Doing Business and U. S. Commercial Treaties: The Case with the Member States of the EEC

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At the present time, the United States has treaties of the Friendship, Commerce and Navigation type with all six of the Member States of the European Economic Community.¹ In addition, there are in existence F.C.N. treaties with two of the three acceding members to the European Community,² and a commercial treaty of limited scope has been in effect with the United Kingdom since 1815.³

The objective of this study will be to examine the functional and legal status of these F.C.N. type treaties with the members of the European Economic Community. Accordingly, the discussion will first center on


the historical use of bilateral commercial treaties in American economic and foreign policy. Further analysis will consider the post-war significance of these treaties with the nations of Western Europe, and the effect the creation of the European Economic Community has and will have on the status of these F.C.N. treaties. The study will conclude with a discussion of the alternatives for a rational approach to the various problems raised by the EEC law and practice.

I. HISTORICAL SETTING

The importance of commercial treaties to the United States first arose in 1776 at the Continental Congress, where a committee was appointed by the delegates to draft outlines to be used in the negotiation of commercial treaties. Geared to the specific goals of American foreign policy, the express objectives of the committee included not only the encouragement of trade relations and the protection of American interests abroad, but also "political and economic support for independence." The coupling of political and economic goals, evidenced in the treaties negotiated in the pre-Constitutional period, can also be seen in the early nineteenth century port-opening activities of the American clipper ship and as a basic premise of the Monroe Doctrine. Thus from the very beginnings of American practice, the bilateral commercial treaty must be viewed as a viable

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4 Convention to Regulate Commerce with the United Kingdom, signed July 3, 1815, 8 Stat. 228; T.S. 110, I Malloy 624 (effective July 3, 1815) [hereinafter cited as British Treaty].

4 As noted by G. Schwarzenberger, The Principles and Standards of International Economic Law, 117 R.C.A.D.I. 1, 19 (1966): The origins of the usage of commercial treaties "goes back to the very dawn of international law." For further consideration of the origins of the commercial treaty see B. Nolde, Droit et technique des Traitée des Commerce, 3 R.C.A.D.I. 291 (1924). With regard to the question of commercial treaties raised at the Continental Congress of 1776, a committee composed of such men as Benjamin Franklin and John Adams was appointed to draft an outline to be followed in the future negotiation of commercial treaties. See specifically JOURNALS OF THE CONTINENTAL CONGRESS, vol. V, 768-78 (Ford et al., ed., 1906).

5 See Treaty of Peace and Commerce with the Netherlands, Oct. 8, 1782, II Malloy 1233 (effective Jan. 22, 1783); and Treaty of Amity and Commerce with Sweden, April 3, 1783, II Malloy 1725 (effective Sept. 25, 1783).

6 V. Setser, Treaties to Aid American Business Abroad, 40 FOREIGN COMMERCE WEEKLY No. 11, 3 (Sept. 11, 1950). An example of this early connection between the use of commercial treaties in pursuit of American foreign policy aims is clearly visible in the package arrangement with France in 1778 for the conclusion, on the very same day in fact, of both the Treaty of Amity and Commerce and the Treaty of Alliance with France. As commented by J. Pratt, A HISTORY OF UNITED STATES FOREIGN POLICY 20 (2nd ed., 1965): "On December 17 (1777), the American commissioners were informed that France would grant recognition and make a treaty with the United States, and on February 6, 1778 a treaty of amity and commerce and a treaty of alliance were signed at Paris, the latter to take effect if Great Britain went to war with France because of the former."
and essential vehicle for pursuing the various aims of American foreign policy.\(^7\)

From the aspects of facilitating commerce between the signatories and of establishing certain standards for the treatment of American citizens and merchants, the bilateral commercial treaty is intended to be a "long-term instrument that embodies basic principles of law holding good over the long-term."\(^8\) Historically, however, these principles of law were not geared to benefit corporations, even though this type of juristic person was known and existing in the early days of American diplomatic history.\(^9\) Corporations were excluded from the protective umbrella of the commercial treaty primarily because such business associations were initially looked upon as a very suspect creature which should be dealt with in a highly restricted fashion,\(^10\) and because the corporation during the nineteenth century simply did not fit into the mobile image of the commercial treaty in the promotion of trade and the protection of the vehicles of trade (goods, ships and merchants).

In perspective, the bilateral commercial treaty in early American practice was a multipurpose instrument designed to foster certain objectives of American foreign policy, to create a broad basis for mutual understanding and contact between the signatories, and to

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\(^7\) H. Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 58-9 (1958), where the author states:

> Depending on the era in which the treaties were negotiated, they have as well been responsive to varying special motivations. In pre-Constitutional days, for example, they betokened and helped secure recognition of American independence. In the first half of the nineteenth century, the period in which the American clipper became mistress of the seas, they were employed to open foreign ports to American shipping. The conclusion of the treaties with countries of Latin America in this period, through emphasizing the sovereignty and rising importance of those countries and their ties with the United States, served to emphasize the Monroe doctrine; and in the era of intense power competition for colonies and spheres of influence, they served to support the open door principle.


\(^10\) See E. Mason, *The Corporation in Modern Society* x. (1970): "As a legal institution, the corporation has its roots in medieval history. It was used by Angevin, Tudor and Stewart kings in England partly as a means of getting things done, partly as an extended arm of royal power. Speculation, dishonesty, and financial excesses caused the South Sea Bubble crash in 1720, and so discredited the corporation as an institution that for nearly a hundred years thereafter it was virtually outlawed in the English-speaking world. Grudgingly, its use was resumed in the nineteenth century, both in Britain and in the nascent United States, though under severe limitations." For a vivid historical analysis of the early role of the corporation in American society see Justice Brandeis' dissenting opinion in *Liggett Co. v. Lee*, 288 U.S. 517, 548-568 (1933).
establish certain standards for the treatment of American citizens abroad. The commercial treaty was initially both an instrument of American foreign policy and a long-term international agreement which attempted to explicate various legal standards for the treatment of American goods, shipping and citizens.\textsuperscript{11}

In the years following the United States' involvement in the first World War, perhaps the most significant development in American commercial treaty practice was the adoption of the principle of unconditional most favored nation treatment.\textsuperscript{12} Prior to the drafting of the Treaty of Friendship, Commerce and Consular Rights with Germany in 1923,\textsuperscript{13} the United States had utilized the conditional version of the most favored nation clause, while its European counterparts had taken to the unconditional version.\textsuperscript{14} In the year of the German Accord, Secretary of State Hughes proposed the inclusion of a most favored nation clause in the negotiation of new commercial treaties, under the terms of which "the United States [would] guarantee and expect to be guaranteed unconditional equality of treatment."\textsuperscript{15} Considered by Secretary Hughes to be in the interest of the United States in competing with the trade of other

\textsuperscript{11} For further consideration of the nature of commercial treaties see R. Wilson, Commercial Treaties: Their Use in International Law Teaching, in Legal Practice, and in Legal Research, in INTERNATIONAL LAW AND THE UNITED NATIONS 22 (8th Summer Institute, Univ. of Michigan, 1955).

\textsuperscript{12} The unconditional m/f/n clause, as defined in modern U.S. commercial treaties is that 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 any third country [See, e.g., 1954 German Treaty, Article XXV (4) supra note 1]. For a comparative study of the m/f/n clause see generally, International Law Commission, The Most-Favoured-Nation Clause, First Report by Mr. Endre Ustor, Special Rapporteur, U.N.G.A. Doc. A/CN.4/213, at 39 (1969) [hereinafter cited as Ustor Report].


\textsuperscript{14} As commented by C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES vol. 2, 74-76 (1922): "The attitude of the United States has been at variance with that of the principal commercial States of Europe, which changed 'first from the unconditional to the conditional, and then back to the uniform use of the unconditional' construction... (T)he practice of making reciprocity treaty requires the conditional construction of the most-favored-nation clause, and that construction must be expected to occasion, as it has heretofore, frequent controversies..." In effect, before 1923, American commercial practice of granting only conditional m/f/n treatment meant that conditions would only be extended upon the reciprocal return of the same compensation or its equivalent [See, e.g., comments by L. OPFENHEIM, INTERNATIONAL LAW vol. 1, 773 (5th ed., 1937)]. For an example of a conditional m/f/n clause see Treaty of Friendship, Commerce and Navigation with Peru, Sept. 6, 1870, II Malloy 1414, Article III.

\textsuperscript{15} As quoted in G. HACKWORTH, V DIGEST OF INTERNATIONAL LAW at 272 (1943).
countries in the markets of the world, except in provisions dealing with consular rights and functions, the use of the unconditional most favored nation standard has proved to be the backbone of the United States commercial treaty policy.

The same reasons which dictated a change in American policy with regard to the standard of treatment used in bilateral commercial treaties also called for a substantial alteration of United States policy with regard to tariffs. Upon entering office, President

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16 The reasons for the shift in American Commercial policy were perhaps more varied than Secretary Hughes suggested. See W. Kelly, Studies in United States Commercial Policy 3, 44-48 (1963). Kelly has rooted out a series of reasons for this shift in American commercial policy: first, the use by the United States in the 1890's and after of the conditional m/f/n standard began to cause visible hostility with certain of her allies; second, as a result of this hostility, the United States experienced difficulty in renewing or revising old commercial treaties, and in negotiating new ones on the conditional basis, which in many cases left American exports without the protection of any treaty standard against discrimination; third, at the turn of the century the United States found itself more and more an exporter of manufactured goods which were highly competitive with like European goods, and this factor took away one of the characteristics that had shielded previous American exports (during the 19th century these exports had been mostly primary products) from trade discrimination; and fourth, the changed international financial position of the United States at the end of World War I from a debtor to a creditor nation made American exports more in need of a uniform and unconditional standard of protection.

17 As noted by M. Whiteman, 14 Digest of International Law 752-3 (1970), the shift from the conditional to the unconditional m/f/n clause did not occur with respect to those treaty provisions dealing with consular rights. This is still the case today. However, in the post World War II U.S. commercial treaties series, the trend has been to renegotiate the consular provisions in separate non-commercial treaties.

18 Note, however, the increasing emphasis in postwar treaties on the national treatment standard. See infra, at p. 13.

19 As emphasized by Secretary of State Hull, in arguing for acceptance of a new American trade policy in the 1930's:

(S)hortly after the World War, ignoring the economic transformation that had taken place, we began to erect barriers to our foreign trade not consistent with our newly achieved creditor position nor our efficiency in production. Within the short space of a decade we had raised our tariff rates on three successive occasions, thereby preparing the destruction of our vast foreign trade, upon which a large share of our prosperity rested. This inference, opportunist in spirit, uncoordinated with our other policies, and contrary to our long-term interests, represented a definite break with the ideal of economic liberalism which had made possible this great commercial expansion. . . . Just at the time when the disturbed international relations of the post-war period called for the broadest possible development of world trade as a means of minimizing shocks and creating a new international balance, we adopted an unduly high protectionist policy which played its part in the subsequent world-wide collapse and contributed in so important a measure to the breakdown in international commercial and financial relations. The Foreign Commercial Policy of the United States, [1933-34] U.S. Dept. Of State Commercial Policy Series No. 9, at 3-4.

20 Hull's attitude toward a liberal foreign trade policy can be seen in 1 The Memoirs of Cordell Hull 81 (1948): "The year 1916 is a milestone in my political thinking . . . . I embraced the philosophy I carried throughout my twelve years as Secre-
Franklin Roosevelt was urged by his Secretary of State Cordell Hull to press for an end to the previous decade of high "flexible," non-negotiable tariffs as manifested by the Tariff Acts of 1922 and 1930. 21 Roosevelt's insistence that the mutual reduction of trade barriers was an essential means for bringing America out of the Great Depression culminated in the passage of the Trade Agreement Act of 1934. 22 The 1934 Act authorized the President to enter into trade agreements for a period of three years and to lower tariffs without specific congressional approval to fifty percent of their 1934 level, although he could not move goods from the dutiable to free list. 23

What is important for present purposes however, is that the Trade Agreement Act of 1934 which authorized the reciprocal trade agreement, introduced a new approach for dealing with the facilitation of foreign trade. 24 Unlike the bilateral commercial treaty which set forth broad standards of treatment for trading partners, the reciprocal trade agreement dealt primarily with schedules of tariff reductions on the unconditional most favored nation basis and binding of rates on special articles. 25 With the 1934 Act the bilateral of State, into the Trade Agreements, into numerous speeches and statements addressed to this country and to the world. From then on, to me, unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war."

21 Concerning the protectionism of the twenties, F. Taussig has commented: "All this constitutes what may be called, to repeat, the club policy. We make no offer. We fix our own duties quite as we please, and quite unalterably. With each successive tariff act, we shove them higher and higher. We make them applicable to all countries without mitigation. And then we insist that all countries shall in turn treat us just as well as they treat any third country. If any one of them grants a favor or reduction to another, this must automatically inure to us also. If not, the President has the club in his hands. He may impose heavy additional duties on their products, may even exclude them entirely." 11 FOREIGN AFFAIRS 397, 398 (1933).


24 For analysis of the Act see Hawkins and Norwood, The Legislative Basis of United States Commercial Policy, in STUDIES IN UNITED STATES COMMERCIAL POLICY 69 (1963), who note at 69: "It thereby gave a new direction to United States commercial policy, which had considered the tariff as virtually 'untouchable' and not subject to negotiation with foreign countries."

25 On the distinction between the reciprocal trade agreement and the commercial treaty, R. Wilson has commented: "Both instruments, the commercial treaty and the trade agreement, look to multilateral trade. The basic difference, of course, aside from procedure (the trade agreements being executive instruments which are authorized by Congress in advance of their making, while each commercial treaty must go to the Senate for approval after its negotiation), is that the treaties set forth principles and standards of treatment, whereas the trade agreement, though it may embody some statement of principle (as on state trading and most-favored-nation treatment), chiefly com-
eral commercial treaty would no longer be the principle instrument of American commercial policy for the promotion of foreign trade.\(^{26}\)

A final element worthy of note, evident in the postwar commercial treaties, was the specific treaty recognition of the status of companies. In the Treaty of 1911 with Japan, the description of persons entitled to commercial treaty rights spoke only of "'citizens,' 'subjects,' 'inhabitants,' or 'nationals.'"\(^{27}\) As to companies, the 1911 treaty simply permitted access to local courts, while specifying that this limited treaty recognition did not grant to companies the same benefits extended to treaty nationals in regard to engaging in business activities.\(^{28}\) With the negotiation of the 1923 commercial treaty with Germany, this limited recognition of treaty companies was enlarged to embrace non-profit legal persons, but as in the treaty with Japan, the benefits extended to companies were restricted to access to courts.\(^{29}\) In addition the German treaty contained a more stringent test for such recognition, requiring a company not only to be "duly organized under the laws" of one of the Contracting Parties, but also to maintain a "central office" in the state of incorporation and to pursue no aims within the territory of the host state which would be contrary to the laws of that state.\(^{30}\) This "host na-


\[^{27}\] H. Walker, Jr., Provisions on Companies in United States Commercial Treaties, supra note 9, at 375.

\[^{28}\] See Treaty of Commerce and Navigation with Japan, Feb. 21, 1911, 37 Stat. 1504, T.S. 558 (effective April 4, 1911). Article VII of this treaty reads as follows:

"Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry on the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof."


\[^{30}\] See Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, supra note 13. Article XII of this treaty reads as follows:
tion” approach espoused by the 1923 German treaty set the pattern for the treatment of companies in the major friendship, commerce and navigation treaties concluded in the years preceding World War II.\textsuperscript{31}

\section*{II. NEW NEEDS IN U.S. POSTWAR COMMERCIAL POLICY}

While the introduction of the reciprocal trade agreement program delimited one of the traditional functions of the bilateral commercial treaty in American practice, a new function was to develop. As noted by Herman Walker Jr., the factor lending special impetus to the postwar Treaty program:

was the need for encouraging and protecting foreign investment, responsively to the increasing interests of American business abroad and to the position the United States has now reached as principal reservoir of investment capital in a world which has become acutely 'economic-development' conscious. The pre-existing content of the commercial treaty (now often known as 'FCN treaty') was therefore overhauled with a view to improving and strengthening its relevance to investor need...\textsuperscript{32}

At the end of the Second World War, in a world largely rendered economically and politically bankrupt, the United States found itself to be the principal-exporting country in the world and the leading source of venture capital. To meet this crisis, President Truman in January of 1949 proposed what has come to be known as the Point IV Program,\textsuperscript{83} the major objectives of which were real-

\textsuperscript{31} Eleven F.C.N. type treaties were concluded after the 1923 German Treaty until 1938, all of which contained this clause on companies, supra note 29, at 43, note 124.

\textsuperscript{32} H. Walker, Jr., \textit{The Post-War Commercial Treaty Program of the United States}, supra note 7, at 59.

\textsuperscript{83} See “Point 4” Program for World Economic Progress Through Cooperative Technical Assistance (remarks of Secretary of State Acheson), 20 U.S. DEPT. OF STATE BULL. 155 (1949).
firmation of support for the United Nations, continuance of America’s postwar programs for world recovery and the strengthening of the free nations of the world from the dangers of external aggression. A further expression of intent embodied in the Truman program, most germinal to our present study, reads as follows:

[We] must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. . . . Our aim should be to help the free peoples of the world, through their own efforts, to produce more food, more clothing, more materials for housing, and more mechanical power to lighten their burdens. . . . With the cooperation of business, private capital, agriculture, and labor in this country, this program can greatly increase the industrial activity in other nations and can raise substantially their standards of living.  

Beneath the rhetoric, the core of the fourth point was to increase the flow of American private investment capital abroad, which in turn would "benefit both the peoples of the underdeveloped areas and the rest of the world, including ourselves (U.S.), as well." 

One of the mediums to be utilized in fostering American private investment abroad was the bilateral commercial treaty. Accordingly, with the end of World War II, the United States embarked upon the negotiation of a new series of commercial treaties. As elaborated by the United States Department of State, the treaty program, was to emphasize expanding and, improving provisions dealing with the rights of American citizens and their enterprises abroad. "The principle objective has been to develop, to the extent that this can be done by treaty, an environment . . . conducive to the flow of American private capital . . . ." (emphasis added).

The need for creating a favorable environment for the flow of American investment capital, is better understood when considered in the context of the economic and political situation existing in Western Europe at the conclusion of the hostilities: "Great Britain was exhausted and impoverished; Germany did not exist; France was barely alive; defeated Italy did not count; and the smaller countries were not important." For the Americans, in the mid and late forties, the balance of power in Europe was most frightening: on

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84 The President's "Point 4" Program, 20 U.S. Dept. of State Bull. 156 (1949).
the one side was the battered array of Allied and Axis countries, and
on the other was a worn, yet expanding Soviet Union. Thus
the political imperative that formed the basis for American foreign
policy evolved as a firm pledge to assist in the development of a
politically and economically rejuvenated Western Europe.88

Through United Nations Relief and Administration financing89
individual credits to various European nations,40 and especially
through the Marshall Plan,41 the United States gave the initial push
for European economic recovery. Moreover, the United States at-
ttempted to protect this postwar economic development through the
military shield provided by the North Atlantic Treaty Organiza-

88 As quoted by H. PRICE, THE MARSHALL PLAN AND ITS MEANING (1955), George
Kennan, head of the U.S. State Department's Policy Planning Staff reflected American
foreign policy when he stated: "The Planning Staff recognizes that the communists are
exploiting the European crisis and that further communist successes would create serious
danger to American security. It considers, however, that American effort in aid of Eu-
roe should be directed not to the combating of communism as such but to the restora-
tion of the economic health and vigor of European Society." Id., at 22.

89 See Joint Resolution to Enable the United States to Participate in the Work of the
United Nations Relief and Rehabilitation Organization ch. 135, 58 Stat. 122 (1944),
for a general treatment of UNRRA, see G. WOODBRIDGE, UNRRA 3 vol. (1950).

40 Joint Resolution Providing for Relief Assistance to the People of Countries De-
vastated by War, ch. 90, 61 Stat. 125 (1947). This act was designed primarily for the
relief of Austria, Greece, Hungary, Italy, Poland, Trieste and China.

41 Convinced that the Soviet Union was anticipating a total collapse of Western Eu-
rope, Secretary of State George Marshall unveiled his grand plan for recovery of Europe,
based on American aid and active European participation at Harvard University in June
of 1947. In part, the Marshall Plan reads as follows: "It is already evident that, be-
fore the United States Government can proceed much further in its efforts to alleviate
the situation and help start the European World on its way to recovery, there must be
some agreement among the countries of Europe as to the requirements of the situation
and the part those countries themselves will take in order to give proper effect to what-
ever action might be taken by this Government. . . . This is the business of the Europe-
ans. The initiative, I think, must come from Europe. The role of this country should
consist of friendly aid in the drafting of a European program and of later support of
such a program so far as it may be practical for us to do so. The program should be a
joint one, agreed to by a number, of not all, European nations. 93 CONG. REC. A3248
(Extension of remarks by Cong. Jurman, quoting General Marshall). On July 16,
1947, sixteen nations, without the presence of Russia and the Eastern European coun-
tries, formed the Committee of European Economic Cooperation which had as its pur-
pose the drafting of a four year recovery program. See Committee of European
Economic Co-operation, July-Sept. 1947, GENERAL REPORT vol. 1 (1947). For a sum-
mary of this report see 17 U.S. DEPT. OF STATE BULL. 681 (Oct. 5, 1947). The six-
teen participating countries were: Austria; Belgium, Denmark, France, Greece, Iceland,
Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland
Turkey and the United Kingdom. Thereafter, the U.S. Congress appropriated five
billion dollars for European recovery. See Foreign Assistance Act of 1948, ch. 169, 62
Stat. 137 (1948); and the Organization for European Economic Cooperation was estab-
lished to help in the disbursement of the Marshall funds. See U.S. Dept of State, Con-
vention for European Economic Cooperation, signed at Paris on April 16, 1948. (Eco-
nomic Cooperation-Series No. 7 (1948)).
tion, and by giving political support and encouragement to various postwar schemes for European integration. These schemes were seen as vehicles for drawing the nation states of Europe closer together while helping to ensure that another violent conflict in Western Europe would become an impossibility. In fact, it is this pragmatic commitment of American power to Western Europe which still in the 1970's forms the "primary foreign policy interest of the United States."

Once the American government had seen postwar Europe on its way to recovery, foreign policy planners anticipated that this economic growth could be continued through the flow of private investment capital into Europe. While a variety of reasons can be cited for the accuracy of the prediction, of more importance than the cause is the impact of the massive American direct investment in postwar Western Europe. From 1946 to 1969 the book value of

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43 See generally F. NORTHROP, EUROPEAN UNION AND UNITED STATES FOREIGN POLICY (1954); D. HUMPHREY, THE UNITED STATES AND THE COMMON MARKET (1962); and E. VAN DER BEUGEL, FROM MARSHALL AID TO ATLANTIC PARTNERSHIP (1966).

44 See speech by Ambassador J. Robert Schaezelt (Head of U.S. Mission to the European Communities), delivered on Feb. 12, 1970, concerning "Relations Between Europe and the United States After the Summit at the Hague," as reported in Document No. 562 of EUROPE (Agence internationnal d'information pour la presse) (Feb. 19, 1970): "Still in pursuit of perspective, let me emphasize the strength and continuity of United States policy toward Europe. The President has reiterated that this is the primary foreign policy interest of the United States: within the larger framework he has indicated support of his Administration for the process of European unity, as has Secretary Rogers. Because the President feels so keenly that this is a matter primarily for Europeans to decide there have been some who misconstrue discretion for shift of policy. In point of fact, there has been no shift of national priorities or indeed of national awareness of the fundamental importance of Europe to our survival."

45 See generally C. RANDALL, A FOREIGN ECONOMIC POLICY FOR THE UNITED STATES (1954); and REPORT OF THE RANDALL COMMISSION, STAFF PAPERS PRESENTED TO THE COMMISSION ON FOREIGN ECONOMIC POLICY (1954).

46 For a discussion of some of the reasons surrounding the post-war rise of American direct investment in Europe see L. KRAUSE, EUROPEAN ECONOMIC INTEGRATION AND THE UNITED STATES ch. IV (1968).

47 For a thorough analysis of the nature and extent of American direct investment in Europe see Report on Transatlantic Direct Investment (Rapporteurs: MM Hackkerup and Rohner), EUR. CONSULT. Ass., 23rd Sess., Doc. 2938 (April 28, 1971) [Hereinafter cited as Transatlantic Investment Report].
American direct investment in Europe soared from just one billion dollars to nearly 22 billion dollars; in the six EEC countries alone, American direct investment totaled over 10 billion dollars as of 1970, having an estimated replacement value of over 30 billion dollars. Such investment generated over 60 billion dollars a year in sales, accounting for more than 1/7th of all new industrial developments.\(^48\)

Whether this surge of American private capital into Europe was facilitated by the new United States program on bilateral commercial treaties is impossible to demonstrate. Certainly, American direct investment in the United Kingdom prospered in the postwar years without the benefit of an F.C.N. type treaty;\(^49\) and quite clearly other factors, such as the formation of the Common Market, were vital in the creation of this dynamic flow of American capital to Western Europe.\(^50\) However, it would appear that at minimum the modern F.C.N. treaties with many of the Western European nations did encourage the generally favorable climate needed to induce American investment by setting out broad and accepted standards for the promotion and fostering of this type of capital flow.\(^51\) The combined American approach in developing a new commercial treaty program, in encouraging world monetary stability through the International Monetary Fund, and in supporting a multilateral rationalization of world trade through the GATT did provide a sound basis for European recovery after the war, and for the expansion of American foreign trade and investment.\(^52\)


\(^{49}\) See Transatlantic Investment Report, supra note 47, at 10: "U.S. direct investment in Europe was traditionally concentrated in the United Kingdom where it was facilitated not only by close political and economic links but also by a common language and similar legal systems. In 1950 for example, out of a total of 1.7 billion dollars worth of direct investment in Europe, 0.8 billion dollars was concentrated in the United Kingdom as opposed to 0.6 billion dollars invested in the six ECSC countries. This pattern remained substantially unaltered until the early 1960's."

\(^{50}\) See A. Edwards, Investments in the European Economic Community 5 (1964): "Clearly, many factors have been responsible for this large, and still rapidly growing, flow of foreign capital into the Six: demand trends, comparative cost levels, official investment incentives, and so on, have all played a part. But the most obvious reason has been the setting up of the EEC as such. The dismantling of trade barriers within the Community and the process of adjustment towards the common external tariff have made it advantageous from the point of view of costs to be within the Common Market instead of exporting to it. Possibly even more important, however, has been the psychological effect of bringing the EEC into existence."

\(^{51}\) See generally Commercial Treaty Program of the United States, supra note 36.

\(^{52}\) On the interrelation of the importance of the IMF, GATT and bilateral commer-
III. SALIENT FEATURES OF POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES

The modern postwar archetypes of American Friendship, Commerce and Navigation (F.C.N.) treaties are the agreements concluded with the Republic of China in 1946 and with Italy in 1948. As already mentioned, there occurred in these treaties a significant shift from a historical preoccupation with the facilitation of trade and navigation to a stress on the various investment or "establishment" provisions. The postwar series of F.C.N. treaties can be seen as "commercial" only in the widest possible context of the term.

With respect to modern U.S. bilateral commercial treaties, they may generally be defined as treaties of establishment. Concerned with the protection of persons, natural and juridical, and of property and interests of such persons, "they define the treatment each country owes the nationals of the other; their right to engage in business and other activities within the boundaries of the former; and the respect due them, their property, and their enterprises." In the postwar F.C.N. treaties this concept of "establishment" has proven itself to be rather broad and varying, embracing such sundry matters as the following: (1) the entry, residence, and sojourn of persons and their protection after admission; (2) alien's rights to participate in various types of work and activities; (3) recognition of the juridical personality of companies; (4) participation of alien corporations in the corporate and economic life of the host country; (5) access to courts for individuals and companies; (6) taxation; (7) exchange restrictions; (8) the rights to acquire and dispose of property and the protection of alien property; (9) rights as to patents and trademarks; (10) alien contractors' rights in seeking government contracts and concessions; (11) guarantees of certain basic personal rights and freedoms; (12) social insurance; and (13) in

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53 See Treaty of Friendship, Commerce and Navigation with the Republic of China, Nov. 4, 1946, T.L.A.S. No. 1871, 25 U.N.T.S. 69 (effective Nov. 30, 1948). As noted in 15 U.S. DEPT. OF STATE BULL. 866 (1946) concerning the China Treaty: "The treaty is somewhat broader in scope than existing United States commercial treaties with respect to the rights of corporations, and includes articles relating to establishment, landholding, and industrial and literary property, commercial articles similar in principle to the general provisions of recent trade agreements, and more detailed coverage of exchange control, the activities of government monopolies and other matters."

certain cases, even exemption from military service.\textsuperscript{55} Though the promotion of international trade still remained a motivating factor behind the postwar F.C.N. treaties, emphasis increased on those provisions of "establishment" which would afford American investors "a proper measure of security against undue risks likely to plague their foreign operations."\textsuperscript{56}

In the postwar series of commercial treaties such matters as consular rights and functions were no longer dealt with under the F.C.N. heading.\textsuperscript{57} With the negotiation of the French, Belgian, and Luxembourg treaties, provisions dealing with imports and exports were specifically omitted. These three treaties thus formed a new species of the F.C.N. treaty, being essentially treaties of establishment.\textsuperscript{58} The reasons for the novel use of these "establishment" treaties with three of the Member States of the European Economic Community are attributable to several factors. Since January 1, 1948, the trade relations of the United States have centered around the General Agreement on Tariffs and Trade, and any additional treaty arrangement on the subject would be somewhat redundant.\textsuperscript{59}

The crucial factor, however, would seem to be the creation on January 1, 1958 of the European Economic Community. With the F.C.N. treaties designed for long-term application, such a commitment in the area of trade would militate against the objective of the EEC in achieving a common Community policy in the area of external trade.\textsuperscript{60} As it was elucidated at the time of the signing of the Convention of Establishment with France:

Along with other governments in Western Europe, the French Government is much preoccupied with developments in connection with the European Economic Community and is reluctant to enter long-term engagements on trade matters for fear of resulting difficulties for the European integration plans. A similar attitude was

\textsuperscript{55} See generally R. Wilson, United States Commercial Treaties and International Law ch. II (1960).

\textsuperscript{56} Commercial Treaty Program of the United States, supra note 36; at 4.


\textsuperscript{58} In a strict sense, the French Treaty is the only one which does not contain any trade provisions; though all three of the treaties do tend to illustrate a new development in U.S. commercial treaty policy toward the EEC countries.

\textsuperscript{59} For a consideration of those provisions of the F.C.N. treaties which are also covered by other international agreements (GATT, IMF, tax treaties and International Patent Convention) see H. Walker, Jr., The Post-War Commercial Treaty Program of the United States, supra note 7, at 61-6.

encountered in the Netherlands negotiations in 1955-56 but was satisfactorily solved through a special arrangement incorporated in an exchange of notes. This type of solution was not acceptable to the French, and it was mutually agreed not to negotiate new trade provisions in connection with this treaty.  

Another characteristic of the postwar U.S. commercial treaty program has been the rising use of the national treatment standard whereby foreign citizens are given the treatment accorded the citizens of a host country. Unlike the most-favored-nation standard which seeks to achieve a "foreign parity," national treatment is concerned with "inland parity" by conferring upon the alien the same rights and privileges as a national would receive from its native government. Illustrative of the wide modern usage of the national treatment standard are various provisions in the 1953 German treaty, wherein national treatment is called for in over a dozen instances, covering such diverse matters as access to courts, taxation of treaty nationals and companies, acquisition and disposal of property, and the protection of the property of treaty nationals and companies.

As to the treatment to be accorded foreign companies, unlike the multiple test that had to be met for recognition in the interwar

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62 H. Walker, Jr., Modern Treaties of Friendship, Commerce and Navigation, supra note 54 at 811.
63 As commonly defined in modern treaties of commerce, the term "national treatment" means: "a 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." (emphasis added).
64 See G. Schwarzenberger, The Principles and Standards of International Economic Law, supra note 4, at 80: "The object of this standard is inland parity. Thus the nationals of the grantor constitute tertium comparationis. The national standard is most valued in the sphere of establishment, that is the personal and property rights of nationals abroad, their free access to local courts and equality regarding taxation and navigation." Some of the other standards used in commercial treaties are: m/f/n, both m/f/n and national, international law standard, equitable treatment standard, reciprocity, and treaty standard.
65 1954 German Treaty, supra, note 1. Article III (protection and security of treaty nationals after entry); Article IV (application of sick benefits and social security); Article V (the protection of the property of treaty nationals and companies); Article VI (access to courts for treaty nationals and companies); Article VII (right of treaty nationals and companies, with certain qualifications, to engage in and establish businesses); Article VIII (right of treaty nationals and companies to engage in scientific, educational, religious and philanthropic activities); Article IX (the leasing of real property, acquisition of personal property, disposition of all types of property, and the succession to property by treaty nationals and companies); Article X (rights related to industrial property rights); Article XI (taxation of treaty companies and nationals); Article XII (capital movements); Article XIV (all matters relating to the importation and exportation of goods by treaty nationals and companies); Article XVI (internal treatment of goods); Articles XX, XXI (certain matters relating to navigation).
series of F.C.N. treaties, the postwar brand set out a simple and unqualified criterion based on the incorporation theory. As exemplified in the 1953 German Treaty, business associations (i.e. a corporation, partnership, company or other association, whether or not with limited liability and whether or not for pecuniary profit) which were validly constituted under the laws of one of the signatories "[were to] have their juridical status recognized within the territories of the other Party" without any further qualifications from local laws.

It must be noted however, that the recognition of legal status does not of itself create any substantive rights. Though such rights as access to courts could appear to be an automatic consequence of recognition, this is not necessarily the case. Legal rights, whether in municipal or international law cannot be assumed as a matter of individual right, but are only conferred upon the benefactors by and through the legal structures and instrumentalities created by "society." While it has been suggested that there is "a principle of customary international law giving to aliens rights to access to courts on a reasonable basis," it seems clear that this would not hold true with regard to companies. No substantive or procedural rights for companies can be implied without some positive foundation in the relevant F.C.N. treaty.

Since 1923, U.S. commercial treaties have included specific provision for the right of access to courts for companies. In the post-

66 H. Walker, Jr., Provisions on Companies in United States Commercial Treaties, supra note 9, at 382: "The simple 'classical' test which has been found acceptable by all countries with which the United States has signed commercial treaties since the last war, nevertheless, follows a number of earlier treaties, especially examples dating from the last century, and is consonant also with other precedents. Further, it represents the practice followed by United States courts in determining the 'citizenship' of corporations for jurisdictional and constitutional purposes. Moreover, it fits consistently into the general scheme of the current treaty type in that it adapts to companies a nationality test analogous to that applied with reference to the other major objects dealt with in the treaties: goods, ships, and individuals."

67 1954 German Treaty, Article XXV (5), supra note 1.


69 R. Wilson, Access-To-Courts Provisions in United States Commercial Treaties, supra note 29, at 47.

70 See R. WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW, supra note 55, at 194-5: "While it is generally presumed, and under liberal rules of construction presumably would be held, that the recognized possession of the capacity to appear carries with it the right of appearing, enjoyment of a capacity does not as such necessarily mean that the exercise of the right will be permitted. In any event, the recognition of the capacity does not determine the terms and conditions under which the right to sue and be sued may be exercised."

71 See 1923 German Treaty, supra note 13.
war period, this provision has been based on the national treatment standard, without reservations by local laws. Moreover, with the present day proliferation of quasi-judicial agencies and commissions the provision has been clarified so as to cover "administrative tribunals and agencies." The national treatment standard has also been employed with regard to requirements concerning security of costs.\footnote{72 See, e.g., 1954 German Treaty, Article VI (1), \textit{supra} note 1: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication." With regard to the treatment of "security of costs" see Protocol, para. 6.}

In the matter of the operational rights of treaty companies, the postwar series of U.S. commercial treaties has generally extended national treatment to companies engaging in "all types of commercial, industrial, financial, and other activity for gain."\footnote{73 See H. Walker, Jr., \textit{Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice}, 5 AM. J. COMP. L. 229, 236 (1956): "The basic principle of national treatment with respect to engaging in business activities and doing the things necessary or incidental thereto, which forms the heart of the treaty as an investment instrument, has been elaborated to mention the various judicial forms under which an activity can be conducted; to emphasize the owners' prerogatives of control and management; and to assure that also the enterprise, qua enterprise, will receive the stipulated treatment.\footnote{74 R. Wilson, \textit{U.S. Commercial Treaties and International Law}, \textit{supra} note 55, at 197-8.}"

This novel extension of the principle of equality of treatment applies to both the initial establishment of an enterprise and to the terms and conditions under which the company is entitled subsequently to conduct its enterprise.\footnote{74 See, e.g., 1954 German Treaty, Article VII (1), \textit{supra} note 1: "Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain, whether in a department or an independent capacity, and whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies..."} Regarding subsequent business activity, the national treatment standard was made applicable to the operation of treaty companies in such matters as establishing and maintaining branches, agencies, offices, factories, and other establishments related to the conduct of their business. It also applies to the control and management of enterprises which have been established or acquired, the acquisition majority interests of such companies under domestic law, and the operation of "controlled enterprises" engaging in all activities relating to the conduct of their business.\footnote{75 See, e.g., 1954 German Treaty, Article VII (1), \textit{supra} note 1: "Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain, whether in a department or an independent capacity, and whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies..."}
The modern series of F.C.N.'s has not however completely overcome the social and economic fears of earlier commercial treaties about extending treaty coverage to corporations. Generally, restrictions can be placed on treaty companies with regard to doing business in areas which are sensitive to national security and well-being. Moreover, in the modern treaties, a specific clause has been added to ensure that the rights extended by the treaties will not be extended to third country corporate interests.

Also significant for American investors and business has been the postwar inclusion of companies under the treaty provisions relating to protection of property. In inter-war commercial treaties, no specific provision was made for the protection of property of treaty companies, however, in the 1946 commercial treaty with China specific reference was made to the protection of business property, to the extent that such property should "receive the most constant protection and security and shall enjoy in this respect the full protection and security required by international law." In addition, provisions were made against unreasonable searches and molestation of such company property which precluded the other signatory state from taking "unreasonable or discriminatory measures that would impair the legally acquired rights or interest" of such companies within its territory.

With regard to expropriation of property, a typical provision adopted in the postwar treaties proscribed the taking of company property "except for public benefit" and provided that such action must be in accordance with due process of law and not without just compensation.

under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals of companies of such other Party.

76 Id. Article VII (3) which makes reservations with regard to communications, air or water transport, making and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources. In all events, though, m/f/n treatment must be shown. Further by Article VII (3) special formalities regarding the establishment of alien-controlled enterprises may be employed, though they may not substantially impair the rights granted by Article VII (1).

77 Id. Article XXIV (1) (e). This type of clause has been inserted in modern F.C.N.'s in order to prevent "free rides" and to permit "piercing of the corporate veil."


79 China Treaty, Article Article VI (1), supra note 53.

80 See, e.g., 1954 German Treaty, Article V (2) & (3), supra note 1.

81 Id. Article V (4). With regard to expropriation of property a typical formula
In general, postwar commercial treaties have also required both most-favored nation and national treatment in all matters pertaining to the expropriation of privately owned enterprises.82 Various other provisions reflecting the shift of emphasis to matters of investment have been introduced into the postwar commercial treaties. For example, concerned over minimizing competitive discrepancies between private and state-controlled business enterprises, the United States has successfully inserted clauses into postwar treaties which help to ensure equitable and non-discriminatory treatment of treaty nationals and companies in their commercial dealings with the state enterprises, especially in the securing of government contracts and concessions.83

Also, since the Second World War, U.S. commercial treaties reflect great concern about commercial arbitration, and it has become standard treaty practice to seek the inclusion of a commercial arbitration clause in the modern F.C.N.-type treaties.84 The approach taken by the United States in seeking arbitration provisions has not been whether local law will favor or encourage arbitration, but rather that such development as does occur will not be narrowly nationalistic.85

In the postwar treaties reads: "Property of nationals and companies of either Party shall not be taken within the territories of the other Party, except for public benefit and in accordance with due process of law, nor shall it be taken without just compensation." This formula makes the following stipulation concerning payments and exchange withdrawals connected with a lawful expropriation: "Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay."

83 See, e.g., 1954 German Treaty, Article XVII, supra note 1.
84 Id. Article VI (2): "Contracts entered into between nationals or companies of either Party and nationals or 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 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. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."
85 H. Walker, Jr., Commercial Arbitration in United States Treaties, 11 Arb. J. (N.S.) 68 (1956). "These treaties are not concerned with whether, or to what extent, or under what procedures, or subject to what measure of judicial supervision, the law will favor and encourage arbitration. . . . Their concern, rather, is merely to assure that such evolution as does occur will not be narrowly nationalistic, but will allow arbi-
Further, in the Department of State’s postwar endeavors to encourage American foreign investment, a specific clause was added to the Immigration and Nationality Act of 1952 to clarify the status of "treaty merchants," and to introduce the new status of "treaty-investor" to those exempted from the immigration quotas of U.S. law. Though the "treaty-investor" clause in post-1952 commercial treaties is generally "subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety," the clause has served as a primary instrument to effectuate postwar U.S. commercial policy by extending mutuality concerning investors to treaty parties without contravening existing U.S. immigration laws. The desirable result of such provisions from the point of view of commercial exchange and the efficient direction of capital is evident when it is recognized that American merchants cannot, "reasonably expect to secure entry and opportunities in foreign countries unless persons from those countries have comparable entry and opportunities in the United States."89

In addition, the modern F.C.N. treaties have helped foster an

86 When the Immigration Act of 1924 and its strict quantitative restrictions on aliens was being discussed in Congress, the State Department became deeply concerned that the passage of this Act would impair various rights already granted under existing commercial treaties to "treaty merchants." To avoid this conflict, Congress finally inserted into the 1924 Act a clause that would exempt from alien status "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." A 1932 amendment to the Act explicitly extended the "treaty-merchant" benefits to treaties concluded subsequent to 1924. For further discussion see R. Wilson, Treaty-Merchant Clauses in Commercial Treaties of the United States, 44 AM. J. INT’L L. 145 (1950).

87 In the Department of State’s postwar endeavors to encourage American foreign investment, a similar result was worked out with regard to "treaty-investors. Congress inserted the following clause in the Immigration and Nationality Act of 1952:

The term 'immigrant' means every alien except . . .

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or an enterprise in which he is actively in the process of investing, a substantial amount of capital. [8 U.S.C.A. 1101 (15)(E)].

88 See, e.g., 1954 German Treaty, Article II (5), supra note 1.

international climate conducive to the flow of American venture capital through various other provisions dealing with exchange restrictions and capital movement controls, the internal taxation of corporate income, and the industrial property rights of companies. In effect, the postwar treaties have endeavored to extend as full protection as possible to individual and corporate American investors abroad.

In summary it may be said that throughout its history in American practice, the bilateral commercial treaty has proved itself to be a convenient and viable medium for the implementation of certain aspects of American economic and political foreign policy. In the postwar era, these treaties have been reworked to help foster a favorable setting for the advancement and protection of American foreign investments. As commented by Professor Metzger:

The most basic and recurring commitments made by the United States in the field of international trade and investments are contained in 'Friendship, Commerce and Navigation treaties.' . . . In the case of a number of countries, they are the only firm international commitments we have, and in the case of most countries, they are the only commitment of such wide scope.

However, despite the functional value of these treaties from a governmental level, the question remains as to what is the actual value of these modern "investment" and "establishment" treaties for the businessman. As already mentioned, U.S. business relations with a country like the United Kingdom have prospered without the existence of any modern F.C.N. treaty. In addition, the American Bar Association's Committee on International Trade and Investment, reporting on the significance of the Convention of Establishment with France to the American businessman and investor in France, stated:

(T)he survey suggests that companies are reluctant to resort to the provisions of the Convention or to the State Department or other U.S. Government agency. This attitude is illustrated by the comment of one company that it has 'never considered it politically expedient to utilize the provisions of the (Convention).'. . . The seeming reluctance of American companies to resort to the Convention and to request assistance from the State Department suggests

the conclusion that the Convention as a practical matter, is of little benefit to the company operating in France. . . . 92

To this author the practical value of the modern Friendship, Commerce, and Navigation treaty, though it may not be resorted to by the business community, is found in the fact that it is an instrument which creates internationally binding obligations on the signatories, many of which can be enforced in the municipal courts. 98 As American investors and businessmen cannot generally assume any rights or guarantees save for certain limited standards of treatment which may be required by customary international law, 94 the modern F.C.N. in effect serves as a skeletal form of constitution for these investors and businessmen. The F.C.N. sets out broad standards of treatment to foster non-discrimination toward American investors and enterprises abroad, their employees and their property. Though this aspect of the matter is often overlooked, it certainly cannot be taken for granted. 95 The modern U.S. bilateral commercial treaty, therefore, finds practical significance by the fact that it is a long-term vehicle for setting out broad guarantees for American nationals and companies, which create international obligations among the signatories and which often creates rights and obligations within the municipal legal systems of the signatories.

IV. STATUS OF F.C.N.'S WITH EEC MEMBER STATES

While the functional value of U.S. bilateral commercial treaties with Western European nations can be elucidated, a fundamental question remains as to what is the actual legal status of those F.C.N.'s now in existence with the original and acceding members


93 See, e.g., Judgment of Dec. 19, 1957, 26 BGHZ 200 (German Federal Supreme Court, 1957). Note, however, much depends upon the varying constitutional status such treaties will have in the municipal laws of the states concerned. For a further consideration on this point see, STEIN AND HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA ch. 1 (1968).

94 See J. L. BRIERLY, THE LAW OF NATIONS 276-91 (6th ed. 1963), who notes in part at 276: "No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them, and their own state may demand reparation for an injury caused to them by a failure to observe this standard."

95 See, e.g., ABA Treaty Report, supra note 92, at 221: "Since the majority of companies that responded to the questionnaire report that they had not experienced difficulties in their French operations, it can be concluded that the present French policy is to treat American companies now operating in France fairly and equitably. That this is in part due to the Convention of Establishment may be assumed — although this is not subject of proof."
to the European Economic Community. In effect, what change in status, if any, has the creation of the EEC had and what effect will it have on the existing F.C.N.'s in question?

Article 113 of the Treaty of Rome not only provides that "(a)fter the expiry of the transitional period the common commercial policy shall be based on uniformly established principles . . . ," but also visualizes the Community as an international legal entity which will supplant the Member States in the negotiating of those agreements concerning their external commercial relations. The area of commercial policy is "one of those fields in which under the Treaty of Rome, the surrender by the member states of their national sovereignty both outside and within the Community seems absolutely clear."96

While the Treaty of Rome provided for a twelve-year transitional period (consisting of three stages, each of which could extend up to four years) which would progressively lead to the establishment of the full Common Market as of January 1, 1970, the specific measures to be taken in the sphere of commercial policy were not stipulated in the seven articles of the Treaty dealing with the common commercial policy of the Community.97 Article III of the Treaty of Rome, however, placed the general and explicit obligation upon the Member States to "coordinate their commercial relations with third countries so as to bring about by the end of the transitional period, the conditions necessary for putting into effect a common policy in the field of external trade."

Moreover, while the Treaty of Rome left the Member States with the ultimate power to conclude or renew commercial agreements with non-member countries during the transitional period, there was in principle no real question that this power would be transferred to the Community at the end of that period.98 As early as October


97 Articles 110-116 of the Treaty of Rome specifically deal with commercial policy.

1961, the EEC Council of Ministers had instituted a system of notification and consultation between the Member States and the EEC Commission with regard to the conclusion or renewal of commercial agreements with third countries. Further to this end, the Council of Ministers stipulated that "(c)ommercial agreements between Member States and third states shall not be concluded for periods exceeding the transitional period of the treaty," and even during the transitional period, "agreements which do not contain the EEC clause nor provide for termination upon one year's notice, shall not be concluded for periods exceeding one year."

Though the principle may have been relatively uncontroversial, in practice the Member States have been hesitant to accept the Community's dominant role in the sphere of commercial policy in the post-transitional period. Quite simply, the Member States have continued in varying degrees to be jealous of their independence in matters of external trade policy, which has traditionally been one of the prime vehicles for the exercise of sovereign national foreign policy. Because of this, even with the end of the transitional period, the European Community is still a long way from having crystallized any concrete and coherent approach to the final implementation of a common commercial policy.

Because it is far from clear what the Community's common commercial policy will finally entail, it is extremely difficult to gauge the effect which the implementation of this policy will have on the status of the bilateral commercial treaties now in force between each of the original and acceding members of the Community and the United States. This state of imprecision has been further aggravated by Decision 69/494/EEC of the Council of Ministers, concerning the progressive standardization of negotiation procedures re-

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100 Council of Ministers (E.E.C.), DÉCISION RELATIVE À L'UNIFORMISATION DE LA DURÉE DES ACCORDS COMMERCIAUX AVEC LES PAYS TIERS, DU 9 OCTOBRE 1961, [1961] E.C.J.O. 1274. For the official text of the "EEC clause," see [1960] E.C.J.O. 1965. The text reads: "Should the obligations which result from the European Economic Community and which provide for the progressive establishment of a common commercial policy necessitate it, negotiations shall be opened without delay in order to provide for all appropriate modification of the agreement."

101 For a consideration of certain ways in which a nation's external trade policy can be used to further its foreign policy, see PALMER AND PERKINS, INTERNATIONAL RELATIONS ch. 6 (1957).
lated to commercial agreements between Community members and third countries.¹⁰²

In a paradoxical way Decision 69/494/EEC has been both a supplement to and a derogation from the above-mentioned Council decisions of 1961. By Article 2 of Decision 69/494/EEC, provision has been made for consultation between the relevant Member States and the European Commission in examining whether or not, and to what extent, the existing bilateral agreements in question come under the common commercial policy of Article 113 of the Treaty of Rome. Thereafter, the Commission may propose to the Council of Ministers that the agreement, or any part thereof, should be continued in force for a period of not more than one year if it has been determined that such prolongation does not constitute a present obstacle to the working out of the common commercial policy. If the agreement under consideration contains an EEC clause or an annual denunciation clause, then continuance may be for a longer period.¹⁰³

Decision 69/494/EEC has in effect struck a curious compromise and balance, where in large part the Member States have maintained for the moment the practical and effective control over their external commercial relations, while the Community has continued to assert the ultimate legal control in the sphere of commercial policy embraced by Article 113 of the Treaty of Rome. In evaluating this situation, one commentator has remarked:

"Faced with political, economic and technical difficulties the Community organs did not want to proceed (and, to a certain extent, could not have proceeded) to replace the Member States in commercial agreements. They have preferred to go for a practical and flexible solution while trying to avoid jeopardizing the establishment of a common commercial policy."¹⁰⁴

In pursuance of Decision 69/494/EEC, the Council of Ministers, on the proposal of the Commission, came to consider the status of various bilateral treaties of Friendship, Commerce and Navigation and other similar accords between the Member States of the Com-


¹⁰³ Id., Article 3. For a further analysis of Decision 69/494/EEC see Leonard and Simon, La mise en œuvre de la politique commerciale commune: passage de la période de transition a la période définitive, 1971 RÉVUE TRIMESTRIELLE DE DROIT EUROPEEN 107, at 139-44.

¹⁰⁴ C. Kim, Developments in the Commercial Policy of the European Economic Community, supra note 96, 164.
munity and third countries. Accordingly by Decision 70/470/EEC the Council issued a list of agreements which could be maintained in force until December 31, 1972, including treaties of the F.C.N. classification between the United States, and Italy, Germany, the Netherlands, Belgium and Luxembourg.\(^{105}\)

There was no clarification as to which parts of these various F.C.N. treaties are to be considered relevant in light of Article 113,\(^{106}\) that is, which parts of the treaties may have to be renegotiated with the Community after December 31, 1972. However, with the exclusion of the Convention on Establishment with France from this list of treaties relevant, to Article 113, it appears clear that the Council of Ministers rejects the view espoused by certain commentators that the content of Article 113 is to embrace all matters directly or indirectly affecting the movement of goods and services into and out of the Community. From the Council's stance such matters as establishment, capital movements, and transportation are to be excluded from the notion of a common commercial policy as these matters are dealt with in sections of the Treaty of Rome which are separate and distinct from the section on commercial policy.\(^{107}\)

At minimum, however, the exclusive treaty-making competence of the Community in matters of commercial policy covers "tariff and

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\(^{107}\) See Report on the third colloquium about the merger of the European Communities, held at the Institute of European Legal Studies, University of Liège, Oct. 25-27, 1967, 5 COMMON MARKET LAW REVIEW 346 (1967-68). The first topic of consideration of the Colloquium concerned the international personality of the Community; the second topic dealt with the common commercial policy of the Community. Of note, the Institute prepared and has published a CAHIER DE DOCUMENTATION of four volumes concerned with the topics discussed.
trade agreements . . . the establishment of uniform practices as regards measures of liberalization . . . export policy . . . and commercial protective measures including measures to be taken in case of dumping or subsidies.'

While it is evident, even from the viewpoint of the Council of Ministers, that those matters directly affecting the external trade of the Community fall within the exclusive control of the Community, a new dimension to this matter has been added by the recent Court of Justice decision in Commission v. Council. Though the facts surrounding this case center around the negotiation of a European Road Transport Agreement (ERTA), the prime importance of this case is capsulized in the Court’s views on the general treaty-making competence of the Community. Here the Court of Justice was

108 Treaty of Rome, Article 113 (1). This listing, however, is not exhaustive.

109 Court of Justice of the European Communities, Commission des Communautés européennes contre Conseil des Communautés européennes (Arrêt 22/70), March 31, 1971, [hereinafter cited as Commission v. Council]. Any English translation used in connection with this case is in conformity with the translation supplied through the services of the European Communities.

Perhaps it may be useful here to briefly summarize the institutional setup of the European Communities (EEC, ECSC and Euratom), which since July 1, 1967 have had the following common institutions:

1) The Council of Ministers: This body consists of any council of Cabinet ministers from the Member States, coming together in Brussels primarily to discuss Commission proposals. For the consideration of the more important matters of Community concern, the respective foreign ministers will meet approximately once a month. In principle, the Treaty of Rome conceived of the Council as principle decision-making organ in the Community.

2) The European Commission: In the newly expanded Community, the Commission will consist of 13 members, selected for their general competence and independence. Each member holds office for five years, the President and Vice-President being appointed for two years. Assisted by a staff of over 5,000 "Eurocrats" in Brussels, the Commission is the prime initiator and formulator of Community actions and policies.

3) The European Assembly: In the expanded Community, there will be some 198 members of the Assembly, with the breakdown by nationality being Italy, France, Germany and the United Kingdom 36 members each, Belgium and the Netherlands 14 each, Denmark and Ireland 10, Luxembourg 6. Though the Treaty of Rome envisages the direct election of Assembly members, these members presently are selected by the various parliaments of the six Member States. The Assembly, which meets monthly, has to date only minimal effective political power in the Community’s decision-making process: the main tasks of the Assembly are the rendering of standing committee reports and the questioning of members of the Commission visiting Strasbourg.

4) The European Court of Justice: In the expanded Community, the Court will consist of 11 judges, with an alternate turnover or renewal of appointments for five judges and two advocat-generals, and six judges and one advocat-general, every three years. These judges, sitting in Luxembourg, endeavor to ensure that “the law is observed in the interpretation and implementation” of the EEC, ECSC, and Euratom treaties.

110 Commission v. Council, supra note 109. Quite briefly the facts of this case are as follows: In pursuance to Article 75 of the Treaty of Rome concerning the implementation of a Community transport policy, the Council of Ministers (acting on a proposal
to embrace a theory of "parallelism" which states that the Community would possess the same degree of competence to deal with external affairs as it possesses internally. 111

In ascertaining whether or not the Community had the competence to negotiate and conclude the ERTA, the Court of Justice could find no specific provisions of the Treaty of Rome concerning the negotiation and conclusion of international agreements in the sphere of transport policy. The Court in considering the general system of Community law relating to agreements with non-Member States, did however express the view that the Community shall have a "legal personality," 112 and noted that in its external relations, the Community enjoys the capacity to establish contractual links with non-Member States over the whole extent of the field of objectives defined in Part One of the Treaty. 113 (emphasis added)

In further considering this general treaty-making power of the Community under the Treaty of Rome, the Court went on to state:

"To determine in a particular case the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions. Such authority may arise not only from an explicit grant by the Treaty — as is the case with Article 113 and 114 for tariff and trade agreements and with Article 238 for association agreements — but may actually flow from other provisions of the Treaty and from steps taken, within the framework of these provisions, by the Community institutions. In particular, each time the Community, from the Commission) adopted a regulation related to various aspects of the driving times for road transportation. The effective date of the regulation which concerned traffic between the Community and non-Member States was postponed until Oct. 1, 1970 (the other parts taking effect a year earlier). This postponement was necessitated by the desire of the Community to reconcile the provisions of the regulation with parallel work being carried on by the Transport Committee of the Economic Commission for Europe on a European Agreement on International Road Transport Workers (ERTA). A previous ERTA had been concluded in 1962, but failed to collect the required number of signatures. The present ERTA was a further attempt to gain signature.

The Council of Ministers issued a communiqué at the conclusion of a session in March 1970 approving "a mandate to allow the Member States to continue negotiations for the conclusion" of the ERTA. The updated ERTA was completed in April, 1970 and opened for signature on July 1, 1970. In a compromise, the Council had agreed to adjust its earlier regulation so as to bring it into accord with the revised ERTA. Against all this the European Commission insisted that it should have been the sole representative of the Community members at the negotiation of the ERTA; and on May 19, 1970, the Commission filed an application with the European Court of Justice seeking an annulment of the Council's "discussion" on March 20th.

111 For a consideration of this theory of "parallelism" see R. Dupuy. "Du caractère unitaire de la Communauté économique européenne dans ses relations extérieures," 9 ANNuaIRE FRANCAIS DE DROIT INTERNATIONAL 779, 804 (196); and L. ANANiADES, L'ASSOCIATION AUX COMMUNAUTÉS EUROPÉENNES 121 (1967).


113 Id.
with a view to implementing a common policy envisaged by the Treaty, lays down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to contract obligations toward non-Member States affecting these rules. . . . (I)t follows that to the extent that Community rules are promulgated for the attainment of the purposes of the Treaty, the Member States cannot, outside the framework of Community institutions, assume obligations likely to affect such rules or alter their scope.” (emphasis added).114

As to the question of concurrent authority on the part of the Member States to conclude such agreements, the Court rejected this possibility, as any such initiative without the common framework of Community institutions would be inconsistent with the unity of the Common Market and with the uniform application of Community law.115

V. CONCLUDING OBSERVATIONS

The problems posed for the possible renegotiation of U.S. bilateral commercial treaties with the Member States of the European Community are myriad and complex. The most basic of these problems is whether or not it is of value for the United States to continue the use of the F.C.N. with the countries in question. However, as already explicated, the F.C.N. has a very real and functional worth for the American government, American investors, and American companies in Western Europe. With a growing unrest in the EEC as how best to deal with the American enterprise in the Community, it would appear essential that the United States continue to seek long-term treaty commitments protecting the rights of American business and nationals in Western Europe.

The second problem to arise is of a far more technical nature, that is, which provisions of the existing F.C.N.’s will have to be renegotiated. Clearly, all those provisions falling under Article

114 Id., 20-21.
115 Id. 23: “(G)ette compétence communautaire exclut la possibilité d’une compétence concurrente des États membres, toute initiative prise hors du cadre des institutions communes étant incompatible avec l’unité du marché commun et l’application uniform droit communautaire.”
116 See e.g., statement by the European Commission on American direct investment in Europe, as reported in Document No. 591 of EUROPE Aug. 26, 1970: “A list can be drawn up of the pros and cons of American investments. There is no denying that they spread economic prosperity and technological progress. They act as a stimulus to numerous European firms. But this progress is not, in the first instance, of benefit to Europeans. As a number of cases have shown as regards employment, research, defence or international trade relations (notably with State-trading countries) the policies of companies so formed remain, in the final analysis, the offshoot of industrial, and even political, headquarters situated outside this continent.”
113 of the Treaty of Rome will have to be dealt with. This automatically raises the task of determining the actual content and scope of the Community's common commercial policy. Further, though the Court of Justice's statements expressed in Commission v. Council concerning the exclusive treaty-making competence of the Community have been characterized by certain writers as an abuse of judicial powers, they do, nevertheless, represent the mind of the Court on this matter. With the Court of Justice being the ultimate interpreter of the Treaty of Rome and with its decisions being binding on the Member States of the Community, the Court's apparent acceptance of the theory of "parallelism" must be treated most seriously. From a purely legal stance, it would accordingly appear that for all those matters (including establishment and capital movements) in which the Community has the internal competence it also possesses an exclusive external competence.

As to those provisions of the F.C.N. treaties which are likely to be reconsidered, this writer suggests that the United States should concentrate on negotiating only a treaty of establishment similar to that concluded with France. As all members of the ten original and acceding members of the European Community are represented in GATT and the IMF, those provisions of the F.C.N.'s dealing with matters concerning the movement and treatment of goods, and of exchange controls are redundant. The argument that these provisions in the F.C.N. were a "fall-back" in the event of the failure of the GATT or IMF now seems irrelevant. As to matters concerning navigation, these could be worked out (as desired) in sepa-


118 As the Court of Justice is not bound by the common law doctrine of precedent, the Court's statement's on the treaty-making competence of the Community cannot even be technically equated with "dicta." However, in practical terms the Court's statement must not be neglected, for they are a very real indication of what the Court's mind is on the subject.

119 Treaty of Rome, Article 171.

120 See H. Walker, Jr., The Post-War Commercial Treaty Program of the United States, supra note 8, at 63: "First, especially as the GATT still operates on a provisional basis, the treaty (F.C.N.) provides a basic agreement to fall back on if, for any reason, the GATT should cease to be in effect between the treaty signatories." However with the GATT being in existence for over two decades now and with the growing interdependence of world trade, such bilateral safeguards do not seem wholly necessary anymore.
rate bilateral treaties, as was done with the case of consular provisions.

The final problem, and perhaps the most important from a long-term point of view, is whether the United States should continue to pursue the bilateral approach to commercial treaties with the Member States of the European Community (merely seeking Community approval of those provisions required), or whether the United States should make the proposal for the negotiation of a Community accord on establishment. Though there may well be an initial fear on the part of the United States that it may end up with a worse package dealing with the Community than it would bilaterally, the United States should be realistic in negotiating the matters in question with the party who has the ultimate control over such matters. Considering the Community's participation in the Kennedy Round,21 the Werner and Davignon Reports,22 the recent Community's stance in the international monetary crisis precipitated by Nixon's New Economic Policy,23 and the upcoming round of trade talks between the Community and the United States,24 it is becoming more and more evident that it is the Community, and not the individual Member States, that is to be reckoned with in economic and monetary matters.25

121 See G. Testa, Le Kennedy Round quelques aspects juridiques, 1968 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 605.
125 In further evidence of the growing competence of the EEC in economic and monetary matters.
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