendship*].

64. VANDEVELDE, *supra* note 7, at 58.

65. *Id.*

66. *Id.*

67. *Id.* at 59.

68. *Id.*

B. Postwar FCN Treaties: After World War II, FCN Treaties Became a Major Focal Point of U.S. Foreign Policy in Making and Protecting Foreign Investments and Rebuilding a War-Torn World

The greatest growth in FCN treaties was in the aftermath of World War I. The world was left devastated after the Second World War and many countries did not have the financial ability to rebuild their economies.[69] The United States began to negotiate more FCN treaties, but rather than focusing on trade and shipping rights, foreign investment motivated the new FCN treaties.[70] The reason for making these FCN treaties was not only based on the desire to rebuild Europe and the world, but also for deterring disheartened states (or newly de-colonialized states) from turning towards the influence of the Soviet Union and communism.[71] As "corporate involvement" expanded, FCN treaties became more centered on a corporation's right to conduct business in other countries—"to assure them [corporations] the right to conduct business on an equal basis without suffering discrimination based on their alienage."[72]

C. The Fall of FCN Treaties and the Rise of BITs: The United States Transitioned from FCN Treaties to Specialized BITs in Order to Maintain its Status as the Frontrunner for Foreign Investment

A new FCN treaty has not been made since the mid-1960s. Coyle identifies three factors that led to the decline and ultimate cessation of the formation of FCN treaties.[73] The first stemmed from the tensions of the Cold War.[74] Many countries did not want to enter into FCN—"friendship"—treaties with the United States due to the stark political tensions which existed at the time.[75] Secondly, due to the increase in nationalizations in foreign countries in the 1960s and 1970s, U.S. officials turned away from FCN treaties and began to devote more time to developing specialized agreements—bilateral in-

69. *Id.*

70. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 186 (1982)

71. VANDEVELDE, *supra* note 7, at 4.

72. *Sumitomo*, 457 U.S. at 188.

73. Coyle, *supra* note 2, at 304.

74. *Id.* at 309.

75. *Id.*

vestment treaties that would better protect U.S. interests in a foreign country.[76]

The rise of bilateral investment treaties was probably the biggest contributor to the decline in FCN treaties.[77] By the time President Jimmy Carter was elected, fifteen years had passed since an FCN treaty was concluded and enforced.[78] However, during that time, BITs were becoming popular in Europe. In 1959, Germany negotiated a treaty with Pakistan (not even two weeks after signing an FCN treaty with the United States), which dealt only with foreign investment.[79] From 1959 to 1966, Germany, France, Switzerland, the Netherlands, Italy, Belgium, Luxembourg, the Economic Union, Sweden, Denmark, and Norway initiated BIT programs.[80] By the late 1970s, over 170 BITs had been formed between sixty-five different countries.[81]

The European BIT treaties dealt only with "treatment standards [of investments], expropriation, financial transfers, and dispute settlement."[82] Further, European countries were successful in the formation of BIT treaties with developing countries.[83] The U.S. FCN treaties, on the other hand, were unsuccessful in the attempt to "extend[ ] treaty ties to the Third World."[84]

The United States became aware of the shift in strategy. The United States was no longer successful in concluding FCN treaties with other countries because such treaties were being replaced with a more specified instrument—the European BITs. Thus, in 1977, the U.S. government decided to implement a series of BITs which would replace FCN treaties.[85] Therefore, in 1977 the Carter Administration launched its BIT program and abandoned FCN treaty negotiations.[86] This phenomenon perhaps is on par with Walker's notion that the need for FCN treaties was rooted in the need for laws governing private investment.[87] Once BITs started to take center stage, the need for

76. *Id.*
77. *Id.*
78. VANDEVELDE, *supra* note 7, at 540.
79. *Id.*
80. *Id.* at 541.
81. *Id.*
82. K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105, 109 (1986).
83. *Id.*
84. *Id.*
85. VANDEVELDE, *supra* note 7, at 543–44.
86. *Id.* at 544.
87. Walker, *supra* note 1, at 806.

FCN treaties declined, which was Coyle's third reason for the decline in FCN treaties.

III. Overview of FCN Treaties

A. Purpose

The purpose of FCN treaties is to govern various aspects of the relationship of the contracting parties.[88] Many times the preamble, or sometimes the first article, addresses the purpose of the FCN. For example, an 1828 Treaty of Amity, Commerce, and Navigation between the United States and Brazil stated:

> The United States of America and His Majesty the Emperor of Brazil, desiring to establish a firm and permanent peace and friendship between both nations, have resolved to fix, in a manner clear, distinct and positive, the rules which shall in future be religiously observed between the one and the other, by means of a treaty or general convention of peace, friendship, commerce and navigation.[89]

Similarly, Article 1 of the 1794 Treaty of Amity, Commerce, and Navigation between the United States of America and Great Britain, more commonly (and hereinafter) referred to as the Jay Treaty, states: "[t]here shall be a firm inviolable and universal Peace, and a true and sincere Friendship between His Britannick Majesty, His Heirs and Successors, and the United States of America; and between their respective Countries, Territories, Cities, Towns and People of every Degree, without Exception of Persons or Places."[90] While the purpose of this section is termed with more aspirational and diplomatic wording than the rest of the provisions of FCN treaties, it sets forth the relationship between the parties and the reasons for the formation of the FCN treaty, which is usually peace and friendly relations.

B. Binding, Enactment, and Enforcement

1. Binding

The name "friendship treaties" or "treaty of amity" portrays somewhat of a misnomer. Its name induces the notion that the treaties are of a political nature, rather than a binding one.[91] For example, one

88. *Id.* at 805.

89. Treaty of Amity, Commerce, and Navigation, Braz.-U.S., Preamble, Dec. 12, 1828, 8 Stat. 390 [hereinafter *Braz.-U.S. Treaty*].

90. Treaty of Amity, Commerce, and Navigation, art. I, Eng.-U.S., Nov. 19, 1794, 8 Stat. 116 [hereinafter *Eng.-U.S. Treaty*].

91. HARRY C. HAWKINS, COMMERCIAL TREATIES & AGREEMENTS: PRINCIPLES & PRACTICE 1–2 (Rinehart & Company, Inc. 1951).

can interpret the FCN treaties are based on friendship and, thus, once that friendship is destroyed, the treaty can lapse. On the contrary, these treaties, according to Herman Walker, are not political agreements. Despite the term "friendship" which seems to "presuppose[ ] friendliness and good-will between the signatories,"[92] these treaties "are fundamentally economic and legal."[93] International agreements obligate the contracting parties to abide by the treaty in good faith and are subject to the doctrine of *pacta sunt servanda*.[94] Thus, the treaties are binding agreements between the contracting states.

2. Enactment

Most FCN treaties are "Article VI" treaties, meaning they must be signed by the President and ratified by 2/3 of the United States Senate.[95] In other words, these treaties are considered self-executing.[96] The Supreme Court of the United States' majority in *Medellin v. Texas* stated, "based on 'the[ir] language'" friendship treaties are generally self-executing instruments.[97] This means the treaties are domestically enforceable and need no further legislation from Congress.[98]

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92. Walker, *supra* note 1, at 806.

93. *Id.* Note: Walker was referring to the friendship treaties made by the United States with another country and not the FCN treaties of other countries, such as the Russian-Ukranian or Moroccan-Spanish FCN treaties. See also Treaty of Friendship, Good-Neighbourliness and Cooperation, Morocco-Spain, Preamble, July 4, 1991, 1717 U.N.T.S. 195.

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 (AM. LAW INST. 1986); *see also* Vienna Convection on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 339.

95. U.S. CONST. art. II, § 2, cl. 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . ."). *See* Treaty of Friendship, Commerce, and Consular Rights, Est.-U.S., Dec. 23, 1925, 44 Stat. 2379 [hereinafter *1925 Est-.U.S. FCN Treaty*] (which was signed December 23, 1923, the Senate gave its consent to ratify on March 25, 1926 and the treaty was signed and ratified by the President on April 17, 1926).

96. *See* Medellin v. Texas, 552 U.S. 491, 521 (2008); *see also* Coyle & Yackee, *supra* note 50, at 71.

97. *See Medellin*, 552 U.S. at 521; *see also* Al-Bihani v. Obama, 619 F.3d 1, 16 (D.C. Cir. 2010) (stating "[n]umerous bilateral treaties—agreements between the United States and one other nation—are self-executing. For example, the United States has entered into many bilateral Friendship, Commerce, and Navigation treaties, which define the civil, property, and commercial rights each treaty country will afford to nationals of the other. Courts have routinely held such treaties to be self-executing.").

98. *Al-Bihani*, 619 F.3d at 13 ("[S]elf-executing treaties are domestic U.S. law and thus enforceable in U.S. courts. By contrast, non-self-executing treaties and customary international law are not domestic U.S. law.").

3. Enforcement

Historically, FCN treaties were enforced in the domestic courts of the contracting states. However, many FCN treaties made during post-World War II contain clauses that permits states unable to settle disputes diplomatically to submit them to the ICJ. For example, the 1951 Friendship, Commerce, and Navigation Treaty between the United States and Greece states: "[a]ny dispute between the Parties as to the interpretation or application of the Present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other amicable means."[99] The United States has used these clauses twice to bring suits arising under FCN treaties to the ICJ. The first time, during the Iranian Hostage Crisis in 1979, the United States sued Iran over violations of three treaties, one of which was a 1955 Treaty of Amity.[100] Secondly, in 1987, the United States sued Italy over alleged violations of their 1948 Treaty of Friendship, Commerce, and Navigation.[101]

Alternatively, as discussed, the United States has also been sued before the ICJ based on an FCN treaty. The first time was with Nicaragua for violations of a 1956 Treaty of Friendship, Commerce, and Navigation.[102] Iran also brought three other lawsuits against the United States based on violations of the 1955 Treaty of Amity—two of which are currently pending in the ICJ[103] (and previously discussed above).

Sometimes, albeit rarely, FCN treaties had other enforcement mechanisms. The 1794 Jay Treaty provided the framework and rules to set up commissions that would decide disputes between Great Britain and the United States. For example, a commission of five members was established to adjudicate claims regarding debts of British creditors from the American Revolution, for boundaries regarding

99. Treaty of Friendship, Commerce, and Navigation, Greece-U.S., art. XXVI, ¶ 2, Aug. 3, 1951, T.I.A.S. No. 3057.

100. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3 (May 24).

101. *See* Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. 15, ¶ 10 (July 20).

102. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

103. *See generally Oil Platforms (Islamic Republic of Iran v. United States of America)*, INT'L CT. JUST., https://www.icj-cij.org/en/case/90 [https://perma.cc/BTN8-A634]; *see also Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, INT'L CT. JUST., https://www.icj-cij.org/en/case/164 [https://perma.cc/TB2Q-DA77] *and Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, INT'L CT. JUST., https://www.icj-cij.org/en/case/175 [https://perma.cc/7H5D-49ZB].

the Mississippi River and for complaints regarding captures of condemnations of vessels during the Revolutionary War.[104] Apart from these examples, most FCN treaties are enforced either in domestic courts or diplomatically between the contracting states.

C. Termination

Lastly, FCN treaties contain clauses proscribing their duration. Most FCN treaties contain a ten-year durational clause, after which the treaty automatically renews, unless one of the signatory states gives notice (sometimes six months or a year notice) that it does not wish the treaty to renew. The treaty would then continue in perpetuity, unless one party wishes to terminate it. For example, the 1925 Treaty of Friendship, Commerce, and Consular Rights between Estonia and the United States reads:

> [T]he present Treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.
>
> If within one year before the expiration of the aforesaid period of ten years neither High Contracting Party notifies to the other an intention of modifying by change or omission, any of the provisions of any of the articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the High Contracting Parties shall have notified to the other an intention of modifying or terminating the Treaty.[105]

Other treaties have different termination clauses. The 1934 U.S.-Finland Treaty of Friendship, Commerce, and Consular Rights initially had a one-year term only and then continues perpetually until a six-month termination is given.[106] The 1851 Costa Rican-U.S. Treaty

104. Eng.-U.S. Treaty, *supra* note 90, art. V, VI, VII.

105. 1925 Est.-U.S. FCN Treaty, *supra* note 95, art. XXIX.

106. Treaty of Friendship, Commerce, and Consular Rights, Fin.-U.S., art. XXXII, Feb. 13, 1934, 49 Stat. 2659 [hereinafter *1934 Fin.-U.S. FCN Treaty*].

> The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Washington. The Treaty shall take effect in all its provisions thirty days from the date of the exchange of ratifications and shall remain in full force for the term of one year thereafter. If within six months before the expiration of the aforesaid period of one year neither High Contracting Party notifies to the other an intention of modifying by change or omission, any of the provisions of any of the Articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect indefinitely after the aforesaid period subject always to termination on a notice of six months.

Id.

of Friendship, Commerce, and Navigation has a seven-year term, after which it became perpetual with a one-year termination notice.[107]

Either of the contracting parties can terminate the FCN treaties by giving notice. For example, in 1841, King Peter II of Brazil gave the United States notice to terminate a treaty of amity after the original twelve-year term of the treaty lapsed (and thereby not letting it renew automatically) because of political discourse that existed between the United States and Brazil at the time.[108] According to Dr. Andrade, the United States at the time possessed disdain for the Brazilian monarchy and the Brazilians in return did not appreciate the attempts by some American traders to incite revolts in Brazil against the monarchy and advocate for a republic, and thus Brazil wanted to terminate the treaty.[109] Similarly, in October 2018, the Trump Administration gave Iran its one-year notice to terminate the 1955 U.S.-Iran Treaty of Amity, as set forth in the termination article in the treaty.[110]

Interestingly, some FCN treaties state that even when terminated, the articles or provisions concerning peace and friendship remain perpetual. For example, the FCN treaty between the United States and Brazil was terminated in 1841.[111] However, the parts concerning "peace and friendship" between the United States and Brazil continued to remain in force after termination and will remain in force perpetually. The Treaty stated:

> The present treaty shall be in force for twelve years from the date hereof, and further until the end of one year after either of the contracting parties shall have given notice to the other of its intention to terminate the same. . .on the expiration of one year after such notice shall have been received by either from the other party, this treaty, in all the parts relating to commerce and navigation, shall altogether cease and determine, and in all those parts which relate to peace and friendship it shall be permanently and perpetually binding on both powers.[112]

107. Treaty of Friendship, Commerce, and Navigation, Costa Rica-U.S., art. XIII, July 10, 1851, 10 Stat. 916.

108. Attila S.L. Andrade Jr., *Treaty of Amity, Commerce, and Navigation Between Brazil and the U.S.*, 47 U. MIAMI INTER-AM. L. REV. 200, 209 (2016).

109. *Id.* at 209–11.

110. Carol Morello, *U.S. Terminates 1955 Treaty with Iran, Calling It an 'Absolute Absurdity'*, WASH. POST (Oct. 3, 2018, 11:16 AM), https://www.washingtonpost.com/world/national-security/us-terminates-1955-treaty-with-iran-calling-it-an-absolute-absurdity/2018/10/03/839b39a6-3bcf-42b1-a2d5-04bfe1c5f660_story.html?utm_term=.856c7a3a50b0 [https://perma.cc/L8NY-3ZC5].

111. Andrade, *supra* note 108.

112. Brazil-U.S. Treaty, *supra* note 89, art. XXXIII, ¶ 1.

Moreover, when FCN treaties are terminated, the friendship and peace articles are left in force by the parties. For example, an 1836 Treaty of Peace, Friendship, Navigation, and Commerce between the United States and Venezuela was terminated in 1851.[113] However, only the articles pertaining to commerce and navigation were terminated, meaning the articles concerning peace and friendship are still in effect.[114]

IV. FCN Subject Matters

The beneficiaries of FCN treaty provisions include individuals, companies, vessels, and goods. And, FCN provisions deal with a variety of subject matters. They range from provisions addressing the rights of individuals, commerce and navigation provisions, consular relations provisions, and (later) rights of companies. This section gives an overview of such provisions.

A. Who? The Protection of FCN Treaty Provisions Extended to Nationals, Corporations, Goods, and Vessels

The protection of FCN treaties originally protected only individuals, goods, and vessels. Harry C. Hawkins's book explored these beneficiaries. The term "nationals" in these treaties does not mean citizen.[115] Rather, a "national" includes citizens and non-citizens who "owe permanent allegiance to the state."[116] FCN treaties also guarantee certain protections to vessels.[117] For example, the U.S.-Honduras FCN treaty states:

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.[118]

This treaty provision applies directly to the vessels of either contracting party. Similarly, some FCN treaty provisions protect the

113. U.S. Dep't of State, Treaties in Force 493 (2019) [hereinafter *State Department Treaties in Force*].

114. Treaty of Peace, Friendship, Navigation, and Commerce, U.S.-Venez., June 20, 1836, 8 Stat. 466; *see also* State Department Treaties in Force.

115. Hawkins, *supra* note 91, at 3

116. *Id.*

117. *Id.* at 5.

118. Treaty of Friendship, Commerce, and Consular Rights, Hond.-U.S., art. X, Dec. 7, 1927, 45 Stat. 2618.

"goods" of the contracting parties. This refers to the "goods originating in the territories of the contracting parties."[119]

In post-World War I treaties, reference was made regarding the recognition of juridical status and access to courts of limited liability and other corporations and associations.[120] Further, post-World War II treaties, saw a shift in focus towards corporate rights and provisions, thus making companies one of the most prominent beneficiaries of FCN treaty provisions.[121]

B. What? The Subject Matter of FCN Treaty Provisions Ranged From a Variety of Topics That Aimed to Protect the Contracting States' Interests and the Interests of Their Nationals

1. Peace and Friendship Provisions

Peace and friendship provisions are aspirational clauses in FCN treaties where the contracting parties agree to promote and continue good relations with each other. Articles such as these are not often used as the sole basis of bringing claims, although courts do look to these articles for guidance on the purpose of the treaty. A rare example is an attempt to obtain jurisdiction based on an article in a U.S.-Moroccan friendship calling for peace and to keep citizens safe.[122] However, because these provisions are more aspirational, they can be considered political statements and do not possess a substantive basis for a claim.

2. Navigation Provisions

Navigation provisions concern ships, ports, and sea passports. These provisions were particularly important when the only means of trading and transportation across seas and oceans were vessels. For example, the 1778 U.S.-French Amity Treaty stated "that in case either of the Parties hereto should be engaged in War, the Ships and Vessels belonging to the Subjects or People of the other Ally must be furnished with Sea Letters or Passports expressing the name."[123] Many of

119. HAWKINS, *supra* note 91, at 8.

120. 1925 Est.-U.S. FCN Treaty, *supra* note 95, art. XII.

121. *See* Friendship, Commerce, and Navigation Treaty, U.S.-Germany, art. V, ¶ 5, Oct. 29, 1954, 7 U.S.T. 1839 ("Property of nationals *and companies* of either Party shall receive the most constant protection and security within the territories of the other Party.") (emphasis added).

122. Pitt-Bey v. District of Columbia, 942 A.2d 1132, 1136 (D.C. 2008).

123. *Treaty of Amity and Commerce Between The United States and France; Feb. 6, 1778*, art. 25, AVALON PROJECT [hereinafter *Treaty of Amity*], https://avalon.law.yale.edu/18th_cen-

the navigation provisions concerned neutrality rights of vessels, the treatment of goods on enemy ships, what was considered contraband and what was not, and the rules governing privateers and prize law. For example, in America's early history, one of the most important friendship treaty provisions that the U.S. courts dealt with was Article 17 in the 1778 U.S.-French Amity Treaty.[124] This provision allowed for privateers to take their prize and enter the ports of the contracting parties (the United States and France) and not be subject to the U.S. courts regarding the lawfulness of the captures.

Other navigation articles provided sanctuary for vessels[125] and others allow each contracting party's vessels "to come with their vessels and cargoes to all places, ports, and waters of every kind within the territorial limits of the other."[126]

3. Commerce Provisions

Because one of the main purposes of FCN treaties in general was to promote commercial relations between two countries, commerce and trade provisions were prevalent in these treaties. This includes provisions for taxes and duties. For example, Article IV of the 1826 U.S.-Denmark Friendship Treaty stated:

> [N]o higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of his majesty the king of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States, than are, or shall be, payable on the like articles, being the produce or manufacture of any other foreign country.[127]

This article, for example, guarantees that any importation into the United States or Denmark will be subject to the same (or lower) duties that a third-party country would be subject to. Some provisions provide for national treatment regarding taxes and duties. For example, the 1953 U.S.-Japan Treaty of Friendship states that "[p]roducts of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all

tury/fr1788-1.asp [https://perma.cc/9AMT-JW6S]; *see also Treaty of Alliance Between The United States and France; February 6, 1778*, AVALON PROJECT [hereinafter *Treaty of Alliance*], https://avalon.law.yale.edu/18th_century/fr1788-2.asp [https://perma.cc/768F-EWAA].

124. *Id.*

125. Eng.-U.S. Treaty, *supra* note 90, art. XXV.

126. Treaty of Friendship, Commerce, and Consular Rights, Hung.-U.S., art. VII, June 24, 1925, 44 Stat. 2441.

127. Bartram v. Robertson, 122 U.S. 116, 118 (1887).

matters affecting internal taxation, sale, distribution, storage and use."[128]

4. Individual Rights Provisions

Individual rights include many of the various provisions that exist in FCN treaties that protect or belong to individuals. Many cases involving individual rights have to do with the ability of a national of one contracting state residing in the other and his or her ability to sell, acquire, devise, or inherit property. The 1950 Irish-U.S. Friendship Treaty states that both parties must give "national treatment within [its] territories . . . with respect to acquiring all kinds of property by testate or intestate succession or through judicial process."[129] The U.S.-Japan Treaty goes farther—protecting not just testate or intestate succession, but also it mandates that "[n]ationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to disposing of property of all kinds."[130] Further, many FCN treaties provide fairness provisions in the laws and regulations that govern wrongful death or workers' compensation laws. For example, the 1950 U.S.-Irish FCN Treaty states:

> Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that (a) establish a right of recovery for injury or death, or that (b) 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.[131]

The right of exemption from the military is another common article regarding individual rights in FCN treaties. Many FCN treaties have a provision that state: "[n]ationals of either Party shall . . . be exempt from compulsory service in the armed forces of the other Party."[132] The issue that arises regarding this provision is how this right affects applications for citizenship of the other country (the one the foreign national elected to exercise his or her right of military exemption). Lastly, some provisions pertain to individual taxation of persons or the right to consular notification.

128. 1953 Japan-U.S. FCN, *supra* note 22, art. XVI, ¶ 1.

129. 1950 Ir.-U.S. FCN, *supra* note 42, art. VII, ¶ 1.

130. 1953 Japan-U.S. FCN, *supra* note 22, art. IX, ¶ 4.

131. 1950 Ir.-U.S. FCN, *supra* note 42, art. IV, ¶ 1.

132. *Id.* art. III, ¶ 1.

5. Employment, Corporations, and Business Provisions

Employment, corporation, and business provisions regulate employment practices or anything in the business sector. They were not present in early friendship treaties. Rather, they became more prominent in the 20th century, particularly after World War II. Dr. Kenneth Vandevelde states that post-World War II FCN treaties extended protections to corporate entities.[133] The priority of these new FCN treaties was investment.[134] Some FCN treaties held provisions that permitted foreign companies to give preference to its own nationals when hiring in the other contracting party's territory. For example, a U.S.-Danish FCN Treaty states:

> [N]ationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nations and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.[135]

This provision is prevalent in many FCN treaties post-World War II and was the subject of much litigation throughout the second half of the 20th century. Other employment provisions state:

> [C]ompanies of either Party shall in no case be subject within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object or to requirements with respect to the levy and collection thereof, more burdensome than those borne by . . . companies of any third country.[136]

Again, the conditions applied to all investments of the contracting state in the territory of another must be the same as the conditions of a third state's investments. Other business provisions include the protection of copyright or trademarks. For example, the U.S.-Korean FCN Treaty states: "[n]ationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial prop-

133. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L. L. & POL'Y 157, 164 (2005).

134. *Id.*

135. Linskey v. Heidelberg E., Inc., 470 F. Supp. 1181, 1185 (E.D.N.Y. 1979).

136. Treaty of Friendship, Commerce and Navigation, Neth.-U.S., art. XI, ¶ 3, March 27, 1956, 8 U.S.T. 2043 [hereinafter *1956 Neth.-U.S. FCN Treaty*].

erty of every kind."[137] Thus, the two states contracted to protect the other's trademarks and patents—promising both the same treatment as nationals of each party state and the same treatment as the nationals or companies of other third state's trademarks or patents.

6. Consular Rights Provisions

Although not frequent, many FCN treaties provide for protections and rights of the consuls of one contracting party in the territory of the other contracting party. Such provisions provide for the inviolability of consul premises[138] or that consular officers "enjoy . . . all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation."[139] Provisions state that consuls have the jurisdiction to intercede in any disputes that arise between captains and his crew on vessels belonging to the consul's state.[140] These types of provisions all relate to consul officers and their role in international affairs between the two contracting parties. Cases involving consular provisions of FCN treaties disappeared in the latter half of the 20th century after the Vienna Convention on Consular Relations was enacted in 1969. Many lawsuits have been brought in U.S. courts under this Convention, thus replacing the need for reliance on consular provisions in FCN treaties.[141]

7. Sovereign Immunity Provisions

Many provisions in FCN treaties provide for immunity of the contracting parties from suits by the other. This stems from the customary international law notion that a foreign state cannot be sued in the

137. Treaty of Friendship, Commerce and Navigation, Korea-U.S., art. X, ¶ 1, Nov. 28, 1956, 8 U.S.T. 2217 [hereinafter *1956 Korea-U.S. FCN Treaty*].

138. 1955 Iran-U.S. Treaty of Amity, *supra* note 5, art. XIII, ¶ 2.

139. Treaty of Friendship, Commerce and Consular Rights, Austria-U.S., art. XIII, June 19, 1928, 47 Stat. 1876 [hereinafter *1928 Austria-U.S. FCN Treaty*].

140. *See* 1925 Est.-U.S. FCN Treaty, *supra* note 95, art. XXIX ("A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district.").

141. *See* Medellin v. Texas, 552 U.S. 491, 521 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Breard v. Greene, 523 U.S. 371 (1998). For examples of consular provisions in pre-VCCR FCN treaties, *see* 1928 Austria-U.S. FCN Treaty, *supra* note 139; 1925 Est.-U.S. FCN Treaty, *supra* note 95; 1934 Fin.-U.S. FCN Treaty, *supra* note 106; and 1955 Iran-U.S. Treaty of Amity, *supra* note 5.

courts of another state—it has immunity.[142] For example, the 1955 U.S.-Iran Treaty of Amity states:

> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.[143]

The main analysis in a vast number of cases concerning this type of provision is whether the entity was acting as a commercial participant. Also, whether a state consented to be sued in the courts of the other contracting party (and thereby not have sovereign immunity) was questioned in many cases, as was the interaction between this treaty provision and the Foreign Sovereign Immunities Act.

8. Judicial Provisions

Judicial provisions concern access to courts—the access nationals and companies of one contracting state have in the courts of the other contracting party. For example, the U.S.-Finland FCN Treaty states that "[t]he nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law."[144] Similarly, some treaties state that the "[n]ationals and companies of either Party shall be accorded national treatment with respect to access to courts of justice and to administrative tribunals and agencies within territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights."[145]

The former treaty only permits "free access" to courts, while the latter (a U.S.-Netherlands FCN Treaty) permits national treatment access to courts. Thus, Dutch citizens in U.S. courts are afforded more protection and access to courts—the same as U.S. citizens—than Finnish citizens, who are only permitted "free access," but not necessarily access to courts that equates to a U.S. citizen's. Moreover, the 1956 U.S.-Korean FCN Treaty states "[n]ationals and companies of either

142. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 94, at ch. 5, introductory note.

143. 1955 Iran-U.S. Treaty of Amity, *supra* note 5, art. XI, ¶ 4; *see also* 1950 Ir.-U.S. FCN Treaty, *supra* note 42, art. XV, ¶ 3.

144. 1934 Fin.-U.S. FCN Treaty, *supra* note 106, art. I.

145. 1956 Neth.-U.S. FCN Treaty, *supra* note 136, art. V.

Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party."[146] As such, Korean plaintiffs have even more protection and access to U.S. courts, as they must be treated the same as any U.S. citizen (national treatment) and as any third-party state's citizen (most-favored nation treatment). Thus, the meaning of "access to courts" is raised frequently in U.S. courts.

Also, many treaties provide for the obligation of one state to recognize the valid judgements of the other contracting state. For instance, the 1956 U.S.-Korean FCN Treaty states:

> No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.[147]

Therefore, a U.S. court must enforce a South Korean judgement in its courts, and vice versa. Rules for contractual obligations to arbitrate claims in some FCN treaties also exist. The 1956 U.S.-Korean FCN states:

> Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party.[148]

As such, many FCN treaties provide for protection of arbitration clauses in contracts in order to promote freedom of contract.

V. Discriminatory State Statutes and FCN Treaties

Throughout American history, states have enacted discriminatory state statutes that favor U.S. citizens over foreign U.S. residents. In 1971, these statutes became subject to strict scrutiny.[149] However, prior to that, foreign plaintiffs have presented cases before U.S. courts claiming that these state statutes violated the FCN treaty the United States entered into with their native countries. The purpose of these

146. 1956 Korea-U.S. FCN Treaty, *supra* note 137, art. V, ¶ 1.
147. *Id.* art. V, ¶ 2.
148. *Id.*
149. *See infra* Section VI.

FCN treaties was, in spirit, to protect certain rights of foreigners while in the territory of the other contracting party. While not always prevailing in their claims, with these FCN treaties, foreigners were able to at least challenge these discriminatory state statutes, which ultimately helped to pave the way for the Supreme Court to rule that discrimination based on alienage was subject to strict scrutiny. This section outlines the main arguments presented to and decisions held by U.S. courts.

A. Many Courts Interpreted the FCN Treaty Based on its Plain Language to Determine if the Statute That Discriminated Against a Non-Citizen was Valid

Many FCN treaties mandated that citizens or subjects of both contracting states have the freedom to "carry on trade" just as the citizens and subjects of the other contracting state when in that other contracting state. Many state statutes prohibited non-citizens from engaging in certain types of occupations or professions. Thus, many U.S. courts faced the question of whether an occupation qualified as a "trade."

For example, under California's Pharmacy Act, non-citizens cannot register to take the examination for a pharmaceutical license.[150] The California State Board of Pharmacy denied plaintiffs the opportunity to take the examination for Licentiate in Pharmacy.[151] Plaintiffs alleged that this Act violated the Treaty of Commerce and Navigation between the United States and the nation to which the plaintiffs belonged.[152] The Treaty stated the following:

> The citizens or subjects of each of the High Contracting Parties shall have liberty . . . to carry on trade, wholesale and retail, to own . . . shops . . . and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.[153]

The issue was whether being a pharmacist was a trade under the treaty or a profession. If it was the former, then the Treaty was violated; if it was the latter, the Treaty would not be violated.[154] The Court rationalized that being a pharmacist is a profession and not a trade, as a profession is one that "professes knowledge" rather than

150. Sashihara v. State Bd. of Pharmacy, 46 P.2d 804, 805 (Cal. Dist. Ct. App. 1935).
151. *Id.*
152. Note: The case never mentions the nation to which the plaintiffs belong. *See generally id.*
153. *Sashihara*, 46 P.2d at 805.
154. *Id.*

"selling" or "engag[ing] in, for procuring subsistence, or for profit."[155] Thus, the statute did not violate the Treaty.[156]

A similar case was presented to the Supreme Court of the United States eleven years prior to this California state case. There, plaintiff was a citizen of Japan and lived in Seattle, Washington since 1904.[157] He worked as a pawnbroker for six years until the city of Seattle passed an ordinance in 1921 regulating the business of pawnbrokers.[158] The new ordinance made it unlawful for any person to engage in the business of a pawnbroker without a license, and the ordinance stated no license was to be granted unless the person was a citizen of the United States.[159] Plaintiff argued this ordinance violated a 1911 FCN Treaty between the United States and Japan.[160] The provision in the Treaty stated:

> The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . . The citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security for their persons and property.[161]

The Supreme Court noted treaties were "the supreme law of the land."[162] The purpose of the 1911 FCN Treaty with Japan was to "strengthen friendly relations between the two nations" and the provision in question "establishe[d] the rule of equality between Japanese subjects while in this country and native citizens."[163] This "equality" is subject to supremacy and "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."[164]

155. *Id.*
156. *Id.* at 805.
157. Asakura v. Seattle, 265 U.S. 332, 339 (1924).
158. *Id.*
159. *Id.* at 33940.
160. *Id.* at 340.
161. *Id.*
162. *Id.* at 341.
163. *Id.*
164. *Id.*

The Seattle ordinance made it impossible for foreigners to carry out their business.[165] The grievance in this case is due to the treaty violation, as the plaintiff was "denied equal opportunity."[166] The Court concluded that under the least restrictive definition, a pawnbroker did qualify as a "trade" as stated in the 1911 Treaty provision.[167] Thus, the ordinance violated the 1911 FCN Treaty with Japan.[168]

In 1920, Washington's State Constitution prohibited a non-citizen from purchasing property.[169] The Supreme Court of Washington held that the treaty between the United States and Switzerland was the "supreme law of the land" and if any state law conflicted with the 1850 Treaty, the state laws must give way to the treaty.[170] The Court held that there was no conflict between 1850 Treaty and the Washington Constitution.[171] There was no intention that the 1850 Treaty "should avoid or conflict with any law of either country."[172] In the state of Washington, foreigners could not hold real estate by purchase, only by inheritance, mortgage or in collection of debts.[173] Holding real estate by purchase was not protected by the Treaty, but the other methods of possession were. Because the Treaty "did not intend to, and does not by words, supersede or modify any law of this or any other state in regard to real estate" the 1850 Treaty did "not nullify" the Washington Constitution in regard to the prohibition of a foreigner to hold real estate via purchase.[174]

In *Kolovrat v. Oregon,*[175] decedents died in Oregon in 1953 without having any wills to dispose of the personal property that they owned in the state of Oregon.[176] Their heirs were residents and nationals of Yugoslavia, who, if not non-resident foreigners, could have inherited the property.[177] However, an Oregon statute limits the rights of non-resident foreigners to "take" both real and personal

165. *Id.* at 341–42
166. *Id.* at 342.
167. *Id.* at 342–43.
168. *Id.* at 343.
169. State *ex rel.* Tanner v. Staeheli, 192 P. 991 (Wash. 1920).
170. *Id.* at 350.
171. *Id.*
172. *Id.*
173. *Id.* at 350–51.
174. *Id.* at 351.
175. Kolovrat v. Oregon, 366 U.S. 187 (1961).
176. *Id.* at 188.
177. *Id.*

property or its proceeds via "cession or testamentary disposition."[178] The statute also states that when no next of kin exist, it must be saved for ineligible non-resident foreigners, and if the deceased person did not have a will, the property then is escheated by the state.[179]

The Supreme Court noted that state policies regarding the rights of non-resident persons to inherit "must give way under [the] Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."[180] The Supreme Court held that the 1881 Treaty between the United States and Serbia[181] entitled plaintiffs to inherit the personal property in Oregon in the same manner as American next of kin.[182] The 1881 Treaty stated that:

> In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.[183]

The Oregon Supreme Court held that this Treaty means that only a U.S. citizen who were in Serbia could acquire or inherit property and only a Serbian citizen in the United States could acquire or inherit property.[184] Thus, under the State Supreme Court's interpretation, the Yugoslavian heirs could not inherit the property of the decedents because they did not reside in the United States.[185] However, the Supreme Court's alternative interpretation is that "in Serbia" all U.S. citizens "enjoy inheritance rights" and "in the United States" all Serbian citizens "enjoy inheritance rights."[186] The Court rejected Oregon Supreme Court's restrictive interpretation.

The 1881 Treaty's purpose was "to bring about 'reciprocally full and entire liberty of commerce and navigation.'"[187] The 1881 Treaty in Article II also has a "most favored nation" clause stating that "each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will

178. *Id.*

179. *Id.* at 189.

180. *Id.* at 190.

181. At this time, Serbia was part of Yugoslavia and thus the Treaty applied to Yugoslavia. *Id.*

182. *Id.* at 191.

183. Treaty of Commercial Relations, Serb.-U.S., art. II, Oct. 14, 1881, 22 Stat. 963.

184. *Kolovrat*, 366 U.S. at 192.

185. *Id.*

186. *Id.*

187. *Id.* at 193.

make."[188] An Argentinian FCN made with the United States provides that the citizens of both contracting parties should enjoy the same privileges, liberties, and rights as citizens native to the other contracting state.[189] The Supreme Court stated that to deny the heirs the rights in the 1881 Treaty:

> [W]ould fall far short of what individuals would hope or desire for their complete fulfillment if one . . . could be denied the gratification of leaving his property to those he loved the most, simply because his loved ones were living in another country where he and they were born.[190]

Thus, treaty interpretation was one tool courts used to analyze FCN treaty provisions to determine if foreigners were protected against discriminatory state statutes.

B. Many Courts Looked to the Intent of the Contracting States in Order to Determine the Meaning of Certain FCN Provisions

FCN treaties are made between the United States and another contracting nation-partner. Courts look to the intent and understandings of these two governments in order to interpret the FCN treaty provisions. In *Maiorano v. Baltimore & O. R. Co.*,[191] Plaintiff's husband was killed while he was on a passenger train due to the Defendant's negligence.[192] The Plaintiff was an Italian citizen and resident.[193] Under Pennsylvania law, the right to recover based on negligence was conferred to the husband, wife, or parents of the wrongfully deceased.[194] The Supreme Court of Pennsylvania, in another case, held that this statute did not give non-resident relatives the right to recover. Plaintiff, however, based her right to recovery on an 1871 FCN Treaty between the Kingdom of Italy and the United States.[195] She alleged that the Treaty bestowed on her the same rights that she would have had if she had been a resident and citizen of Pennsylvania.[196] The case went to the United States Supreme Court.[197]

188. *Id.*
189. *Id.*
190. *Id.* at 194.
191. Maiorano v. Balt. & Ohio R.R. Co., 213 U.S. 268 (1909).
192. *Id.* at 271.
193. *Id.* at 272.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

The Supreme Court stated it needed to interpret the 1871 FCN Treaty with Italy.[198] The articles Plaintiff relied on stated that "citizens of each of the high contracting parties shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges" as natives.[199] Further, Article 23 states that the citizens of both contracting states had "free access to the courts of justice" of the other.[200] The Supreme Court stated that Plaintiff's claim is that Plaintiff's right of action for her husband's death was being denied to her.[201] The Court recognized that the purpose of the legislative statute was for people to be careful and further reasons that a possible legislative purpose is to secure compensation for those who lost relatives.[202] However, the Court concluded that this "protection and security" that could have been contemplated by the state legislature was "so indirect and remote that the contracting powers [the United States and Italy] [could not] be thought to have had them in contemplation."[203] As such, the Supreme Court ruled that the 1871 FCN treaty with Italy did not allow for plaintiff's recovery.[204]

In *Kolovrat*, the Supreme Court looked at diplomatic notes exchanged between the United States and Yugoslavia. The 1881 Treaty had always been construed as allowing for inheritance by both U.S. and Yugoslavian nationals regardless of the location of the property to be passed or the domiciles of the nationals.[205] The purpose of the series of FCN treaties like the 1881 Treaty was "to put the citizens of the United States and citizens of other treaty countries on a par with regard to trading, commerce and property rights."[206] Thus, the Supreme Court held that the 1881 Treaty protected the Yugoslavian heir-claimants' rights to inherit the property of the decedents as if they were American citizens.[207]

198. *Id.*
199. *Id.* at 273.
200. *Id.*
201. *Id.* at 272.
202. *Id.* at 274.
203. *Id.* at 275.
204. *Id.*
205. Kolovrat v. Oregon, 366 U.S. 187, 194–95 (1961).
206. *Id.* at 195.
207. *Id.* at 196.

C. Discriminatory State Statutes Were Often Struck Down if They Intruded on U.S. Federal Foreign Policy

A decedent who resided in Oregon died intestate in 1962.[208] Appellants were the heirs of the decedent and resided in East Germany.[209] Appellees petitioned for escheat of the net proceeds of the estate pursuant to an Oregon statute, which provided for escheat in cases where a non-resident foreigner claims real or personal property unless three requirements are met: (1) a reciprocal right for the U.S. citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of U.S. citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."[210]

The Supreme Court held while states have "traditionally regulated the decedent and distribution of estates," "those regulations must give way if they impair the effective exercise of the Nation's foreign policy."[211] The Oregon statute concerned "confiscation," which was opposed to the 5th Amendment's clause for just compensation.[212] Further, "this led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied "the right to receive."'"[213] Thus, the statute is invalid because the foreign policy of the U.S. government was affected.[214]

In *Kolovrat*, the Supreme Court looked to the Oregon statute that forbade inheritance of Oregon property by a non-resident foreigner unless an enforceable right for an American to receive payment in the U.S. of the proceeds of an inheritance of property in that foreign country.[215] The Oregon Supreme Court held no such right existed.[216] The United States and claimants urged that the Oregon state policy must give way to the 1881 Treaty.[217] The Supreme Court ruled be-

208. Zschernig v. Miller, 389 U.S. 429, 430 (1968).
209. *Id.*
210. *Id.* at 430–31.
211. *Id.* at 440.
212. *Id.* at 435.
213. *Id.*
214. *Id.* at 441.
215. Kolovrat v. Oregon, 366 U.S. 187, 196 (1961).
216. *Id.*
217. *Id.* at 197.

cause the government agencies have set the foreign policy of the country, Oregon could not refuse to give the Yugoslavian claimants their treaty rights because Oregon was afraid that the valid international agreements would not work completely.[218] Therefore, the foreign policy and the 1881 Treaty precluded Oregon from concluding the Oregon claimants were not entitled to their 1881 Treaty rights.[219]

D. Many Courts Upheld Discriminatory State Statutes as a Valid Exercise of State Policy Power

States are given broad authority to exercise its state police power. Discriminatory statutes were upheld based on this power even though FCN treaties were violated. In *Sashihara*, while the court recognized excluding non-citizens was "palpably arbitrary," the objective was to protect "the public health, safety and general welfare" and the means to do so were reasonably related to the object and means adopted.[220] Thus, the act was not an abuse of the state's police power.[221] Likewise, the Supreme Court of Washington held that the city had a right to restrict public employment to U.S. citizens only and a prohibition of foreigners from engaging in public work did not violate an FCN Treaty with Japan.[222]

In a similar Supreme Court case, a defendant appealed his conviction for possessing a shotgun in violation of a Pennsylvania law that prohibited an unnaturalized foreign-born resident from owning or possessing a shotgun.[223] The defendant claimed the 1871 FCN Treaty between the United States and Italy allowed for citizens of Italy "the right to carry on trade" while in the United States, and that Italians in the U.S. (and U.S. citizens in Italy) should be granted the "'same rights and privileges as are or shall be granted to the natives.'"[224] The Supreme Court held that the act did not apply to trade.[225] Further, the 1871 Treaty only assured "equality only in respect of protection and security for persons and property."[226] Additionally, "prohibition

218. *Id.* at 198.
219. *Id.*
220. Sashihara v. State Bd. of Pharmacy, 46 P.2d 804, 805 (Cal. Dist. Ct. App. 1935).
221. *Id.* at 806.
222. Cornelius v. Seattle, 213 P. 17, 20 (Wash. 1923), *overruled by* Herriott v. City of Seattle, 500 P.2d 101 (Wash. 1972) (where the Supreme Court of Washington applied strict scrutiny to a discriminatory state statute based on alienage).
223. Patsone v. Pennsylvania, 232 U.S. 138, 143 (1914).
224. *Id.* at 145.
225. *Id.*
226. *Id.*

of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishe[d] no inequality in either respect."[227] The State was free to preserve the act of shooting wild game for its citizens alone if it wanted to and there was "nothing in the treaty that purports or attempts to cut off the exercise of [the state's] powers over the matter."[228]

E. Courts Refused to Give Foreigners Greater Rights Than U.S. Citizens

Decedent was a citizen of Norway who immigrated to the United States in 1868 and settled in Nebraska in 1878.[229] He made his homestead in Hamilton County, Nebraska and lived there until he died intestate in 1923.[230] Decedent executed deeds for the homestead to his nieces and their husbands and conveyed the property to the Union State Bank.[231] Decedent's son sued to cancel the conveyances of the land, claiming they were fraudulent.[232] The widow of the decedent sued stating she had the right to the real estate due to a treaty of amity and commerce between the United States and Norway.[233] The question before the Supreme Court was the meaning of Article 6 of the FCN Treaty. The Treaty stated:

> The subjects of the contracting parties in the respective States, may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even ab intestato, either in person or by their attorney, without having occasion to take out letters of naturalization.[234]

The Supreme Court reviewed the understanding of the Swedish Minister, who stated the words "goods and effects" included real estate.[235] The Supreme Court decided that that interpretation was correct and the treaty should "receive a liberal interpretation to give effect to their apparent purpose."[236] Next, the question was whether the treaty trumped the state law regarding the disposition of the

227. *Id.*
228. *Id.* at 146.
229. Todok v. Union State Bank of Harvard, Neb., 281 U.S. 449, 450 (1930).
230. *Id.*
231. *Id.* at 451.
232. *Id.* at 451–52.
233. *Id.* at 451.
234. *Id.* at 453.
235. *Id.* at 454.
236. *Id.*

homestead property.[237] If it did, according to the Court, it would put a non-citizen owner of a homestead in Nebraska "on a better footing than that of a citizen of the State."[238] The Supreme Court noted that the conclusion seemed "repugnant to the purpose of the treaty."[239] This purpose was "to avoid injurious discrimination in either country against the citizens of the other."[240] The treaty was not supposed to secure a non-citizen's right to dispose of property in any manner he would like, regardless of the domestic law applicable to both non-citizens and citizens.[241] Further, this right to dispose of property under the treaty cannot "be deemed to give a wholly unrestricted right to the non-citizen to acquire property, without regard to reasonable requirements relating to particular kinds of property and imposed upon both non-citizens and citizens without discrimination."[242]

Nebraska's establishment of the homestead policy was reasonable and not inconsistent with the treaty.[243] The homestead property was exempt from judgment liens and executions or forced sales under Nebraska law, and the acquisition of the homestead with "these incidents depends upon the bona fide intention to make it a home."[244] Because of these "special privileges," "the homestead cannot be conveyed or encumbered unless the instrument is executed and acknowledged by both husband and wife."[245]

In this case, the decedent "sought the advantages of the provisions of the local [Nebraska] law as to homesteads" and as such, "he could not properly obtain the benefits of these provisions without accepting the property with the quality which the law attached to it."[246] Therefore, the Supreme Court concluded that the Treaty with Norway did not give decedent the right to establish the homestead in Nebraska and "hold it free from the restrictions which governed it as a homestead, restrictions which operated upon every citizen of Nebraska who owned a homestead."[247] Thus, the Supreme Court held

237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 455.
241. *Id.*
242. *Id.*
243. *Id.* at 456.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*

the Treaty with Norway did not trump a state statute to allow for a foreigner to obtain better rights than a citizen of Nebraska.[248]

Similarly, the Washington Supreme Court held the Treaty of Amity and Commerce between the United States and Norway-Sweden "was intended to secure, and does secure, to the citizens of Sweden and Norway the right to succeed to property left them by will or inheritance, upon the same terms as such rights of our own citizens may be defined by law."[249] Therefore, foreigners cannot be subject to a greater tax than the tax imposed on U.S. citizens and the state law had to, therefore, be held in abeyance and yield to the provisions of the treaty.[250]

VI. *Graham v. Richardson*: The Supreme Court Decided That Discrimination Based on Alienage was Subject to Strict Scrutiny

In 1971, the Supreme Court ruled statutes that discriminate based on alienage are subject to strict scrutiny.[251] The facts of the case arose from welfare cases.[252] The issue was whether the U.S. Constitution's Equal Protection Clause was violated if a state conditioned welfare benefits on the beneficiaries' possession of U.S. citizenship or if the non-citizen beneficiary needed to reside in the U.S. for a specific number of years.[253] In both consolidated cases, the state statutes required, in order to obtain welfare benefits, the tentative beneficiary be a U.S. citizen or have had resided in the United States for a specific number of years, and the tentative beneficiaries were denied because of their alienage or because they did not meet the residency requirement.[254] The Appellants sued, arguing the state statutes violated the Equal Protection Clause of the U.S. Constitution by favoring U.S. citizens over non-citizens in the distribution of the welfare benefits.[255]

The Supreme Court reaffirmed the word "person" in the language of the 14th Amendment[256] included both U.S. citizens and non-citizens.[257] Under general Equal Protection law, states "retain [ ]

248. *Id.* at 456.
249. *In re* Estate of Stixrud, 109 P. 343, 352–53 (Wash. 1910).
250. *Id.* at 355.
251. Graham v. Richardson, 403 U.S. 365, 375–76 (1971).
252. *Id.* at 366.
253. *Id.*
254. *Id.* at 366–70.
255. *Id.* at 370.
256. U.S. CONST. amend. XIV, § 1.
257. *Graham*, 403 U.S. at 371 (citing Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

broad discretion to classify as long as its classification has a reasonable basis."[258] However, the Court stated alienage was a class that was "a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[259] It was understood that previous decisions recognized a state's right to treat one's own citizens more favorably than noncitizens.[260] However, a "state's desire to preserve limited welfare benefits for its own citizens is inadequate to justify" the state statutes in this case.[261] Further, the Supreme Court recognized while a state "has a valid interest in preserving the fiscal integrity of its programs," it cannot "accomplish such a purpose by invidious distinctions between classes of citizens."[262]

The Supreme Court held the classifications in the consolidated cases before it were "inherently suspect and [were] therefore subject to strict judicial scrutiny."[263] Looking at the statutes in question, the Court held "a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."[264] Further, Congress has stated, as federal policy, a lawfully admitted non-citizen resident who later obtains public benefits is not subject to deportation.[265] Therefore, these state statutes "encroach[ed] upon exclusive federal power" and were thus "constitutionally impermissible."[266]

After an extensive search and analysis into cases that involved FCN treaties, the claims involving alleged violations of FCN treaty provisions declined sharply and drastically after 1971 because foreigners no longer had to rely on FCN treaties to challenge these discriminatory state statutes as U.S. constitutional law now subjected these discriminatory statutes to strict scrutiny.[267]

Conclusion

In conclusion, while FCN provisions are no longer relied on to challenge discrimination of foreigners, during early and mid-twenti-

258. *Id.*
259. *Id.* at 372.
260. *Id.* at 372–73.
261. *Id.* at 374.
262. *Id.* 374–75.
263. *Id.* at 376.
264. *Id.*
265. *Id.* at 378.
266. *Id.* at 380.
267. Coyle, *supra* note 2, at 325.

eth century, these treaties were an important instrument to protect foreigners' rights and to protect U.S. foreign policy from being undermined by discriminatory state policies. Even though foreigners did not prevail in every case, these FCN treaties provided them a vehicle to have their cases heard before U.S. courts. Thus, FCN treaties were an important protection against discrimination of foreigners before the Supreme Court declared alienage subject to strict scrutiny.