

UNIVERSITY OF CALIFORNIA, SAN DIEGO

The First Bilateral Investment Treaties:
U.S. Friendship, Commerce and Navigation Treaties in the Truman Administration

A dissertation submitted in partial satisfaction of the
requirements for the degree Doctor of Philosophy

in

History

by

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Chair

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DEDICATION

For Lidia, Jenny and Shelly

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ABSTRACT OF THE DISSERTATION

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The First Bilateral Investment Treaties addresses the processes by which, and the purposes for which, the State Department, during the years of the Truman administration, reconceptualized as bilateral investment treaties the friendship, commerce and navigation (FCN) treaties that the United States had negotiated since its independence, originally as treaties to establish trade and maritime relations. It argues that, at the end of the Second World War, to ensure peace and prosperity the United States sought to project New Deal liberalism onto the international plane and for that

reason urged the creation of multilateral institutions to foster full employment worldwide. U.S. officials believed that full employment required the promotion, but also the regulation, of international capital movements. To promote capital movements, State Department officials acceded to the demands of the business community that it seek treaty protection for U.S. foreign investment. After efforts to incorporate investment protections into a multilateral International Trade Organization failed, the State Department turned to bilateral FCN treaties to obtain the protections it sought. In devising these treaty protections, U.S. officials incorporated into the FCN treaties four U.S. constitutional law principles – security, reasonableness, nondiscrimination and due process -- largely as these principles were understood by the New Deal Supreme Court, thereby providing U.S. investors abroad with protections similar to those enjoyed in the United States. Other FCN treaty provisions sought to facilitate the movement of capital across borders, while permitting host states to regulate such movements.

This account uncovers the origins and purposes of a set of provisions that would create a legal framework for global capitalism in the late twentieth century. It demonstrates that U.S. foreign investment policy during the Truman years is best understood as a projection of New Deal liberalism, including ideas of liberal legality, onto the international plane, rather than as an instrument of Cold War containment or a capitulation to the demands of U.S. capitalists.

Introduction

During the years of the Truman administration, the United States of America, the world's preeminent military, economic and political power, endeavored to negotiate a new series of friendship, commerce and navigation (FCN) treaties with countries in every part of the globe. After approaching at least 70 different countries to explore the possibility of negotiating a treaty, the United States successfully concluded in that period and would bring into force only eight treaties. Yet, as inauspicious as this effort may have seemed at the time, those eight treaties introduced a mixture of investment related provisions that eventually would gain widespread acceptance and, by the end of the century, would form a network of some 3000 treaties establishing a legal framework for global capitalism.¹ The negotiation of the U.S. postwar FCN treaties is the birthing moment of one of the most important developments in international economic law in the twentieth century.

This account of the U.S. postwar FCN treaty program poses three questions about the origins of these investment related provisions. First, what prompted the

¹ Extensive discussion of the scope and content of modern bilateral investment treaties may be found in Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010); Kenneth J. Vandavelde, *Bilateral Investment Treaties: History, Theory and Interpretation* (New York: Oxford University Press, 2010); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008); Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins, and Borzu Sabahi, *Investor-State Arbitration* (Oxford: Oxford University Press, 2008); August Reinisch, ed., *Standards of Investment Protection* (Oxford: Oxford University Press, 2008); Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Portland: Hart Publishing, 2008); Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007)

United States to incorporate these provisions into a treaty series that in the past had been devoted primarily to the establishment of trade and maritime relations? Second, what was the process by which these provisions were drafted and incorporated into the FCN treaties? Third, what did the United States seek to accomplish with these provisions?

The answer that emerges from the documentary record, in broad terms, is as follows: In the early 1940s, U.S. policymakers planned the creation of a postwar international economic order designed to avoid the perceived mistakes of the interwar period, including autarkic economic policies and a rigid gold standard, mistakes that they believed had led to economic ruin and then war. To ensure prosperity and thus peace in the postwar era, the United States envisioned a kind of international New Deal, that is, a set of pragmatic policies that would promote a full employment economy in the United States and abroad, subject to principles of liberal legality. The chief obstacle to a full employment economy in the United States was the manufacturing surplus that the U.S. economy would enjoy when the war ended, which could be eliminated only through exports. Yet, other countries, their economies ravaged by the war or still undeveloped, lacked sufficient dollars to purchase U.S. exports. U.S. prosperity thus necessitated that the United States persuade other countries to open their markets to U.S. goods, while opening its own market to their exports so that other countries could earn the dollars needed to purchase the surplus. The export capacity in other countries, however, was insufficient to earn enough dollars to purchase the entire U.S. surplus. Thus, other countries would need to obtain

a portion of the necessary dollars from inward foreign investment, both public and private.

To promote international capital movements, U.S. policymakers believed that U.S. investment abroad must be guaranteed legal protection against adverse host state treatment. At the same time, however, they believed that obtaining the maximum benefit from international capital movements while preserving economic stability necessitated that countries also retain the discretion to regulate such movements.

As the war neared its end, the United States proposed a set of multilateral institutions to create the postwar international economic order that it sought. An International Trade Organization (ITO) would facilitate multilateral negotiations to lower trade barriers worldwide. An International Monetary Fund (IMF) would provide stable exchange rates, but with greater flexibility than had the gold standard. An International Bank for Reconstruction and Development (IBRD) would provide public capital to support reconstruction of Europe and economic development in Asia, Africa and Latin America.

The United States obtained international agreement on the creation of the IMF and IBRD at an international conference at Bretton Woods, New Hampshire, in 1944, a year before the war ended. The proposed ITO, however, was far more ambitious and formal negotiations to create the ITO did not begin until late in 1946 and were not completed until early 1948.

Meanwhile, the international business community long had been dissatisfied with the lack of protection for foreign investment under international law. When the

United States announced its proposed charter for the ITO, the business community strongly urged the inclusion of provisions to protect foreign investment and the U.S. government sought to honor that request. Some of the investment related provisions proposed by the United States were extremely controversial, with the result that negotiators adopted them, but riddled them with exceptions. The exceptions so weakened the provisions that the U.S. business community believed that they were actually counterproductive and it turned against the charter. By this time, the Truman administration, preoccupied with the Cold War and lacking support for the charter from the business community, abandoned its efforts to obtain Congressional approval of the ITO charter, which was never ratified by the United States and never entered into force.

While the ITO charter was pending before Congress, U.S. negotiators sought to reconcile the FCN treaties with the ITO charter by incorporating into the U.S. model FCN treaty investment related provisions of the ITO charter that expanded the protection already provided to foreign investment by the FCN treaties, specifically, prohibitions on unreasonable or discriminatory treatment of investment and a guarantee of fair and equitable treatment. The result was a model treaty much more protective of foreign investment.

As U.S. negotiators crafted the investment related provisions of the model FCN treaty, U.S. law relating to business regulation, particularly U.S. constitutional law, provided a set of principles that U.S. negotiators sought to incorporate within the model. These principles – principles of security, reasonableness, nondiscrimination

and due process – were also basic principles of the rule of law and U.S. negotiators saw the treaties as reflecting both U.S. constitutional principles and the rule of law, concepts that they tended to conflate.

Constitutional principles guided the negotiators' crafting of the treaties' investment related provisions for at least two reasons. First, the negotiators regarded the FCN treaties as a means of projecting U.S. liberal legality onto the international plane and the Constitution established the basic principles of that legality. Second, the treaties were reciprocal, meaning that foreign investors would receive treaty protection in the United States, including the protection of the U.S. Constitution,² and thus a treaty that failed to include protections similar to those provided by the Constitution would have obtained for U.S. investors abroad less protection than foreign investors received in the United States.

The FCN treaties, in one respect in particular, went beyond basic constitutional or rule of law principles and that was in their provisions that dealt with the movement of capital across the border. Two provisions dealt especially with capital at the border. One was a provision guaranteeing to investors the right to establish investment in the territory of the host country. The other was a provision guaranteeing to investors the right to withdraw capital and earnings from the host country. Because of widespread concern about the potentially adverse effects of international capital movements, these were the most controversial of the investment provisions and resistance to them greatly impeded the negotiation of the treaties.

² Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 8.

As his 1949 inauguration approached, President Truman sought a memorable theme for his inaugural address. A midlevel State Department official proposed that the United States commit itself to a program of technical assistance for the developing world, an idea that Truman instantly supported because it seemed to be an extension of the New Deal onto the international plane. Truman incorporated the proposal as “Point Four” of his inaugural address, although he advocated combining U.S. technical assistance with the promotion of foreign investment because he recognized the role that foreign investment had played in the development of the United States. As the State Department endeavored to create a program to implement Point Four, it began to regard the FCN treaties with their new investment provisions as a key element of the U.S. investment promotion program under Point Four. Meanwhile, Cold War efforts to contain the spread of Soviet influence provided a new rationale for promoting U.S. private investment, the idea that those countries that were the least developed economically were most susceptible to the appeal of communism. Insofar as it promoted economic development abroad, U.S. private investment would contribute to containment.

By mid 1949, the State Department had reconceptualized the FCN treaties as investment treaties and had refined and strengthened the investment related provisions of the treaties. As the State Department negotiated the postwar FCN treaties, it faced pressure from the business community to strengthen even more the protection afforded by the treaties to U.S. investment. Believing that the treaties represented a mutual acceptance of “right principle” rather than merely a collection of concessions, the

State Department rejected the demands of the business community that it use its economic power to coerce other countries to conclude an FCN treaty on terms desired by the Department or the U.S. business community. As a result, the State Department was able to conclude treaties only at the rate of about one per year.

This account, which begins with the launching of the postwar FCN treaty program at the end of the war, concludes with the end of the Truman administration, in 1953. Although the United States would continue to conclude FCN treaties until 1966, few important innovations occurred after the end of the Truman administration. It was in the Truman years that the State Department reconceptualized the FCN treaties as investment treaties and that the investment related provisions of the treaties achieved their mature form as a charter of liberal legal rights for investors. The years after 1953 would see little more than minor refinements.

New Deal Liberalism: Economic Policy

Although the FCN treaties were instruments of foreign economic policy, U.S. government officials during the Truman administration not infrequently drew analogies between U.S. foreign economic policy and the liberal domestic economic policies of Franklin Roosevelt's New Deal. Truman himself formulated portions of his foreign economic policy with explicit reference to the domestic policies of the New Deal.

Historians long have debated the meaning of New Deal liberalism. Early accounts celebrated the New Deal as an era of reform,³ but by the 1960s New Left historians treated the New Deal as a set of very modest, perhaps even reactionary, reforms that were far too unambitious and accomplished far too little.⁴ Conservative critics, by contrast, have argued that the statist programs of the New Deal were counterproductive and exacerbated the Great Depression.⁵

However its success is measured, the New Deal endeavored to end the depression and to reform the U.S. economy to prevent a recurrence of the panics that had occurred intermittently for more than a century. Yet, the policies employed to these ends were often contradictory. New Deal liberalism reflected a clash between policies of restricting supply and stimulating demand,⁶ between policies of organizing cartels and restoring competition,⁷ and between policies of economic nationalism and liberal internationalism.⁸

³ See, e.g., Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Crisis of the Old Order* (Boston: Houghton Mifflin, 1956); Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* (Boston: Houghton Mifflin, 1958); Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Politics of Upheaval* (Boston: Houghton Mifflin, 1960); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper & Row, 1963).

⁴ See, e.g., Howard Zinn, ed., *New Deal Thought* (Indianapolis: Bobbs-Merrill, 1966); Paul Conkin, *The New Deal* (London: Routledge & Kegan Paul, 1968); Barton J. Bernstein, "The New Deal: The Conservative Achievements of Liberal Reform," in Barton J. Bernstein, ed., *Towards a New Past: Dissenting Essays in American History* (New York: Pantheon, 1967).

⁵ See, e.g., Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: HarperCollins, 2007).

⁶ Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995).

Most historians now regard the New Deal as a pragmatic collection of experiments.⁹ The New Deal rejected economic orthodoxies constructed around rationalist models of economic behavior in favor of a more empirical approach to policy making that was willing at times to embrace conflicting policies either simultaneously or sequentially.¹⁰ For example, the early New Deal experimented with a planning model, while the later New Deal turned to vigorous antitrust enforcement.¹¹

⁷ Michael A. Bernstein, *A Perilous Progress: Economists and Public Purpose in Twentieth-Century America* (Princeton: Princeton University Press, 2001), page 76; Kenneth S. Davis, *FDR: The New Deal Years, 1933-1937: A History* (New York: Random House, 1986), pages 233-235.

⁸ Robert Dallek, *Franklin Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1979), page 38; Lloyd C. Gardner, *Economic Aspects of New Deal Diplomacy* (Madison: The University of Wisconsin Press, 1964), pages 3-4.

⁹ Michael Bernstein, for example, writes that “It was in fact this willingness to experiment . . . that in large part animated the New Deal itself.” Bernstein, *op. cit.*, page 74. Kenneth S. Davis similarly argues that the New Deal mind was “a composite or conglomerate, a mixture and mingling of mental tendencies and points of view that differed from one another to the point, often enough, of direct contradiction.” Davis, *op. cit.*, page 233. Elizabeth Borgwardt refers to the “pragmatic and polyglot New Deal idiom.” Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge: Harvard University Press, 2005). The characterization of the New Deal as a pragmatic collection of sometimes contradictory policies appeared early in the literature. See, e.g., C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: The MacMillan Company, 1948), page 265.

¹⁰ The emergence of an empirical, pragmatic mode of policy making in the early years of the twentieth century is wonderfully sketched in Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrer, Straus and Giroux, 2001) and in Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973). The connection between this mode of policy making and Keynesian economics is described in Robert Skidelsky, *Keynes: The Return of the Master* (New York: Public Affairs, 2009). The connection to postwar developmental assistance programs modeled after the state capitalism of the New Deal, such as the International Bank for Reconstruction and Development, the Marshall Plan, and Truman’s Point Four program is drawn in Michael E. Lathan, *Modernization as Ideology: American Social Science and “Nation Building” in the Kennedy Era* (Chapel Hill: University of North Carolina Press, 2000). Pragmatism had emerged in the United States during the Progressive era and many of Roosevelt’s advisors were products of that era. Alonzo Hamby, *For the Survival of Democracy: Franklin Roosevelt and the World Crisis of the 1930s* (New York: The Free Press, 2004), page 204.

Early attempts to end the depression by controlled production yielded to a later policy of promoting consumption through the creation of a welfare state and through Keynesian countercyclical spending.¹² The United States shifted from a producer oriented to a consumer oriented economy.¹³

Postwar New Deal liberals “praised the New Deal for having solved the problems of capitalism without altering the structure of capitalism; for having used the state to save the economy without intruding the state too far into the economy.”¹⁴ The state’s role was “to compensate for capitalism’s inevitable flaws and omissions without interfering very much with its internal workings.”¹⁵

Several programmatic elements of New Deal liberalism are especially relevant to the development of U.S. foreign investment policy. Although they remained committed to a system of free enterprise, when the market failed to generate full employment, New Deal liberals willingly embraced state capitalism, as reflected in programs such as the Reconstruction Finance Corporation, the Tennessee Valley Authority, the Rural Electrification Administration and numerous public works

¹¹ Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995).

¹² Hawley, *op. cit.*; Brinkley, *op. cit.* On Roosevelt’s gradual conversion to countercyclical spending, see Kenneth S. Davis, *FDR: Into the Storm, 1937-1940: A History* (New York, Random House, 1993), especially pages 536-537.

¹³ Kathleen G. Donohue, *Freedom from Want: American Liberalism and the Idea of the Consumer* (Baltimore: Johns Hopkins University Press, 2003).

¹⁴ Hawley, *op. cit.*, page 266.

¹⁵ *Ibid.*, page 269.

projects.¹⁶ By promoting economic development, these kinds of projects stimulated consumption and thus employment.

New Deal liberals also embraced regulation as a means of addressing market failure. Labor laws addressed market failure in the form of unequal bargaining power by establishing a measure of industrial democracy, but also served to promote consumption.¹⁷ Antitrust laws addressed market failure in the form of anticompetitive business practices.

The pragmatism and empiricism of the New Deal were evident in its foreign economic policy.¹⁸ Roosevelt's initial approaches to foreign economic policy were contradictory and included some experiments with economic nationalism,¹⁹

¹⁶ Jordan A. Schwartz, *The New Dealers: Power Politics in the Age of Roosevelt* (New York: Alfred A. Knopf 1993); Jason Scott Smith argues that Truman's Point Four program of developmental assistance was a legacy of New Deal state capitalism. Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933-1956* (New York: Cambridge University Press, 2006), pages 248-249.

¹⁷ Steve Fraser, "The 'Labor Question,'" in Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order 1930-1980* (Princeton: Princeton University Press, 1989).

¹⁸ Lloyd C. Gardner has argued to the contrary, asserting that "[t]he domestic pragmatism of the New Deal was not repeated in foreign policy matters, though there were tactical shifts from time to time." Gardner, *op. cit.*, page 20. Gardner's account does not address FCN treaties except very briefly.

¹⁹ Patricia Clavin writes in detail about a particular instance of economic nationalist behavior, Roosevelt's decision to torpedo the 1933 World Economic Conference by refusing to agree to a currency stabilization plan, thereby leaving the United States free to allow further devaluation of the dollar. Patricia Clavin, *The Failure of Economic Diplomacy: Britain, Germany, France and the United States, 1931-1936* (New York: St. Martin's Press, 1996). Other accounts of Roosevelt's early economic nationalism include Alfred E., Eckes, Jr., *A Search for Solvency: Bretton Woods and the International Monetary System, 1941-1971* (Austin: University of Texas Press 1975), pages 20-24; John M. Rothgeb, Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington: Congressional Quarterly Press 2001), pages 40-42; Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945-1950* (New York: Columbia University Press, 1985), page 7; Kunz, *op. cit.*, page 11; Dallek, *op. cit.*, pages 35-77; Jeffrey Frieden, "Sectoral conflict and U.S. foreign economic policy, 1914-1940," in G. John Ikenberry, David A. Lake, and Michael Mastanduno, eds., *The State and American Foreign Policy* (Ithaca: Cornell University Press, 1988); and Stephan Haggard,

unsurprising given that Roosevelt had campaigned on the claim that the depression had originated in the United States as result of flawed Republican policies, rather than, as Herbert Hoover claimed, a crisis that had spread to the United States from abroad.²⁰ Roosevelt soon yielded, however, to the free trade policies of Secretary of State Cordell Hull and publicly embraced the view that “a full and permanent domestic recovery” depended upon an increase in U.S. exports.²¹ The critical turning point was Roosevelt’s 1934 decision to seek passage of the Reciprocal Trade Agreements Act, legislation that gave the executive unprecedented authority to negotiate tariff reductions with other countries without the need to obtain Congressional approval of each reduction.²² Able to guarantee that the United States would meet its commitments to tariff reductions, the State Department after passage of the act possessed the bargaining leverage necessary to persuade other countries to lower their tariffs and to open their markets to American exports. Lowered U.S. tariff barriers would enable other countries to earn the dollars needed to purchase U.S. exports.²³

“The Institutional Foundations of Hegemony: Explaining the Reciprocal Trade Agreements Act of 1934,” in Ikenberry *et al*, *op. cit.*

²⁰ Alonzo Hamby, *For the Survival of Democracy: Franklin Roosevelt and the World Crisis of the 1930s* (New York: The Free Press, 2004), page 105.

²¹ Edward S. Kaplan, *American Trade Policy, 1923-1995* (Westport: Greenwood Press, 1996), page 46.

²² The administration’s rationale for this legislation has been described by Harry Hawkins, who had primary responsibility for the negotiation of trade agreements during the 1930s, in Harry C. Hawkins and Janet L. Norwood, “The Legislative Basis of United States Commercial Policy,” in William B. Kelly, Jr., *Studies in United States Commercial Policy* (Chapel Hill: University of North Carolina Press, 1963). The process of legislative enactment is described in Robert A. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy, 1929-1976* (Berkeley: University of California Press, 1980) and Kaplan, *op. cit.*, pages 43-65.

²³ Gardner, *op. cit.*, page 39.

Truman's accession to the presidency upon the death of Franklin Roosevelt in April 1945 in no way diminished the administration's commitment to the New Deal.²⁴ Truman as president "proposed a liberal program to extend the New Deal."²⁵ Indeed, only four days after the surrender of Japan, Truman forwarded a message to Congress outlining his domestic program, a list of twenty-one New Deal programs that had not yet been enacted.²⁶ In January 1949, having just won reelection, Truman announced in his State of the Union address that "every segment of our population and every individual has a right to expect from his government a fair deal."²⁷ Truman's Fair Deal programs, however, consisted largely of the same New Deal measures that he had proposed in 1945²⁸ and, in fact, Truman had not intended to designate the phrase "fair deal" as a nickname for his administration.²⁹

Truman continued to regard his administration as an extension of the New Deal. In his final State of the Union address, delivered on January 7, 1953, Truman reviewed the accomplishments of his eight years in the White House. He did so by

²⁴ Patrick Hearden argues that the same was true with respect to foreign policy. He writes, "The foreign policy of the United States did not undergo any fundamental change when Roosevelt died and Truman moved into the White House. . . . [T]he basic ideas that been institutionalized in the State Department continued to guide the conduct of U.S. diplomacy." Patrick J. Hearden, *Architects of Globalism: Building a New World Order during World War II* (Fayetteville: The University of Arkansas Press, 2002), page 314.

²⁵ Robert H. Ferrell, *Harry S. Truman* (Washington: Congressional Quarterly Press, 2003), page 4. See also Robert J. Donovan, *Conflict and Crisis: The Presidency of Harry S. Truman, 1945-1949* (New York: W. W. Norton & Company, 1977), pages 30, 118.

²⁶ Ferrell, *op. cit.*, page 115.

²⁷ Harry S. Truman, State of the Union Message, January 5, 1949, *quoted in* Ferrell, *op. cit.*, page 115.

²⁸ Ferrell, *op. cit.*, page 115.

²⁹ Robert J. Donovan, *Tumultuous Years: The Presidency of Harry S. Truman, 1949-1953* (New York: W. W. Norton & Company, 1982), page 23.

posing, and then answering, some of the questions he faced at the end of the war.

With respect to domestic policy, he said,

Now let me turn to another question we faced at the war's end. Would we take up again, and carry forward, the great projects of social welfare – so badly needed, so long overdue – that the New Deal had introduced into our national life? Would our government continue to have a heart for the people, or was the progress of the New Deal to be halted in the aftermath of war as decisively as the progress of Woodrow Wilson's New Freedom had been halted after the First World War?³⁰

Similarly, in his final annual Economic Report, made to Congress on January 15, 1953, Truman elaborated upon what had been his philosophy. He explained that “It is the duty of government to help improve the environment in which private enterprise works. . . . [T]he government should place principal reliance upon the careful use of fiscal and credit policy, along with the well established regulatory and protective programs.”³¹ The role of the government was to supervise the market through its power to tax, spend and regulate.

New Deal Liberalism: Constitutional Restraints

As New Deal liberals experimented with various forms of market regulation and state capitalism, they recognized that the U.S. Constitution imposed constraints on the measures that they could employ. Some of these constraints reflected American federalism, a doctrine under which the federal government possesses only those

³⁰ Harry S. Truman, State of the Union Message, January 7, 1953, *quoted in* Louis W. Koenig, *The Truman Administration: Its Principles and Practice* (New York: New York University Press, 1956), page 255.

³¹ Truman's economic report, dated January 15, 1953, is reprinted in Koenig, *op. cit.*, page 197.

powers specified in the Constitution and may not act except pursuant to one or more of those powers,³² while at the same time the states may not legislate in areas reserved to the federal government, either by the Constitution or by Congressional enactment.³³ These federalism based restrictions on Congressional power are the product of the unique distribution of power between the national government and the state governments dictated by the U.S. Constitution. They do not address the relationship between the state and the market, a problem of broader significance for political economy.

The relationship between the state and the market is structured by the U.S. Constitution principally through four clauses: the contract clause, the takings clause, the due process clause, and the equal protection clause. Each of these clauses embodies norms that not only establish a particular relationship between the state and the market, but are central to the American understanding of the rule of law.

The contract clause was the first of these clauses to appear in the Constitution. The clause, set forth at Article I, section 10, provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .” The framers of the Constitution intended the contract clause to protect the security of entitlements, in particular, those created through contract. They included the clause primarily to prevent states from

³² The principle that the federal government is one of limited powers and possesses only those powers that the Constitution confers upon it is confirmed by the Tenth Amendment, which provides that “The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.”

³³ States are prohibited from acting inconsistently with federal legislation by the Supremacy Clause of Article VI, clause 2, which provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land. . . .”

enacting debtor relief laws, although the language of the clause was broad enough to apply to a much wider range of circumstances.³⁴ Early decisions of the Supreme Court read the clause expansively in order to protect the security of investment.³⁵

The Great Depression awakened the Supreme Court to the impact of private contracts on the public sphere. In its 1934 decision in *Home Building & Loan v. Blaisdell*,³⁶ the Supreme Court upheld a Minnesota law that imposed a moratorium on mortgage foreclosures, a clear interference with the creditors' right to receive timely payments on loans and thus, seemingly, a law impairing the obligation of contract. The Court explained, however, that

there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. . . . Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.³⁷

The Supreme Court thus held that the contract clause permitted the state to impair the obligation of contract as long as the impairment, in effect, was a reasonable means of

³⁴ James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), page 45; Douglas W. Kmiec and John O. Malone, "The Contract Clause: A Return to the Original Understanding," *Hastings Constitutional Law Quarterly* 14 (1987), 525-560; Steven R. Boyd, "The Contract Clause and the Evolution of American Federalism, 1789-1815," *William and Mary Quarterly* 44 (1987), 529-48.

³⁵ The classic examples are *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

³⁶ 290 U.S. 398 (1934).

³⁷ *Ibid.*, page 442.

furthering the state's legitimate aims. That is, the state's regulation of contractual obligations and thus its interference with contractual entitlements was subject only to a norm of reasonableness.

The adoption of the Fifth Amendment to the Constitution in 1791 incorporated into the Constitution a second protection for the security of entitlements, the takings clause, a provision that applies to the states as well as to the federal government.³⁸ That clause provided, "nor shall private property be taken for public use, without just compensation." Although the language of the clause seems to address the situation where the state seizes property, the Supreme Court held in 1922 that a mere regulatory act that "goes too far" could also be considered a taking of property that requires payment of compensation.³⁹ Thus, the takings clause imposed an outer limit on the extent of state regulatory power. Left unclear was precisely how far the regulation must go before it would constitute a compensable taking.

The adoption of the Fifth Amendment also incorporated into the Constitution a third protection for property rights, the due process clause. The due process clause provides, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." The adoption of the Fourteenth Amendment imposed a similar restriction on the states. The Supreme Court held in 1856 that the phrase "due process of law" required those procedural rights existing in the common law and

³⁸ The Supreme Court held in 1833 that the takings clause applied only to the federal government. *Barron v. City of Baltimore*, 32 U.S. 243 (1833). Today, however, as a result of the adoption of the Fourteenth Amendment, the clause applies to the states as well. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

³⁹ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

statute law of England.⁴⁰ At a minimum, this required notice and an opportunity to be heard.⁴¹

By the middle of the nineteenth century, members of the Supreme Court had begun to suggest that the due process clause imposed a substantive restriction on legislative enactments,⁴² more specifically, a requirement that legislative action be a reasonable exercise of the state's regulatory power.⁴³ Although initially the Court used this clause to invalidate social reform legislation, most famously a maximum hour law in *Lochner v. New York*,⁴⁴ in the 1930s the Supreme Court adopted a more deferential stance, holding that only the wholly arbitrary legislative act would violate the norm of reasonableness.⁴⁵ This shift reflected the same pragmatism and empiricism that underlay the New Deal's economic policy. Justice Oliver Wendell Holmes had complained in a dissenting opinion in *Lochner* that the Court's opinion invalidating the maximum hour law had rested on "an economic theory which a large

⁴⁰ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

⁴¹ *Hagar v. Reclamation District*, 111 U.S. 701, 708 (1884); *Hurtado v. California*, 110 U.S. 516, 534 (1884).

⁴² The history is traced in John V. Orth, *Due Process of Law: A Brief History* (Lawrence: University Press of Kansas, 2003).

⁴³ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

⁴⁴ 198 U.S. 45 (1905). The Court held that a law prohibiting the employment of bakers in excess of 60 hours a week was not a reasonable health measure and therefore violated the due process clause.

⁴⁵ *United States v. Carolene Prodcuts Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Several scholars have argued that the extent of the shift has been overstated and that the Supreme Court used the doctrine of substantive due process to invalidate legislation before 1937 far less often than is normally believed. See, e.g., Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport: Praeger, 2001). No one denies, however, that, at least where economic regulations were concerned, the Supreme Court by the end of the 1930s invalidated only the wholly arbitrary law.

part of the country does not entertain.”⁴⁶ The Fourteenth Amendment, he argued, did not “enact Mr. Herbert Spencer’s Social Statics.”⁴⁷ Put another way, the Constitution did not incorporate any particular economic orthodoxy. Rather, it permitted the legislature the discretion to experiment with different economic theories. In 1940, echoing Holmes’ comment in his *Lochner* dissent, the Court would note that, in assessing the constitutionality of state action, “It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes.”⁴⁸ That is, the Keynesian economic policies of New Deal liberalism were not intrinsically inconsistent with the requirements of the Constitution.

The Fourteenth Amendment also prohibited any state from denying “to any person within its jurisdiction the equal protection of the laws,” a prohibition that the Supreme Court in the 1950s would also begin to apply to the federal government.⁴⁹ Although the Court initially suggested that this clause prohibited only race discrimination,⁵⁰ it soon was adjudicating the consistency of other kinds of legislative classification with the clause⁵¹ and allowing them as long as they were reasonable.⁵²

⁴⁶ *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting).

⁴⁷ *Ibid.*

⁴⁸ *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

⁴⁹ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁵⁰ *Slaughterhouse Cases*, 83 U.S. 36 (1873).

⁵¹ *See, e.g., Munn v. Illinois*, 94 U.S. 113 (1877) and *Missouri v. Lewis*, 101 U.S. 22 (1880).

Although this development threatened to collapse the norm of nondiscrimination into the norm of reasonableness, the Supreme Court would hold in 1944 that certain discriminations, particularly those involving race, would be subject to the “most rigid scrutiny.”⁵³ Thus, the norm of nondiscrimination retains some independent content. It indicates that certain kinds of discriminations are suspect and cannot be justified merely on a showing of reasonableness. Further, even apart from the concept of suspect classifications, the principle of nondiscrimination represented by the equal protection clause requires a different inquiry than the norm of reasonableness represented by the doctrine of substantive due process. The doctrine of substantive due process requires that a state’s infringement of liberty or property rights be reasonable, while the doctrine of equal protection requires that the state’s different treatment of persons be reasonable. A state in theory might have a reasonable justification for regulating a particular activity (and thus satisfy the norm of reasonableness under the doctrine of substantive due process), but might not have a reasonable justification for regulating a particular activity when some but not other persons engage in the activity (and thus would not satisfy the norm of nondiscrimination).⁵⁴

⁵² David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago: The University of Chicago Press, 1994), page 136. Among these decisions are *Barbier v. Connolly*, 113 U.S. 27 (1885) and *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

⁵³ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁵⁴ For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Sandra Day O’Connor wrote a separate opinion in which she contended that Texas had a reasonable basis for enacting a law

In short, by the 1940s, U.S. constitutional law imposed norms of security, reasonableness, nondiscrimination and procedural due process on the state in its regulation of economic activity. In applying these norms, the Court embraced a pragmatic and empirical philosophy under which it would permit the state to experiment with different forms of economic organization and to intrude upon the private sector as long as regulations were not unreasonable, unreasonably discriminatory, confiscatory or applied without notice and an opportunity to be heard. As I have argued elsewhere, these basic norms – along with the norm of transparency - - are reflections of the basic rule of law notion of a “government of laws and not of men.”⁵⁵

New Deal liberalism thus comprised affirmative and negative dimensions. The state had an affirmative obligation to regulate the economy to ensure full employment.

prohibiting sodomy, but not a reasonable basis for enacting a law that prohibited sodomy only between same sex couples.

⁵⁵ Kenneth J. Vandavelde, “A Unified Theory of Fair and Equitable Treatment,” *New York University Journal of International Law and Politics* 43 (2010), 43-107. The meaning of the “rule of law” is highly contested and the literature on the subject grows rapidly, which only exacerbates the profusion of definitions. Useful surveys of the debate may be found in Jeremy Waldron, “The Concept and Rule of Law,” *Georgia Law Review* 43 (2008) 1 and Brian Z. Tamanaha, “The History and Elements of the Rule of Law, Washington University in St. Louis Legal Studies Research Paper No. 12-02-07 (February 2012). My definition of the rule of law is a relatively minimalist one, intended to include elements that most theorists would agree are embraced within the concept of the rule of law, even if they would include others. It is rooted in a liberal legal tradition that draws on the work of Dicey, Fuller and Raz. See A.V. Dicey, *An Introduction to the Law of the Constitution* (New York: MacMillan, 1959); Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) and Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979). My purpose here, in any event, is not to defend my definition of the rule of law, which, as already noted, I have done elsewhere. Rather, my argument is that my definition encapsulates the core constitutional principles that U.S. postwar FCN treaty negotiators incorporated into the treaties and repeated references to the rule of law by treaty negotiators indicate that they believed that the principles of the treaties were rule of law, as well as constitutional, principles.

At the same time, it must operate within basic rule of law constraints imposed by the Constitution.

These premises of New Deal liberalism would shape the Truman administration's foreign investment policy. As will be seen, the Truman administration's foreign economic policy would be a pragmatic one that sought to project the New Deal onto the international plane. That is, it sought to use both state capitalism and regulated private markets to promote full employment at home and abroad. At the same time, it sought to ensure through treaty negotiations that the regulation of private capital, particularly by foreign governments, would conform to basic rule of law principles, most notably those reflected in U.S. constitutional law.

State Department officials spoke publicly about constitutional principles or the rule of law only occasionally. Nearly all of those involved in drafting and negotiating FCN treaties were professional economists, not lawyers, and they did not think rigorously about the relationship between the Constitution and the rule of law. Rather, policy pronouncements during the Truman years tended to conflate the two.

For example, Truman himself delivered a speech on September 17, 1951, the anniversary of the signing of the Constitution, in which he noted that the Constitution expresses "the higher principles of political life: that all men have certain inalienable rights, that guarantees are set up to provide for the welfare of the people, and that the rule of law stands above government and citizen alike."⁵⁶ Thus, Truman continued,

⁵⁶ "The Constitution – A Means of Correcting Injustices in Human Society," *Department of State Bulletin*, Vol. 25, No. 636, October 1, 1951, page 528.

under the Constitution, “the rule of law is made supreme.”⁵⁷ Yet, Truman also emphasized that the Constitution posed no barrier to the economic policies of New Deal liberalism. “We have,” he noted, “been able to make the necessary reforms without overthrowing the ancient guarantees of our liberty.”⁵⁸

Although they did not engage in extended public discussion of the subject, those involved in setting foreign investment policy through the negotiation of FCN treaties were acutely aware of the limitations on state regulation imposed by constitutional principles. They regarded the FCN treaties as charters that conferred on U.S. investors basic protections under law that were analogous to those that foreign investors in the United States enjoyed under U.S. law, most notably U.S. constitutional law.

For example, Robert Wilson, an FCN treaty negotiator during the Truman administration, after leaving the Department wrote about a “Fourteenth Amendment psychology” that prevailed during the New Deal that prompted the United States to project U.S. constitutional norms onto the plane of international law.⁵⁹ Clair Wilcox, who served as director of the Office of International Trade Policy (which oversaw FCN treaty negotiations) during the early years of the Truman administration, later wrote a book on business regulation entitled *Public Policies Toward Business*. The book’s second chapter, “The Framework of Control,” consisted largely of an extended

⁵⁷ *Ibid.*, page 529.

⁵⁸ *Ibid.*, page 530.

⁵⁹ Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 98.

discussion of U.S. constitutional principles that structure government regulation of business. Wilcox explained that the purpose of the chapter was to identify “the limitations imposed by law” upon the government’s exercise of the methods for controlling business.⁶⁰ After discussing principles relating to the allocation of power within a government – federalism and separation of powers – Wilcox turned to limitations on the power of government to regulate business, specifically, the requirements of procedural due process, substantive due process, equal protection of the laws and payment of compensation for expropriation. He urged the reader to memorize these provisions of the Constitution “for it is upon them that the system of law that governs the public control of business in the United States is based.”⁶¹ Wilcox noted that the requirements of substantive due process and equal protection were, ultimately, protections against arbitrary government action.⁶² He also cited the prohibition on impairment of contracts, but noted that this applied only to action by state governments,⁶³ not the federal government, and, in any event, permitted impairments that were appropriate means to regulating for legitimate ends. He observed that the Constitution “interposed no obstacles to public ownership.”⁶⁴ The government was permitted to “socialize an existing private business whose owners do

⁶⁰ Clair Wilcox, *Public Policies Toward Business* (Chicago: Richard D. Irwin, Inc., 1955), page 23.

⁶¹ *Ibid.*, page 36.

⁶² *Ibid.*, pages 43-47.

⁶³ The Supreme Court has held, however, that contracts are property rights that are protected by the takings clause against repudiation by the state without just compensation. *Lynch v. United States*, 292 U.S. 571 (1934).

⁶⁴ *Ibid.*, page 48

not wish to sell,” although the taking must be for a public use and just compensation must be paid.⁶⁵ Thus, Wilcox had identified four principles imposed by the U.S. constitution, those of procedural due process, reasonableness, nondiscrimination and security, and he saw these as establishing a framework for the regulation of business activity. John Parke Young, the chair of the Foreign Investment Policy Committee during the Truman years, would later write his own book in which he characterized the world as divided “politically and economically into two opposing camps, one based on Western concepts of constitutional organization, economic life, and personal freedom, and the other on Marxian and neo-Marxian political and economic organization and concepts.”⁶⁶ Young too identified the constitutional framework for state regulation as a defining feature of the U.S. economic system.

Significantly, the State Department’s characterizations of the FCN treaties as charters of constitutional or rule of law principles were most visible at precisely the moment when investment related provisions were the focus of attention. As will be seen, the constellation of investment related provisions associated with the reconceptualization of FCN treaties as investment treaties first appeared in treaties concluded early in Truman’s second term, notably those with Uruguay and Ireland. The State Department’s letter transmitting the treaty with Ireland to the president noted that the treaty “is designed to provide a comprehensive, integrated legal framework within which general economic relations between the two countries may

⁶⁵ *Ibid.*

⁶⁶ John Parke Young, *The International Economy* (New York: The Ronald Press Company 4th ed., 1963), page 4.

develop in harmony with modern economic conditions. As an essential part of this framework, it defines in broad and liberal terms the fundamental rights and privileges which nationals and enterprises of each country enjoy in the other”⁶⁷ In testifying before the Senate Foreign Relations Committee on behalf of both treaties on May 4, 1950, Assistant Secretary of State Willard Thorp, observed that “A treaty of this kind is, in effect, a ‘bill of rights’ for the nationals of one country in their dealings with the government, nationals and enterprises of the other.”⁶⁸

The investment related provisions reached their mature form in treaties that were concluded in 1951, by which time State Department references to the constitution and the rule of law were much more explicit. For example, the State Department’s May 1951 letter transmitting the FCN treaty between the United States and Colombia to the president explained that the treaty “broadly endorses standards regarding the protection of persons, their property and interests that reflect the most enlightened legal and constitutional principles.”⁶⁹ The letter further observed that the treaty also reinforces the position of the federal government as the guardian of right of foreigners and foreign enterprises in the United States, “a policy that has developed in conformity with the Constitution and federal law.”⁷⁰ Four months later, the State Department’s letter transmitting the treaty between the United States and Israel to the president again noted that the treaty “formally endorses standards regarding the

⁶⁷ *Department of State Bulletin*, Vol. 22, No. 555, February 20, 1950, page 297.

⁶⁸ *Department of State Bulletin*, Vol. 22, No. 568, May 22, 1950, page 811.

⁶⁹ *Department of State Bulletin*, Vol. 24, No. 618, May 7, 1951, page 746.

⁷⁰ *Ibid.*

protection of persons and their property and interests which reflect enlightened constitutional and legal principles.”⁷¹ That letter added that the treaty provides the “juridical conditions” favorable to private investment designed to promote economic development.⁷² The language from the letters transmitting the FCN treaties with Colombia and Israel appeared yet again in October, when the State Department transmitted to the president the FCN treaty with Denmark.⁷³ The following year, when testifying in support of these treaties before the Senate Foreign Relations Committee on May 9, Deputy Assistant Secretary of State Harold F. Linder explained that the FCN treaty “aims at establishing the rule of law in our every day relations with the country concerned. . . .”⁷⁴

Foreign Policy in the Truman Administration

The FCN treaty program in the Truman administration not only reflected New Deal assumptions about the proper relationship between the state and the market, but also operated within the context of a broader U.S. foreign policy. In the 1950s and 1960s, the prevailing view among U.S. historians was that the foreign policy of the Truman administration was a reaction to Soviet expansionism.⁷⁵ Typical of this

⁷¹ *Department of State Bulletin*, Vol. 25, No. 636, September 3, 1951, page 382.

⁷² *Ibid.*

⁷³ *Department of State Bulletin*, Vol. 25, No. 641, October 8, 1951, page 575.

⁷⁴ *Department of State Bulletin*, Vol. 26, No. 675, June 2, 1952, pages 881-882.

⁷⁵ See, e.g., Louis J. Halle, *The Cold War As History* (London: Chatto & Windus, 1967); Martin F. Herz, *Beginnings of the Cold War* (Bloomington: Indiana University Press, 1966); Steven W. Hook and

approach was Daniel Yergin's *Shattered Peace: The Origins of the Cold War and the National Security State*, which argued that American foreign policy after the war was to protect "national security" against the Soviet Union, a totalitarian aggressor that initiated the Cold War.⁷⁶

Accounts, such as Yergin's, that focus on national security are insufficient for two reasons. First, they often portray the United States at the end of the war as if it were in a defensive posture, merely responding to the threat of Soviet expansionism. Second, they largely disregard economic considerations in postwar foreign policy. The United States, however, was not in a solely reactive stance, nor was it disinterested in foreign economic policy. Rather, at the end of the war, the United States took the initiative to construct a postwar international economic order based on New Deal liberalism.

A focus on containment is particularly inadequate for understanding the postwar FCN treaty program and the investment related provisions of the FCN treaties. The State Department formally launched the FCN program in 1944, during the pendency of World War II, at a time when the United States and the Soviet Union were allies against fascism. U.S. postwar economic policy, including its foreign investment policy, reflected ideas that predated the entry of the United States into the war. As will be seen, the State Department's concern in developing its postwar

John Spanier, *American Foreign Policy Since World War II* (Washington: Congressional Quarterly Press 15th ed., 2000).

⁷⁶ Daniel Yergin, *Shattered Peace: The Origins of the Cold War and the National Security State* (Boston: Houghton Mifflin, 1977).

foreign policy was not containing Soviet expansionism, but preventing the recurrence of another Great Depression or economic circumstances that would lead to another global military conflict. Indeed, immediately following the war, the United States sought to conclude an FCN treaty with the Soviet Union and to accommodate the differences between the planned economy of the Soviet Union and the market economy of the United States. The Cold War would eventually influence the FCN treaty program, but its principal impact was to provide an additional rationale for pursuing a program that had been initiated for other reasons.⁷⁷

Correctives to the traditional history of the Cold War began to appear by the late 1950s. A new group of “revisionist” historians portrayed the United States as the aggressor, although the aggression they attributed to the United States was economic as much as it was political or military. For example, in *The Limits of Power: The World and United States Foreign Policy, 1945-1954*,⁷⁸ Joyce and Gabriel Kolko argued that, at the end of World War II, the United States found itself “without rival, the strongest nation on the globe.”⁷⁹ Further, the United States intended to use its power to accomplish a specific aim, which was “to restructure the world so that

⁷⁷ John Gimbel makes a similar argument about the Marshall Plan. He contends that it began simply as an attempt to promote reconstruction in Europe and in Germany in particular, but that the Cold War provided an added justification that was especially useful in light of divisions within the U.S. government regarding the desirability of German reconstruction. John Gimbel, *The Origins of the Marshall Plan* (Stanford: Stanford University Press, 1976).

⁷⁸ Joyce and Gabriel Kolko, *The Limits of Power: The World and United States Foreign Policy, 1945-1954* (New York: Harper & Row, 1972).

⁷⁹ *Ibid.*, page 1.

American business could trade, operate, and profit without restrictions everywhere.”⁸⁰ This in turn required the creation of a world of politically reliable and stable capitalist nations.

William Appleman Williams, in *The Tragedy of American Diplomacy*,⁸¹ concurred that American foreign policy assumed that American prosperity depended upon ever expanding international trade. He argued that the United States sought to use its awesome military power to promote a “policy of an open door through which American preponderant economic strength would enter and dominate all underdeveloped areas of the world.”⁸² The Soviet Union resisted the open door policy in Eastern Europe, which the United States interpreted as a hostile act, thus triggering the Cold War. Similarly, Thomas McCormick, in *America’s Half Century: United States Foreign Policy in the Cold War and After*,⁸³ argued that the Cold War originated in the refusal of the Soviet Union to be incorporated into the U.S. world system of liberal capitalism.

Revisionist historians provided an important corrective in their demonstration of the importance of economic considerations in American foreign policy and in their depiction of the United States as actively seeking to reshape the world, rather than merely responding to Soviet aggression. Yet, the revisionist account is too crude to

⁸⁰ *Ibid.*, page 2.

⁸¹ William Appleman Williams, *The Tragedy of American Diplomacy*, (New York: Dell Publishing Co., 2d ed. 1972).

⁸² *Ibid.*, page 45.

⁸³ Thomas J. McCormick, *America’s Half-Century: United States Foreign Policy in the Cold War and After* (Baltimore: The Johns Hopkins Press, 2d ed. 1995).

serve as a model for understanding the postwar FCN treaty program. To regard the United States as either completely in thrall to business interests or single-mindedly in pursuit of free market capitalism would oversimplify and thus distort the account that emerges from the archives. First, with respect to persuading other countries to conclude FCN treaties, the United States was quite restrained in the use of its extraordinary economic power, to say nothing of its military power, notwithstanding that these treaties were to provide a legal basis for facilitating and protecting international capital movements. Frequently, the United States met resistance from other countries and often it did not prevail in establishing the norms or institutions that it wished to establish.⁸⁴ Indeed, the account that follows will reflect far more defeats for U.S. negotiators than victories. State Department officials believed that U.S. norms and institutions as embodied in New Deal liberalism should be a model for the world, but they had no intention of using the FCN treaty program to force those norms and institutions on other countries. Second, while the State Department consulted widely with representatives of America's largest corporations and wished to promote the export of U.S. capital, it sometimes rejected the recommendations of the business community and it routinely refused to accede to demands by business groups that it use its economic leverage to compel more treaty concessions from other countries. Third, State Department officials clearly believed that the conclusion of FCN treaties was mutually beneficial to the treaty parties and was justified for that reason.⁸⁵ Where

⁸⁴ Thomas W. Zeiler makes a similar point about postwar U.S. trade policy. Thomas W. Zeiler, *Free Trade Free World* (Chapel Hill: University of North Carolina Press, 1999), page 4.

the other country did not perceive the treaty to be in its best interest, the State Department did not pursue the negotiation. Finally, even where the United States did succeed in negotiating FCN treaties, those treaties were fully consistent with the regulated markets and state capitalism envisioned by New Deal liberalism. To the extent that the United States was promoting the expansion of capitalism, and unquestionably the United States was promoting the expansion of capitalism, it was the capitalism of Franklin Roosevelt and Harry Truman, not that of Calvin Coolidge.⁸⁶

By the 1970s, “post-revisionist” historians were constructing more nuanced accounts of U.S. efforts to spread liberal capitalism, arguing that revisionist history was an oversimplification. For example, John Lewis Gaddis argued that the revisionists “have performed a needed service by stressing the influence of economic considerations on American diplomacy, but their focus has been too narrow: many other forces . . . also affected the actions of Washington officials.”⁸⁷

Many post-revisionists have treated national security concerns as preeminent, while emphasizing the importance of foreign economic policy in promoting national

⁸⁵ Robert R. Wilson, one of those responsible for the negotiation of FCN treaties during the Truman administration, argued that the benefits to a developing country from an increased flow of investment attributable to the conclusion of a treaty might, over the long run, be greater than the benefits of the treaty to the capital exporting country. Robert R. Wilson, “Postwar Commercial Treaties of the United States,” *American Journal of International Law* 43 (1949), 262, 286.

⁸⁶ Michael Parrish notes Coolidge’s “rigid devotion to an unfettered capitalist economy.” Michael E. Parrish, *Anxious Decades: America in Prosperity and Depression, 1920-1941* (New York: W. W. Norton & Company, 1992), page 51. One Coolidge biographer observed that the regulatory state under Coolidge was “thin to the point of invisibility.” Robert H. Ferrell, *The Presidency of Calvin Coolidge* (Lawrence: The University of Kansas Press, 1998), page 72.

⁸⁷ John Lewis Gaddis, *The United States and the Origins of the Cold War, 1941-1947* (New York: Columbia University Press, 2000). The book originally appeared in 1971.

security. For example, Michael Hunt argued in *Ideology and U.S. Foreign Policy*⁸⁸ that Truman's postwar foreign policy was directed at preserving liberty against a military threat from the Soviet Union. The most important expression of that policy was the doctrine of containment, a doctrine that proved effective in Europe. In the developing world, however, European-style containment, involving military protection coupled with economic assistance, would not be sufficient. Developing countries were too poor, too resistant to American political values, and too committed to anti-colonialism. Thus, Washington shifted in the case of the developing world to a policy of promoting economic development, a policy in which "American institutions would provide the models."⁸⁹ Similarly, Melvin P. Leffler, in *A Preponderance of Power: National Security, the Truman Administration, and the Cold War*,⁹⁰ argued that the Truman administration believed that "[i]f friends as well as foes could be convinced of the beneficent character of a liberal capitalist multilateral order," then "the world would enter a new era of peace and harmony" and the United States "would recover its traditional sense of safety from external threats."⁹¹

An account that treats the Cold War as the central concern of foreign policy during the Truman administration, however, is inadequate to illuminate fully the origins of the U.S. postwar FCN treaty program. Even if national security concerns

⁸⁸ Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven: Yale University Press, 1987).

⁸⁹ *Ibid.*, page 160.

⁹⁰ Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War*, (Stanford: Stanford University Press, 1992), page 496.

⁹¹ *Ibid.*

were paramount, the United States nevertheless had a coherent foreign investment policy that ran from the New Deal through the Fair Deal and changed little, even as the United States first allied with the Soviet Union to defeat German aggression and then rebuilt Germany as a bulwark against Soviet expansionism. The postwar FCN treaties cannot be understood except as a reflection of a foreign economic policy that sought to project New Deal liberalism onto the global economy.

One of the few historians to focus attention specifically on U.S. foreign economic policy during the Truman administration was Robert A. Pollard, who concurred with Hunt and Leffler that national security concerns were preeminent, but that economic policy was critical to national security. In *Economic Security and the Origins of the Cold War, 1945-1950*, Pollard argued that the opening of markets abroad “was not foremost in the minds” of policymakers in the Truman administration.⁹² Rather, “the Truman administration subordinated foreign economic policy to the preservation of Democracy in Europe, the support of friendly governments in the Far East, the containment of Soviet power, and other political and strategic aims.”⁹³ Pollard, however, focused primarily on economic assistance programs and largely ignored those aspects of Truman’s foreign economic policy that dealt with the promotion of private trade and investment. Pollard’s discussion of the ITO charter and the FCN treaties was confined to a couple of pages.⁹⁴

⁹² Pollard, *op. cit.* page 4.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, pages 203-205.

The argument by many post-revisionists, such as Hunt, Leffler, and Pollard, that the creation of a capitalist world was a merely a means of achieving national security hardly denies that the spread of U.S. norms and institutions was a major U.S. policy goal. As Michael Hunt contends, the United States set out to create a new postwar order in which “American institutions would provide the model.”⁹⁵ Indeed, the State Department in the Truman years often noted that U.S. economic policy prescriptions were “based on our own experience.”⁹⁶ As the Department explained, “Our foreign economic policies attempt to translate what we have learned into international terms.”⁹⁷

⁹⁵ Emily Rosenberg has argued that America’s quest to spread its norms and institutions to other lands began well before the New Deal, as early as 1890. Emily S. Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (New York: Hill and Wang, 1982). Rosenberg focuses on the spread of a constellation of American economic policies and institutions that she terms “liberal developmentalism” and she concentrates on the decades before the Truman administration. I have carried her argument forward beyond 1945 and argue that in the years following 1945 the United States sought to project New Deal liberalism onto the international plane. Rosenberg’s concept of liberal developmentalism is broad enough to embrace my definition of New Deal liberalism. The principal difference between my account and Rosenberg’s, apart from the fact that I start my account just as she ends hers, is that the norms and institutions on which I focus are those implicated in the American notion of liberal legality, while she addresses principally the economic norms and institutions embraced within liberal developmentalism.

Elizabeth Borgwardt similarly argues that Roosevelt sought to “internationalize the New Deal,” Borgwardt, *op. cit.*, page 3, although, apart from two chapters on the Bretton Woods conference, she addresses primarily U.S. efforts to promote human rights rather than foreign economic policy. Further, to the extent that she does discuss foreign economic policy in those two chapters, she is concerned primarily with economic assistance and Roosevelt’s idea of freedom from want, while my concern is the state as promoter and regulator of private economic activity. Nevertheless, the parallels in our accounts are striking. She also sees postwar foreign policy as an attempt to avoid the mistakes of the interwar years and she too contends that the U.S. negotiators pursued a postwar order in which “ideas about democracy, rights and constitutionalism . . . had a distinctly American flavor,” *Ibid.*, page 15, a contention that parallels my claim that the FCN treaties represented an attempt to promote the U.S. concept of liberal legality.

⁹⁶ Department of State, *Our Foreign Policy, 1952*, Department of State Publication 4466, (Washington: Government Printing Office, 1952), page 47.

⁹⁷ *Ibid.*

The American norms and institutions most directly relevant to the FCN treaty program were those of the American legal system. The negotiation of the FCN treaties was part of a process through which the United States exported its liberal legal culture to the rest of the world.⁹⁸ By the end of the century, the norms that found expression in the investment related provisions of the postwar FCN treaty program would provide a legal framework for the expansion of global capitalism.

⁹⁸ Robert Renbert Wilson, *The International Law Standard in Treaties of the United States* (Cambridge: Harvard University Press, 1953), pages 4, 24; The diplomatic historian John Basset Moore argued that a “conception of legality” had always formed a part of U.S. diplomacy. John Basset Moore, *The Principles of American Diplomacy* (New York: Harper & Brothers, 1918), page 424.

Chapter One

U.S. Postwar Investment Policy

Long before the bombing of Pearl Harbor, the Roosevelt administration was engaged in planning the postwar international economic order.⁹⁹ As officials contemplated this new order, their chief concern was to avoid the mistakes in international economic policy that had contributed to the two great scourges that would dominate the 1930s and 1940s: the economic scourge of the Great Depression and the political-military scourge of the Second World War.¹⁰⁰ As Assistant Secretary of State Will Clayton, described by *Newsweek* as “the principal architect of American postwar foreign economic policy,”¹⁰¹ explained in 1946, “There are only two economic roads open to us. One leads backwards to the tragic mistakes all of us made following the first World War. The other leads forward to peace and prosperity.”¹⁰² This would continue to be a theme of U.S. postwar foreign policy. President Truman

⁹⁹ The Roosevelt administration’s early postwar planning is described in Harley A. Notter, *Postwar Foreign Policy Preparation, 1939-1945* (Washington: Government Printing Office, 1950). As the title of his book implies, Notter traces the beginning of the postwar planning process back to 1939.

¹⁰⁰ The Roosevelt administration had studied the mistakes of interwar economic policy so extensively in the 1930s that, when the postwar planning process began, the administration had a more clearly defined sense of its postwar economic goals than of its postwar political or territorial goals. *Ibid.*, page 23.

¹⁰¹ *Newsweek*, October 27, 1947, “Good-by, Mr. Clayton.”

¹⁰² Quoted in William L. Garwood, Jr., *Will Clayton: Economic Statesman* (Washington: The American Studies Center, 1981), page vi.

would tell the American Legion in 1949 that “[t]he free nations are determined to avoid the mistakes of the past.”¹⁰³

U.S. foreign economic policy in the postwar era was to be based on “enlightened self-interest.”¹⁰⁴ Such self-interest included “the maintenance of international security” to avoid another world war and the attainment within the United States of “the maximum of economic benefits for all of the people” to avoid another Great Depression.¹⁰⁵

As U.S. troops battled in Europe and the Pacific, State Department officials, who had primary responsibility for planning the postwar international economic order,¹⁰⁶ focused particularly on the avoidance of war. The avoidance of war, however, required a prosperous global economy. The Department noted in 1943 that “the past few decades” had demonstrated that “international political stability cannot be hoped for except against a backdrop of reasonably good economic conditions. Countries suffering from economic instability and distress have been fertile ground for the seeds of aggression and for ideas threatening the safety of the world.”¹⁰⁷

¹⁰³ Harry S. Truman, “New Problems in World Prosperity,” August 29, 1949, reprinted in Department of State, *A New Era in World Affairs: Selected Speeches and Statements of President Truman, January 20 to August 29, 1949*, Department of State Publication 3653 (Washington: Government Printing Office, 1949), page 52.

¹⁰⁴ Memorandum In Reply to the President’s Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

¹⁰⁵ *Ibid.*

¹⁰⁶ Patrick J. Hearden, *Architects of Globalism: Building a New World Order During World War II* (Fayetteville: The University of Arkansas Press, 2002), page xi.

¹⁰⁷ Memorandum In Reply to the President’s Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

Roosevelt told Congress in March 1945, “We know that we cannot succeed in building a peaceful world unless we build an economically healthy world.”¹⁰⁸ Thus, U.S. government officials concluded, raising the standard of living¹⁰⁹ in other countries would promote peace.¹¹⁰

The end of the war brought no change in this perspective. Secretary of State Edward R. Stettinius explained on August 21, 1945, that “Peace and prosperity are the twin goals of America’s post-war effort.”¹¹¹ Similarly, in May 1946, Assistant Secretary Clayton, in a speech before the U.S. Chamber of Commerce, proclaimed that the fundamental objective of U.S. foreign policy was to preserve the peace. Peace, however, was most likely when every country enjoined a rising standard of living.¹¹² Article 55 of the United Nations Charter, signed in June 1945, reflected the widespread understanding of the link between higher standards of living and world peace when it declared that “[w]ith a view to the creation of conditions of stability and

¹⁰⁸ *New York Times*, March 27, 1945, page 36. Roosevelt’s belief that peace and prosperity were mutually dependent preceded his election to the presidency. Robert Dallek, *Franklin Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1979), page 20.

¹⁰⁹ Victoria de Grazia has shown how, in the late 1920s, the notion of a “standard of living,” particularly the American standard of living, became especially in Europe the measure of national prosperity. Victoria de Grazia, *Irresistible Empire: America’s Advance through Twentieth-Century Europe* (Cambridge: Harvard University Press, 2005). American policy statements in the 1940s consistently treated a rising standard of living as the goal of economic policy. Roosevelt in his 1944 state of the union address promised “the establishment of an American standard of living higher than ever before known.” Dallek, *op. cit.*, page 444.

¹¹⁰ Letter dated November 20, 1943, from Secretary of State Cordell Hull to President Franklin D. Roosevelt, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I)”.

¹¹¹ *Department of State Bulletin*, Vol. XIII, No. 322, August 26, 1945, page 279.

¹¹² Address by Assistant Secretary of State Will Clayton before the U.S. Chamber of Commerce, May 2, 1946, NARA, Record Group 59, Department of State File No. 611.0031/5-146.

well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . higher standards of living, full employment, and conditions of economic and social progress and development.”¹¹³

Congress was in accord. A 1945 report by a special House of Representatives committee on postwar economic planning noted, “Almost all post-war policies, whether international or domestic, economic or political, will have two general aims: (1) The establishment and maintenance of peaceful conditions, and (2) the provision of a high and expanding level of income and employment both at home and abroad.”¹¹⁴

The view that the United States must act to ensure full employment and a rising standard of living was essentially a projection of the New Deal onto the international economy.¹¹⁵ The New Deal had arisen as a response to the Great Depression, the first of the two great scourges of the 1930s and 1940s. As discussed in the Introduction, the early years of New Deal economic policy had been marked by pragmatism, the willingness to experiment with a variety of sometimes inconsistent approaches in order to bring recovery. By the 1940s, with the war having brought recovery, the central tenet of New Deal liberalism was that the government was responsible for maintaining a full employment economy, in particular through countercyclical spending policies, in accordance with Keynesian economic theory.

¹¹³ Charter of the United Nations, signed June 26, 1945, Article 55, 59 Stat. 1031, T.S. No. 93.

¹¹⁴ *Post-War Economic Policy and Planning*, Sixth Report of the House Special Committee on Post-War Economic Policy and Planning, House Report No. 541, 79th Congress, 1st Session, May 8, 1945, page 8.

¹¹⁵ As Elizabeth Borgwardt writes, Roosevelt “attempted to project an activist regulatory state onto the wider world stage.” Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge: Harvard University Press, 2005), page 70.

Spending might involve consumption expenditures, but it might also include public investment.

Promoting Global Full Employment

In seeking to achieve full employment and a rising standard of living around the world, the Roosevelt administration initially focused its postwar international economic planning on trade policy and on monetary policy. Trade was the central concern of foreign economic policy in the early 1940s. As Leo Pasvolsky, who served as special assistant to Hull during the war and who was extremely close to Hull,¹¹⁶ explained in 1942, international trade “is by far the most important of international economic relationships and is, in fact, basic to all others.”¹¹⁷

Roosevelt had been elected only two years after the enactment of the notorious Smoot-Hawley tariff of 1930. That act raised U.S. tariffs to their highest level since the Civil War, triggered a trade war, and resulted in a 60 percent reduction in world trade between 1929 and 1932.¹¹⁸ U.S. exports fell by 70 percent.¹¹⁹ Roosevelt’s Secretary of State, Cordell Hull, an ardent free trader, argued that reversing the decline

¹¹⁶ John Parke Young Oral History, Harry S. Truman Library.

¹¹⁷ Leo Pasvolsky, “The Problem of Economic Peace After War,” *State Department Bulletin*, Vol. VI, No. 141, March 7, 1942, page 211.

¹¹⁸ Thomas W. Zeiler, *Free Trade Free World: The Advent of GATT* (Chapel Hill: The University of North Carolina Press, 1999), page 7; Robert A. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy, 1929-1975* (Berkeley: University of California Press, 1980), page 79.

¹¹⁹ John M. Rothgeb, Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington: Congressional Quarterly Press, 2001), page 38.

in export trade would contribute importantly to recovery.¹²⁰ As early as 1934, at Hull's urging, Congress approved the Reciprocal Trade Agreements Act, which gave the State Department unprecedented discretion for a period of three years to negotiate treaties to reduce tariffs by as much as 50 percent without Congressional approval.¹²¹ The United States would offer to lower its tariffs in exchange for a reduction of trade barriers by other countries, thereby opening foreign markets to U.S. goods and promoting economic recovery.¹²² The administration regarded the act as "a New Deal for our foreign trade."¹²³

The outbreak of war only strengthened the Roosevelt administration's commitment to free trade. U.S. policymakers believed that the war was in part a result of the protectionist policies of the interwar years¹²⁴ and that free trade would promote peace. Secretary Hull noted that "it is a fact that war did not break out between the United States and any country with which we had been able to negotiate a trade agreement. It is also a fact that, with very few exceptions, the countries with which we

¹²⁰ Rondo Cameron, *A Concise Economic History of the World* (New York: Oxford University Press, 3rd ed. 1997), pages 370-371.

¹²¹ A contemporary account of the enactment of the legislation may be found in Frances Bowes Sayre, *The Way Forward: The American Trade Agreements Program* (New York: The MacMillan Company, 1939), pages 54-59. Sayre served as assistant secretary of state during the Roosevelt administration. A more recent account may be found in Rothgeb, *op. cit.*, pages 43-46.

¹²² David A. Lake, *Power, Protection, and Free Trade: International Sources of US Commercial Strategy 1887-1939* (Ithaca: Cornell University Press, 1989), page 204. David Lake argues that the act was "a tactical and pragmatic response" to retaliation precipitated by the Smoot-Hawley tariff two years before. *Ibid.*

¹²³ October 1941 address by Undersecretary of State Sumner Welles to the National Foreign Trade Convention, *Department of State Bulletin*, Vol. 5, No. 120, October 11, 1941, page. 268.

¹²⁴ On interwar protectionism, see Alfred E. Eckes, Jr., *A Search for Solvency* (Austin: University of Texas Press, 1975), pages 20-22.

signed trade agreements joined together in resisting the Axis. The political line-up followed the economic line-up.”¹²⁵

International monetary policy prior to Roosevelt’s election had been structured around the gold standard.¹²⁶ Under the gold standard, countries fixed the value of their currencies in relation to gold and pledged to redeem their currencies with gold. Accordingly, each unit of currency was the equivalent of a fixed amount of gold and could be exchanged for the gold equivalent. Because every currency on the gold standard had a fixed value in relation to gold, every such currency also had a fixed value in relation to every other such currency. Currencies could be readily exchanged with no risk of loss attributable to changes in exchange rates. This system thus promoted stable exchange rates between currencies as well as capital mobility. Stable exchange rates promoted international trade by eliminating the risk that the exchange rate would change between the time when the parties agreed to a transaction and payment was made.

In September 1931, Great Britain, deprived of reparation payments from a financially precarious Germany, had abandoned the gold standard in order to obtain flexibility to devalue the pound and thereby lower the price of British goods in international markets and increase its exports. Other countries soon followed Britain’s example, enabling them to engage in competitive devaluations, and, by April 1932,

¹²⁵ Cordell Hull, *Memoirs of Cordell Hull*, Vol. I (New York: MacMillan, 1948), page 365.

¹²⁶ Harold James, *International Monetary Cooperation Since Bretton Woods* (Washington: International Monetary Fund, 1996), pages 14-17.

forty-one countries effectively were off the gold standard.¹²⁷ A major problem with the gold standard was that much of the foreign investment of the 1920s had been portfolio investment that moved easily between countries.¹²⁸ If a country during the depression lowered interest rates to spur recovery, capital would flee in search of higher returns. Capital flight would drain the country of gold, fueling deflation, which would be ruinous to debtors with fixed payment obligations and deepen the depression. If the same country raised interest rates to attract capital and thus restore its gold reserves, the higher interest rates would increase the cost of investment and stall economic recovery. Thus, those countries that remained on the gold standard the longest generally suffered the most during the depression.¹²⁹

While the State Department had primary responsibility for foreign trade policy, the Treasury Department had primary responsibility for monetary policy. As early as 1941, Harry Dexter White, an assistant to U.S. Treasury Secretary Henry Morgenthau,¹³⁰ and John Maynard Keynes, an advisor to the British Treasury, began

¹²⁷ Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge: Harvard University Press, 1974), page 169.

¹²⁸ Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945-1950* (New York: Columbia University Press, 1985), page 26.

¹²⁹ Economic historians still debate the causes of the Great Depression, but few appear to doubt that the gold standard was an aggravating factor. The contribution of the gold standard to the Great Depression is discussed in detail in Barry Eichengreen, *Golden Fetters: The Gold Standard and the Great Depression, 1919-1939* (New York: Oxford University Press 1992). For other accounts of the adverse impact of the gold standard on recovery, see Charles P. Kindleberger, *The World In Depression, 1929-1935* (Berkeley: University of California Press, Revised and Enlarged Edition, 1986) and Ben S. Bernanke, *Essays on the Great Depression* (Princeton: Princeton University Press, 2000).

¹³⁰ Morgenthau told his staff that White was to be treated as if he held the status of assistant secretary and that White was responsible for all matters within the Treasury that bore on foreign relations,

to exchange proposals for a system that would replace the gold standard after the war.¹³¹ White's proposal was entitled "A New Deal in International Economics."¹³²

Keynes and White believed that two defining features of the gold standard – rigid exchange rates and capital mobility – had aggravated the economic consequences of the Great Depression.¹³³ Indeed, Keynes believed that "capital flight had been the major international interwar problem."¹³⁴ He also believed that "control of capital movements, both inward and outward, should be a permanent feature of the post-war system."¹³⁵ White independently had come to believe that international capital flows must be regulated. He had written in his doctoral dissertation that "some measure of the intelligent control of the volume and direction of foreign investments is desirable."¹³⁶ White and Keynes, however, meant to regulate, not halt, international capital movements.¹³⁷

although White was never formally appointed to the position of assistant secretary. David Rees, *Harry Dexter White: A Study in Paradox* (New York: Coward, McCann & Geoghegan, 1973), pages 131-2 .

¹³¹ Alan P. Dobson, *The Politics of the Anglo-American Economic Special Relationship, 1940-1987* (New York: St. Martin's Press, 1988), pages 48-59.

¹³² Garwood, *op. cit.*, page 21.

¹³³ Harold James argues that by the early 1940s a "consensus" had emerged among economists that the short term capital flows of the 1920s and 1930s were an important contributing factor to the severity of the Great Depression. James, *op. cit.*, pages 37-38.

¹³⁴ *Ibid.*, page 38. Keynes' thought during this period is exhaustively described in Robert Skidelsky, *John Maynard Keynes: Fighting for Britain, 1937-1946* (London: MacMillan, 1946).

¹³⁵ Alfred E., Eckes, Jr., *A Search for Solvency: Bretton Woods and the International Monetary System, 1941-1971* (Austin: University of Texas Press, 1975), page 68. According to Robert Skidelsky, Keynes believed that "[n]othing is more certain than that the movement of capital funds must be regulated." Skidelsky, *op.cit.*, page 205.

The views of White and Keynes prevailed in Washington and London and, by the end of the war, the State Department acknowledged that a return to rigid exchange rates and “complete freedom of international capital movements” was “neither feasible nor desirable.”¹³⁸ The Roosevelt administration sought an international economic order designed to promote free trade, but to regulate capital movements.¹³⁹

In July 1944, the United Nations Monetary and Financial Conference met at the Mount Washington Hotel in Bretton Woods, New Hampshire, and adopted a plan, based predominantly on White’s proposals, that was intended to address both the problems of rigid exchange rates and free capital movements.¹⁴⁰ Under that plan, the U.S. dollar would have a fixed value expressed in terms of gold and all other currencies would have a fixed value expressed in terms either of gold or the U.S. dollar. As it would happen, members other than the United States would choose to fix the value of their currencies in terms of the U.S. dollar. The Bretton Woods conference created the International Monetary Fund (IMF), which lent money to

¹³⁶ Harry Dexter White, *The French International Accounts: 1880-1913* (Cambridge: Harvard University Press, 1933), pages 311-312. White’s doubts about the desirability of free capital movements dated from his work on his doctoral dissertation. Eckes, *op. cit.*, page 46. The context of White’s dissertation is sketched in Rees, *op. cit.*, pages 33-36. See also James M. Boughton, “Why White, Not Keynes? Inventing the Postwar International Monetary System,” IMF Working Paper, WP/02/52 (Washington: International Monetary Fund, 2002), page 10.

¹³⁷ Boughton, *op. cit.*, page 10

¹³⁸ “Questions and Answers on Foreign Economic Problems and Policies,” attachment to *Current Economic Developments*, July 9, 1945, NARA, Record Group 59, Department of State Lot Files. White’s doubts about the desirability of free capital movements dated from his work on his doctoral dissertation. Eckes, *op. cit.*, page 46.

¹³⁹ Pollard, *op. cit.*, page 26.

¹⁴⁰ On the Bretton Woods conference generally, see James, *op. cit.*, and Eckes, *op. cit.*

governments needing financing to maintain the value of their currencies against short term pressures, such as in the case of a temporary decrease in exports. If a country found that its currency was fundamentally under or overvalued, then with the approval of the IMF the country could modify the exchange rate. This system would stabilize exchange rates, while permitting greater flexibility than had the gold standard.

The plan adopted at Bretton Woods also contemplated that countries would be permitted to limit capital mobility. Article VI(3) of the IMF Articles of Agreement, explicitly authorized members to impose exchange controls with respect to the transfer of capital. That is, members were permitted to prohibit a foreign investor from withdrawing capital from the host country.

The treatment of currency transfers for capital transactions differed from the treatment of currency transfers for current transactions, *i.e.*, transactions related to trade. Article VIII of the IMF Articles of Agreement prohibited members from imposing exchange controls on current transactions, as opposed to capital transactions, except with the approval of the IMF. Exchange controls had functioned during the interwar years as a means of controlling imports (by limiting access to foreign currencies needed to purchase imports). One goal of the IMF Articles of Agreement was to foreclose that possibility, at least over time, by ensuring the availability of foreign currencies (often referred to as “foreign exchange”) for trade transactions. In other words, the IMF agreement sought to promote free trade in goods, but not the free mobility of capital.

In the period immediately after the war, most countries had serious foreign exchange shortages and thus convertibility even for current transactions was difficult for most countries to achieve. In fact, at the end of the war, only the U.S. dollar was freely convertible.¹⁴¹ Accordingly, Article XIV of the IMF Articles of Agreement allowed members to defer their acceptance of the Article VIII obligation with regard to current transactions during a transitional period.

As the war drew to a close, memories of the Great Depression haunted Americans.¹⁴² U.S. policymakers feared that the end of the war, rather than bringing the full employment and rising standards of living sought by U.S. foreign economic policy, would plunge the United States back into another Great Depression,¹⁴³ a fear shared by many other countries.¹⁴⁴

The problem was overproduction (or its correlate, underconsumption). In 1940, 45 million Americans had been employed. By 1943, as a result of increased production for the war, the American workforce had grown to 60 million. Although some of these workers, such as women “return[ing] to their homes,”¹⁴⁵ would leave

¹⁴¹ Eckes, *op. cit.*, page 226.

¹⁴² Robert J. Donovan, *Conflict and Crisis: The Presidency of Harry S. Truman, 1945-1949* (New York 1977), pages 107-108. Donovan notes that some 10 million people had been unemployed as recently as 1939.

¹⁴³ Alan Lawson, *A Commonwealth of Hope: The New Deal Response to Crisis* (Baltimore: The Johns Hopkins University Press, 2006), page 238. Lawson describes a “widespread expectation” that the depression would return once the “artificial prosperity” induced by war ended.

¹⁴⁴ Economic Report to the President, *Department of State Bulletin*, Vol. XVI, No. 394, January 19, 1947, page 126.

¹⁴⁵ Memorandum In Reply to the President’s Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

the workforce at the end of the war, the avoidance of serious economic and social problems after the war would require the continued employment of some 56 to 57 million people, or about 30 percent more than were employed at the beginning of the war.¹⁴⁶ To keep this substantially larger number of people employed would require the production of far more goods and services than the American people could consume. Thus, the only way to avoid a serious economic crisis was to create an export market for surplus U.S. goods and services. As James F. Byrnes, then the director of war mobilization, wrote in January 1945, “We must export goods if we are to provide jobs for all of our workers.”¹⁴⁷ Indeed, exports were twice as important to the U.S. economy at the end of the war as they were at the beginning.¹⁴⁸

Creating an export market for the U.S. surplus, in turn, necessitated the lowering of trade barriers in other countries. As already noted, the promotion of liberalized trade had been Roosevelt administration policy since the adoption of the Reciprocal Trade Agreements Act in 1934. The reduction of trade barriers through bilateral negotiations with one country at a time, however, was a slow process. By 1943, the United States and Great Britain were engaged in extensive discussions about the creation of an international trade organization that would facilitate multilateral negotiations for the reduction of trade barriers.¹⁴⁹ Under that process, a country would lower trade barriers to all participants in the multilateral process simultaneously.

¹⁴⁶ *Ibid.*

¹⁴⁷ *New York Times*, January 2, 1945, p. 12.

¹⁴⁸ Frieden, *op. cit.*, page 262.

The Role of International Investment

Simply reducing legal barriers to trade, however, was not enough to create an export market for the U.S. surplus. Other countries would not be able to purchase U.S. exports unless they had access to U.S. dollars.¹⁵⁰

Lowering U.S. trade barriers would address that problem to some extent because it would allow other countries to sell their goods to the United States and thereby earn dollars needed to purchase U.S. exports. The productive capacity in other countries, however, was sufficiently small that these countries would not be able to sell enough to the United States in the foreseeable future to acquire all of the dollars needed to purchase the entire U.S. surplus. For example, in 1947, U.S. exports totaled \$19 billion, while U.S. imports equaled only \$8 billion, giving the United States an \$11 billion trade surplus.¹⁵¹ For other countries to purchase that surplus, they would need to acquire \$11 billion from some source other than exports to the United States.

One source from which they could obtain access to U.S. dollars was outward U.S. foreign investment. U.S. investors had invested abroad since colonial times, but the amounts were small until the 1890s. Thereafter, outward private foreign investment grew rapidly, from less than \$1 billion in 1897 to more than \$15 billion in

¹⁴⁹ These are described in Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order* (New York: Columbia University Press, 1980), pages 101-109.

¹⁵⁰ Memorandum In Reply to the President's Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "Foreign Investment Policy (I)".

¹⁵¹ *Ibid.*, page 11.

1929,¹⁵² an amount that was about evenly divided between direct and portfolio investment.¹⁵³ World War I had stimulated U.S. outward investment, especially outside Europe in areas where European businesses previously had been dominant, and by the end of the war the United States, for the first time, was a creditor nation.¹⁵⁴ The war years had also witnessed U.S. legislative enactments to encourage outward foreign investment, including the approval in 1918 of foreign tax credits and the enactment in 1919 of the Edge Act, which authorized the creation of federally chartered corporations to engage in international banking.¹⁵⁵ U.S. investment continued to grow in the 1920s, more than doubling between 1919 and 1929.¹⁵⁶ By the late 1920s, many U.S. foreign investors had become multinational companies.¹⁵⁷ Ironically, U.S. expansion abroad occurred during the 1920s despite the fact that Herbert Hoover as secretary of commerce from 1921 to 1928 and then as president from 1929 to 1932 had disfavored outward U.S. manufacturing investment, although he had applauded U.S. foreign investment in raw materials.¹⁵⁸ And, in fact, much of

¹⁵² Cleona Lewis, *America's Stake in International Investment* (Washington: The Brookings Institution, 1938), page 425.

¹⁵³ *Ibid.*, page 426. Direct investment is investment that is made for the purpose of controlling the asset in which the investment is made, such as majority stock ownership in a company. Portfolio investment is investment that is made for the purpose of earning a return or diversifying risk, but not controlling the asset in which the investment is made, such as in the case of stock ownership too small in amount to be controlling or bonds purchased from an enterprise.

¹⁵⁴ Wilkins, *op. cit.*, pages 8, 29.

¹⁵⁵ *Ibid.*, page 50.

¹⁵⁶ Lewis, *op. cit.*, page 425.

¹⁵⁷ Wilkins, *op. cit.*, page 138.

¹⁵⁸ *Ibid.*, pages 52-53.

the expansion of U.S. manufacturing investment occurred as the result of reinvested earnings while U.S. investment in mining and petroleum reflected new money.¹⁵⁹ In any event, the Great Depression sharply reduced the amount of U.S. private foreign investment after 1929 and by 1940 U.S. outward investment still had not returned to 1929 levels.¹⁶⁰

At the end of the war, U.S. policymakers recognized that U.S. capital was available and could be profitably employed abroad. As a 1945 House of Representatives report on postwar planning noted, following the war, the United States would have an “enormous” surplus of capital¹⁶¹ and returns on investment would be higher abroad than in the United States because of the relative scarcity of capital in many foreign countries.¹⁶²

Further, outward U.S. investment could benefit both the United States and the capital importing country. As the same House report observed, “After the war, extensive foreign investments by the United States will have important benefits both to the United States and to the rest of the world. The scarcity of capital in undeveloped regions and in countries devastated by the war will provide a large opportunity for American investments. If loans are made on a productive basis, both the lending nation and the borrowing nations will benefit from the resulting industrial

¹⁵⁹ Lewis, *op. cit.*, page 428.

¹⁶⁰ Wilkins, *op. cit.*, pages 182, 205.

¹⁶¹ *Post-War Economic Policy and Planning*, Sixth Report of the House Special Committee on Post-War Economic Policy and Planning, House Report No. 541, 79th Congress, 1st Session, May 8, 1945, page 19.

¹⁶² *Ibid.*

expansion.”¹⁶³ The benefit to the United States would come from increased exports made possible by the money invested abroad and from higher returns on the investments. Other countries would benefit from industrial development. Further, the diversification of their economies would insulate them to some extent from the impact of fluctuations in commodity prices.

The administration concurred in the value of international investment flows. The Executive Committee on Economic Foreign Policy (ECEFP), an interdepartmental group that Roosevelt appointed in April 1944 as the primary planning and coordinating group for foreign economic policy,¹⁶⁴ believed that a properly conceived program of foreign investment would be “of substantial benefit” to the United States. It would contribute to employment and a high level of national income. It would provide an outlet for surplus equipment and excess capacity, thereby facilitating the adjustment to a peacetime economy. It would restore European productivity and international trade and promote international security.¹⁶⁵ The State Department further noted that, as a result of increased efficiency in the capital importing countries, outward U.S. foreign investment would allow the United States to acquire imports at a reduced cost.¹⁶⁶

¹⁶³ *Ibid.*, page 2.

¹⁶⁴ The origins of the ECEFP are described in Notter, *op. cit.*, pages 218-219.

¹⁶⁵ Executive Committee on Economic Foreign Policy, Memorandum headed “Subcommittee on Foreign Investment Policy,” dated June 26, 1945, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Documents.”

¹⁶⁶ Memorandum In Reply to the President’s Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

Thus, the administration recognized that prosperity in the United States was dependent upon prosperity in the rest of the world. As Assistant Secretary of State Will Clayton explained in a May 1946 address before the American Chamber of Commerce, “It is essential that American capital, private and public both, make a major contribution over a long time to the increase of production and wealth in many countries. This is true, both because we are able to do it (and almost the only country that is) and because the peace and well-being of the world demand it. We cannot long continue to enjoy great wealth and prosperity, with most of the rest of the world lying prostrate from the war.”¹⁶⁷

The American business community understood this as well. For example, the Final Declaration of the 1946 National Foreign Trade Convention, an annual meeting of U.S. business executives, proclaimed that “[t]he economic well-being of the United States is bound up inextricably with the economic well-being of the world as a whole.”¹⁶⁸

Private investment in some cases could be supplemented by public investment. Here, the administration drew upon the New Deal’s experience with public capital formation.¹⁶⁹ The Bretton Woods conference called for the establishment of an

¹⁶⁷ Address by Assistant Secretary of State Will Clayton before the U.S. Chamber of Commerce, May 2, 1946, NARA, Record Group 59, Department of State File No. 611.0031/5-146.

¹⁶⁸ National Foreign Trade Council, *Draft Final Declaration of the Thirty-Third National Foreign Trade Convention, 1946*, page 4, NARA, Record Group 59, Department of State File No. 611.0031/11-1446.

¹⁶⁹ On the importance of state capitalism to the New Deal, see Jordan A. Schwartz, *The New Dealers: Power Politics in the Age of Roosevelt* (New York: Alfred A. Knopf 1993) and Jason Scott Smith,

International Bank for Reconstruction and Development (IBRD). The bank would provide public capital for the reconstruction of Europe and the development of economically underdeveloped countries. Such a bank was necessary because private investors were reluctant to invest in public works projects, such as railroads and ports, that would not generate a return for a long period of time.¹⁷⁰ The bank could finance public works projects that were necessary to attract private capital but that would be difficult to finance through private investment. Thus, the bank acted as a supplement to private investment, leaving to private investment the primary role in promoting capital formation abroad.¹⁷¹

The Need to Promote and Regulate International Investment

Two important problems, however, attended efforts to promote outward private foreign investment. First, as State Department officials openly acknowledged, international investment in the past had not always operated to the benefit of the capital importing country.¹⁷² New Deal liberals recognized that private sector activity has public consequences and believed that these public consequences justified the

Building New Deal Liberalism: The Political Economy of Public Works, 1933-1956 (New York: Cambridge University Press, 2006).

¹⁷⁰ Frieden, *op. cit.* at 258.

¹⁷¹ David A. Baldwin, *Economic Development and American Foreign Policy, 1943-1962* (Chicago: The University of Chicago Press, 1966), page 22.

¹⁷² Memorandum In Reply to the President's Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "Foreign Investment Policy (I)." Economist Cleona Lewis in a widely cited study made the same observation. Cleona Lewis, *The United States and Foreign Investment* (Washington: The Brookings Institution, 1948), page 1.

regulation of private activity.¹⁷³ Governments would need to regulate international investment flows to ensure that they operated to the benefit of both the capital exporting and the capital importing countries.

Much of the discussion in the mid 1940s focused on the problem of avoiding the undesirable consequences of foreign investment. In attempting to anticipate some of these consequences, the State Department looked particularly to the experience of British investment from 1815 to 1914 and again during the 1920s.¹⁷⁴ The State Department found that the behavior of British investors largely had been guided by profit considerations and that such investment had not always contributed as much as it might have to the economic development of the host country. For example, the benefits of increased productivity sometimes were not widely diffused, the local economies failed to develop in a balanced way, and local entrepreneurship was restricted. Similarly, other commentators noted that much of the international lending in Europe during the 1920s provided new capital in the short run, but drained the economies of foreign exchange in the long run as the amount of money paid to foreign lenders in principal and interest exceeded the original loan amount.¹⁷⁵ The Department noted that “[s]ome of these obstacles to development might have been

¹⁷³ Note in this regard the discussion of *Home Building & Loan v. Blaisdell* in the Introduction.

¹⁷⁴ Memorandum headed “British Foreign Investment Experience,” dated May 24, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

¹⁷⁵ Sir Arthur Salter, *Foreign Investment* (Princeton: Princeton University Press, 1951), pages 19, 25, 34.

eliminated by a considered investment policy” that took account of factors other than prospective profits.¹⁷⁶

Apart from the specific case of British foreign investment, State Department policymakers saw that a variety of other problems sometimes occurred.¹⁷⁷ For example, a foreign investor might have established an investment in a host country, following which the host country raised tariff barriers to protect the investment against competition. The investment thus may have failed to lower consumer prices in the host country, while the capital exporting country may have lost an export market. Loans to foreign countries were sometimes used in ways that failed to increase productivity, thus leaving the host country with an increased debt service that was not offset by a higher income. Further, if the debt was denominated in U.S. dollars, then any depreciation in the currency of the borrower would result in an even greater burden of debt service. Foreign investors tended to abandon countries precisely when their economies were faltering, thus aggravating the impact of a recession.

Outward foreign investment could adversely affect the political relations between the capital exporting and importing countries.¹⁷⁸ Foreign investors sometimes had acted in such a way as to raise claims of exploitation or interference in local affairs. Outward foreign investment also could imperil relations with countries where nationalism was on the rise. As the State Department told Franklin Roosevelt

¹⁷⁶ Memorandum headed “British Foreign Investment Experience,” dated May 24, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

¹⁷⁷ Memorandum In Reply to the President’s Letter of April 9, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

¹⁷⁸ *Ibid.*

in 1943, it was necessary to “so organiz[e] the flow of investment funds that they shall not in themselves become a source of international economic friction.”¹⁷⁹

For these reasons, the State Department believed, the United States must adopt safeguards to secure the maximum benefit from foreign investment and the minimum detriment. The United States government “must recognize its responsibilities over the entire range of foreign investment.”¹⁸⁰ In best Keynesian fashion, the United States should encourage countercyclical flows of investment to smooth the effects of booms and depressions. Investment should take the form of equity rather than debt denominated in foreign currency. Cartels and monopolies should be controlled, adequate labor standards should be encouraged, and agreements should be concluded to ensure nondiscriminatory treatment of foreign investment. Adequate machinery should be developed for collaboration between the United States government and U.S. foreign investors.

State Department officials even contemplated the creation of an international organization to regulate private investment flows. In December 1943, John Parke Young, an economist in the State Department’s Division of Financial and Monetary Affairs, circulated a proposal for a United Nations Investment Board as an alternative to the Treasury Department’s proposal for an International Bank for Reconstruction and Development.¹⁸¹ The board was to serve a number of purposes, the first of which

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

was to ensure that capital exported “is not for undesirable purposes, especially from the standpoint of international security and economic stability.”¹⁸² This included the discouragement of excessive borrowing and speculation.¹⁸³ At the same time, the board would actively promote desirable investment by distributing information and bringing borrowers and lenders together.

Although the proposal for a U.N. Investment Board was soon abandoned in favor of the Treasury Department proposal, the Roosevelt administration recognized that the United States would have a responsibility to regulate capital movements. For example, a June 1944 memorandum transmitting the ECEFP’s recommendations to Roosevelt explained that U.S. foreign economic policy included “the elimination of unnecessary obstacles to the flow of private foreign investment and the regulation of private foreign investment to the extent necessary to eliminate abuses detrimental to international relations.”¹⁸⁴

As suggested by the ECEFP’s memorandum, the second problem that attended efforts to promote outward foreign investment was that private investors were often

¹⁸¹ John Parke Young Oral History, Harry S. Truman Library; Memorandum headed “A United Nations Investment Board,” dated December 7, 1943, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “Foreign Investment Policy (I).”

¹⁸² *Ibid.*

¹⁸³ Economist James Meade, who would win the Nobel Prize in economics in 1977 for his work on the theory of international trade and capital movements, argued in 1940 that “short-term speculative movements of capital serve no useful purpose.” J. E. Meade, *The Economic Basis of a Durable Peace* (New York: Oxford University Press, 1940), page 110. He also acknowledged, however, that in some cases “legitimate investments” might be difficult to distinguish from purely speculative ones. *Ibid.*

¹⁸⁴ NARA, Record Group 59, Department of State File No. 611.0031 Executive Committee/826, excerpted in *Foreign Relations of the United States*, Vol. II (Washington: Government Printing Office 1967), pages 44-45.

reluctant to invest abroad because the risks could be high and the returns in the past had been disappointing. U.S. foreign direct investors in some cases, particularly in the mining and petroleum industries, had enjoyed “spectacular gains.”¹⁸⁵ Investments in manufacturing had grown steadily, largely, as already noted, through the reinvestment of earnings. Portfolio investors, by contrast, had fared poorly, earning a lower return on average from foreign investment than they would have received by investing in U.S. government bonds.¹⁸⁶

The poor performance of these investments was attributable in part to increasingly autarkic foreign economic policies of the 1920s and 1930s, when countries embraced high tariffs, prohibitions on inward foreign investment, and controls on currency transfers, and in part to more recent events, including a global depression and a world war.¹⁸⁷ Harry Dexter White had noted during the planning for the IBRD that private capital “has suffered too many losses. It has been too severely discouraged by depreciating currencies, exchange controls and defaulting governments, to justify the hope that investors will lend large sums to a foreign country.”¹⁸⁸

¹⁸⁵ Lewis, *op. cit.*, page 427.

¹⁸⁶ *Ibid.*, page 436.

¹⁸⁷ Executive Committee on Economic Foreign Policy, Memorandum headed “Subcommittee on Foreign Investment Policy,” dated June 26, 1945, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Documents.”

¹⁸⁸ Eckes, *op. cit.*, page 52.

In the postwar era, policymakers believed that the single greatest deterrent to foreign investment was the risk of currency exchange controls.¹⁸⁹ Countries with insufficient reserves of foreign currency, which after the war included virtually all countries, typically prohibited private parties from exchanging local currency for foreign currency so that foreign currency reserves could be used to purchase necessary imports, such as fuel or food. A foreign investor who earned profits in the local currency could be prevented by exchange controls from transferring those profits into the investor's own currency and repatriating them for use in the investor's home country. Similarly, if the foreign investor chose to liquidate an investment, exchange controls could prevent the investor from obtaining the foreign currency needed to repatriate the liquidation proceeds. A potential investor who knew that capital invested in another country could not be repatriated and could not generate a return usable outside the host country would be unlikely to invest in that country.

The postwar era also featured risks to the security of the investment. The greatest of these was the risk of expropriation.¹⁹⁰ Other risks included physical destruction from war or civil disturbance and harm from discriminatory legislation.¹⁹¹

Policymakers believed that reviving private investment flows necessitated government action to minimize these risks.¹⁹² The government action most desired by

¹⁸⁹ Transcript of Proceedings, Meeting of Economic Consultants on Point Four Program, dated April 8, 1949, page 81, NARA, Record Group 59, Department of State File No. 800.50T.A./4-849.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

investors was the conclusion of treaties to create a favorable legal environment for investment.¹⁹³

Developing a Foreign Investment Policy

As the war drew to a close, the ECEFP decided that its policy of both promoting and regulating outward investment required greater elaboration. On July 10, 1945, it created a Foreign Investment Policy Committee to prepare a formal statement of U.S. foreign investment policy.¹⁹⁴ The State Department had been under pressure for several years to produce a foreign investment policy and Franklin Roosevelt, who died only weeks before the committee came into existence, had been especially interested in the development of such a policy.¹⁹⁵ As the United States began to encourage private foreign investment, a formal government policy was desirable to provide guidance to officials responsible for that encouragement.¹⁹⁶ The committee would comprise representatives of the Departments of State, Treasury,

¹⁹² Executive Committee on Economic Foreign Policy, Memorandum headed, "Subcommittee on Foreign Investment Policy," dated June 26, 1945, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

¹⁹³ Transcript of Proceedings, Meeting of Economic Consultants on Point Four Program, dated April 8, 1949, page 112, NARA, Record Group 59, Department of State File No. 800.50T.A./4-849.

¹⁹⁴ Memorandum from Committee on Foreign Investment Policy to the Executive Committee on Economic Foreign Policy, dated July 8, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

¹⁹⁵ Memorandum dated June 17, 1946, from Mr. Lathringer to Mr. Clayton, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

¹⁹⁶ Executive Committee on Economic Foreign Policy, Memorandum headed, "Subcommittee on Foreign Investment Policy," dated June 26, 1945, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

Commerce and Labor, the Federal Reserve Bank, the Securities and Exchange Commission, and the Export-Import Bank.¹⁹⁷ Almost immediately, it began to consider ways in which the U.S. government might control investment flows to ensure that they promoted productivity without damaging the foreign relations of the United States.¹⁹⁸

Even before the committee undertook to draft a formal statement of U.S. foreign investment policy, other agencies were already deliberating about discrete aspects of the problem of how best to regulate capital movements. The State Department's Division of Financial and Monetary Affairs, for example, had produced a policy statement on the subject in 1944.¹⁹⁹ According to that policy statement, such investment should genuinely improve the productive capacity of the host state and generate enough foreign exchange to pay for the returns on the investment, so that it did not result in a net foreign exchange loss for the host country. Foreign investment should not be protected by tariffs or other trade restrictions, which were *prima facie* evidence that the investment was not an efficient one. Foreign investments should avoid a monopolistic or privileged position and should adopt adequate labor standards, defined as those comparable to the most advanced standards practiced by similar

¹⁹⁷ Memorandum dated June 17, 1946, from Mr. Lathringer to Mr. Clayton, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

¹⁹⁸ Foreign Investment Policy Committee Minutes, February 21, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "FIP Agenda & Lists."

¹⁹⁹ Department of State Division of Financial and Monetary Affairs, "Considerations Affecting Private Direct Investment in Foreign Countries," July 26, 1944, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Docs. 1-4."

enterprises in the country. Equity investment was preferable to debt investment because it permitted greater flexibility to the host country and was safer and more lucrative for the investor. Local participation in the investment was often desirable, particularly where nationalistic sentiment was strong. Foreign investment should not conflict with local mores and should be consistent with the general foreign policy of the United States.

A study prepared by the ECEFP in January 1945 urged that foreign investors take account of the foreign exchange position of the host country. According to the study, the Departments of Commerce and State should use their good offices to dissuade investors from making investments inconsistent with the foreign economic policy of the United States. In deciding whether to make representations on behalf of U.S. investors, the State Department should consider the consistency of the investment with U.S. policy and the ethical character of the investor's business practices. The United States should discourage efforts by U.S. investors to gain monopolistic or other special privileges. Insofar as is feasible, investments should be undertaken in cooperation with local investors.²⁰⁰

Despite their belief that foreign investment should be controlled to ensure that it benefited home and host countries, U.S. government agencies recognized the limitations in their own ability to evaluate the impact of specific investments.²⁰¹

²⁰⁰ Executive Committee on Economic Foreign Policy, Memorandum headed, "Investment of United States Public and Private Funds in Latin America," dated January 2, 1945, NARA, State Department File No. 611.0031Executive Committee/1-1545.

²⁰¹ Foreign Investment Policy Committee Minutes, January 7, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "FIP Agenda & Lists."

During discussions within the Foreign Investment Policy Committee, for example, the Department of Commerce noted the lack of information sufficient to make the necessary judgments, while the State Department feared that a requirement of advance approval would disadvantage U.S. investors competing with foreign investors of countries that imposed no such requirement.²⁰² The State Department argued that the U.S. government should use the force of public opinion to discourage investments that threatened economic stability or the foreign relations of the United States, but not undertake to prohibit them through criminal penalties.²⁰³ The Department might also threaten to deny diplomatic protection to investments made contrary to its wishes.²⁰⁴ Even these modest efforts, however, raised the potential problem that, if the Department were to review proposed investments, it would be blamed, wrongly or rightly, for any adverse consequences of foreign investments that it approved.²⁰⁵

By April 1946, the Foreign Investment Policy Committee under the leadership of John Parke Young, who by then was the associate chief of the State Department's Division on Investment and Economic Development, had produced a draft of a U.S. foreign investment policy. The draft stated that investment flows would expand

²⁰² Foreign Investment Policy Committee Minutes, February 21, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "FIP Agenda & Lists."

²⁰³ *Ibid.*

²⁰⁴ Foreign Investment Policy Committee Minutes, January 7, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "FIP Agenda & Lists."

²⁰⁵ Foreign Investment Policy Committee Minutes, February 21, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked "FIP Agenda & Lists."

production and trade, resulting in greater prosperity and international security.²⁰⁶ It noted that the U.S. desire for a liberal, multilateral, nondiscriminatory trade regime could not be easily achieved unless U.S. capital was available to other countries. At the same time, barriers to trade would limit the capacity of countries to service their inward foreign investment and would interfere with the benefits of investment. Liberal trade and international capital movements thus were mutually dependent. The primary emphasis, however, still was on promoting international trade. The committee regarded outward investment as important principally because it provided a means of financing exports.

Under the draft policy, the United States expressed a preference for private investment over government loans, but anticipated that loans would be necessary at times to supplement private investment.²⁰⁷ When public lending was necessary, the United States preferred that it occur through the IBRD. For that reason, a large portion of the policy addressed U.S. lending policy.

The policy statement observed that the flow of investment, although desirable, must be regulated by the government rather than left entirely to market forces, so as to ensure economic development while mitigating the effects of economic fluctuations.²⁰⁸ The United States encouraged private investment abroad, provided that it was adapted to local conditions, could survive without undue government

²⁰⁶ “United States Foreign Investment Policy,” Working Paper dated April 3, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

assistance and was consistent with the foreign policy of the United States.²⁰⁹ The policy described various forms of undesirable foreign investment, including investment under terms that were likely to become the subject of public resentment or to be otherwise detrimental to U.S. foreign relations. Thus, investment should not receive special tax concessions, except perhaps for “an initial short period of time,” or exclusive concessions unless essential to the nature of the undertaking.²¹⁰ It should provide opportunities for the participation of local capital and management. Investment should be in the form of equities rather than loans with fixed payment obligations. Interest rates should be reasonable and amortization schedules should take account of economic circumstances. The United States expressed its desire that U.S. investors inform the government when it contemplated the establishment of new investments or the expansion of existing investments whenever “substantial sums” were involved.²¹¹

The committee also examined the problem of promoting private investment flows. The ECEFP had noted the previous year that the promotion of private investment would require legal protections. As it had observed, “If United States investors are to commit their funds to undertakings abroad, they must have from those Governments the assurance of nondiscriminatory and just treatment.”²¹²

²⁰⁹ “United States Foreign Investment Policy,” Working Paper dated April 16, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

Despite the call for government regulation of the flow of capital, the draft policy criticized restrictions on inward investment as undesirable deterrents to investment.²¹³ It recommended intergovernmental cooperation to facilitate the flow of private investment, such as measures to eliminate exchange controls, to promote exchange stability and to establish investment practices conducive to healthy private investment. The policy called for national treatment of foreign investment, except when contrary to “the fundamental principles of public interest,” and called for intergovernmental agreements to assure nondiscrimination.²¹⁴ The policy thus embraced norms of access and nondiscrimination.

The policy also embraced the norm of security. It called for payment of adequate and effective compensation without undue delay when foreign investment was expropriated. It noted that, where U.S. investors in a dispute with the host country were unable to obtain “adequate consideration,” the U.S. government may make representations on behalf of the investor.²¹⁵

By May, the policy cited a higher “standard of living” as an element of the prosperity that foreign investment would promote. It called for intergovernmental

²¹² Executive Committee on Economic Foreign Policy, Memorandum headed, “Investment of United States Public and Private Funds in Latin America,” dated January 2, 1945, NARA, Record Group 59, State Department File No. 611.0031Executive Committee/1-1545.

²¹³ “United States Foreign Investment Policy,” Working Paper dated April 16, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

cooperation to ensure “just and equitable treatment” for private investment.²¹⁶ In June, the committee amended the draft policy to include among undesirable forms of investment those that engaged in monopolistic practices or exploited labor.²¹⁷

None of these executive branch policy statements emphasized the conclusion of FCN treaties as a means to promote outward foreign investment, although they did speak of obtaining legal protections. Policymakers in the mid 1940s did not yet regard FCN treaties as the principal legal instruments for promoting outward investment.

Neither did Congress at that time associate FCN treaties in any important way with the promotion of outward investment. The 1945 House report on postwar planning made several recommendations to encourage “the free flow of investment funds abroad.”²¹⁸ First among these was the establishment of the IBRD “as soon as practicable.”²¹⁹ The principal advantage of the bank was its ability to finance long term developmental projects, thereby raising the standard of living throughout the world.²²⁰ Three other recommendations appeared, including increased funding for the Export-Import Bank, repeal of the Johnson Act²²¹ (which prohibited U.S. investors

²¹⁶ “United States Foreign Investment Policy,” Working Paper dated May 3, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²¹⁷ “United States Foreign Investment Policy,” Working Paper dated June 10, 1946, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²¹⁸ *Post-War Economic Policy and Planning*, Sixth Report of the House Special Committee on Post-War Economic Policy and Planning, House Report No. 541, 79th Congress, 1st Session, May 8, 1945, page 2.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, page 25.

²²¹ 48 Stat. 574.

from making private loans to countries in default on past debt, including the United Kingdom and France), and the settlement of Lend Lease Act obligations. Notably, the negotiation of FCN treaties to promote foreign investment was not among the committee's recommendations.

As the federal government pondered the development of a foreign investment policy, the U.S. business community sought to influence the direction of that policy. The most influential U.S. business organization with respect to foreign investment policy was the National Foreign Trade Council (NFTC), which held annual meetings of business executives known as the National Foreign Trade Convention. These conventions produced declarations regarding U.S. foreign economic policy that reflected the perspective of major actors in the business community. Like the U.S. government, much of the American business community in the mid 1940s saw the purpose of U.S. foreign economic policy as primarily to promote international trade. To the extent that these annual declarations addressed investment, not surprisingly, they focused far more on the problem of creating conditions conducive to international investment flows than on the problem of controlling the undesirable effects of foreign investment.

The Final Declaration of the convention's meeting in 1946 contained a section detailing "A Proposed Foreign Economic Policy for the United States."²²² The declaration began by proclaiming that the purpose of U.S. foreign economic policy

²²² National Foreign Trade Council, *Draft Final Declaration of the Thirty-Third National Foreign Trade Convention, 1946*, page 3, NARA, Record Group 59, Department of State File No. 611.0031/11-1446.

was “to fortify and implement our established foreign policy, and to encourage, in the process, the development of an optimum flow of international trade.”²²³ Next, the declaration stated that “our foreign economic policy is dedicated to the attainment and maintenance of an international trading system. . . .”²²⁴ Only after two pages of discussion of the benefits of free trade did the declaration address the promotion of foreign investment. Even at that point, however, the declaration observed that “attainment of the high level of foreign trade . . . demands that the flow of physical goods and services internationally be supplemented by a free and unrestricted flow of capital and earnings.”²²⁵ In other words, the promotion of foreign investment was merely a means to the promotion of international trade. U.S. outward investment by raising the standard of living in other countries created a market for U.S. exports and provided other countries with dollars with which to purchase U.S. exports.

While U.S. government policy statements on foreign investment policy in the mid 1940s rarely mentioned FCN treaties, the business representatives at the National Foreign Trade Convention believed that the promotion of outward investment necessitated the conclusion of FCN treaties. As its 1946 final declaration proclaimed,

If the productivity of other lands is to be rapidly expanded, thus increasing the benefits to be derived from an exchange of our products for theirs, encouragement must be given to the projection abroad of private American capital, either as loans, or as direct investments supported by the necessary management and techniques. Our foreign

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

economic policy will seek, through the medium of treaties of friendship and commerce or by other means legitimately available, to secure the protection of such capital investments against expropriation without adequate, prompt and effective compensation, and against discrimination in any form. It will insist, specifically, upon the protection of proprietary rights; upon provision to the enterprises represented of equal opportunity to compete with local enterprises, without regard to the participation or non-participation in such American enterprises of local capital; upon avoidance of international double taxation and other unfair or discriminatory tax practices; and upon granting to American citizens the right to travel, sojourn, trade and work within foreign countries – all on the basis of full reciprocity vis-à-vis the country concerned.²²⁶

The National Foreign Trade Convention wanted FCN treaties that guaranteed access, nondiscrimination and security.

In February 1947, Britain formally notified the United States that it no longer could provide financial assistance to Greece and Turkey.²²⁷ Greece was engaged in a civil war that could have resulted in victory for communist forces, while Turkey was struggling to prevent the Soviet Union from gaining control over the Dardanelles. In March, Truman announced the Truman Doctrine, under which the United States would provide assistance to free peoples resisting subjugation, and asked Congress to approve economic assistance to Greece and Turkey, a request that Congress granted in May.²²⁸

²²⁶ *Ibid.*

²²⁷ Pollard, *op. cit.*, page 119. U.S. postwar aid to Europe and the Marshall Plan are described in Diane B. Kunz, *Butter and Guns: America's Cold War Economic Diplomacy* (New York: The Free Press, 1997), pages 29-56.

²²⁸ The emergence of the Truman Doctrine is described in Pollard, *op. cit.*, pages 107-132.

As Congress was approving funding for Greece and Turkey, Assistant Secretary Clayton returned from several weeks in Europe, where he had been attending the International Trade Organizations negotiations, discussed in Chapter Three, and reported that the wartime destruction throughout the entire continent was far worse than the United States had believed.²²⁹ As Secretary of State Dean Acheson recalled, Clayton presented “a dark and frightening picture.”²³⁰ General Dwight D. Eisenhower, who had served as supreme commander of the allied forces in Europe during the war, concurred with Clayton’s bleak assessment.²³¹

On June 5, Secretary of State George C. Marshall delivered a commencement address at Harvard, where he proposed a massive program of economic assistance for reconstruction in Europe. Such a program would prevent an economic disaster in Europe, enable Europe to continue to purchase U.S. exports and help to prevent a recession in the United States.²³²

The 1946 elections had given control over Congress to the Republicans, who were opposed to the statist programs of the New Deal. To overcome Congressional resistance to increased spending, the Truman administration increasingly justified its foreign assistance requests as necessary to contain Soviet expansionism.²³³ The rhetoric of promoting peace and prosperity that dominated policy pronouncement

²²⁹ Garwood, *op. cit.*, page 59.

²³⁰ *Ibid.*, page 60.

²³¹ Rothgeb, *op. cit.*, page 86.

²³² Kunz, *op. cit.*, page 35

²³³ *Ibid.*, pages 37-47.

during the years of the Second World War gave way to the rhetoric of winning the Cold War.

Anti-communism had been all but absent from the declaration of the 1946 National Foreign Trade Convention. A year later, however, the convention had already learned to justify policies of free trade and free capital movements in terms of the Cold War. The 1947 declaration began with a statement headed “America’s Stake in the World.” That statement explained that “the nations of the world are confronted with a choice between two opposing economic courses.”²³⁴ The statement described the first course as “the course of economic freedom, with its reliance upon free, private, competitive enterprise as the mainspring of accomplishment and progress, and its recognition of the dignity and worth of the individual as inherent in political democracy and in the spiritual concept of freedom itself.”²³⁵ This was the course to which the United States was committed. The second course, according to the statement, was “the course of economic regimentation, with its invitation, under socialism, to the materialist concept that the individual is the servant of the State and a cog in the collectivist machine, and its subversion not only of economic freedom but of political freedom as well.”²³⁶ The Declaration went on to say that communism posed a great threat to American security and to the integrity of American institutions.

²³⁴ National Foreign Trade Council, *Final Declaration of the Thirty-Fourth National Foreign Trade Convention, 1947*, page 6, NARA, Record Group 59, Department of State File No. 611.0031/10-2747.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

It found that the appeal of communism in certain countries was “no accident.”²³⁷ Rather, wherever poverty existed, “the appeal of collectivist security will be compelling.”²³⁸ The solution to the communist threat was to create a system that would enhance world productivity.

To this end, the declaration specified a program of action that called for subsistence relief, public investment in areas where private capital could not be attracted, and the encouragement of private capital. Only after articulating these proposals did the declaration call for the promotion of free trade. Thus, between 1946 and 1947, the business community began to shift its defense of outward foreign investment from treating it as a means of promoting trade to regarding it as a means of economic development, which in turn was necessary to halt the spread of communism.

By 1948, the National Foreign Trade Convention had begun to characterize its policy statements as a defense of capitalism. Its declaration that year began with a statement headed “Private Enterprise Is the World’s Best Hope.” The opening paragraph of the statement celebrated American freedom embodied in free political institutions and the free enterprise system. The second paragraph turned immediately to the importance of capital. It said that “[t]he right to acquire and own property is inherent in the free enterprise concept; and it is through the process of capital formation, based upon private ownership, profits and saving, that the dynamic potentialities of free enterprise find release and consummation. The process of capital

²³⁷ *Ibid.*

²³⁸ *Ibid.* page 7.

formation underlies all industry and trade in our industrial civilization and it constitutes the mechanism through which private enterprise must function.”²³⁹ Thus, in two years, capital formation, which in 1946 was a way of stimulating trade, by 1948 had become the foundation of the American economic system.

As the National Foreign Trade Convention developed increasingly elaborate defenses of capitalism, it acknowledged the right of governments to regulate international capital movements. Not even the American business community advocated a policy of *laissez-faire*.²⁴⁰ The declaration undertook to dispel “popular misconceptions which exist concerning capital and its function in our complex economy.”²⁴¹ The declaration explained that the private enterprise system “must be imbued with the public interest.”²⁴² That is, “it cannot countenance that unbridled license which is the abuse of freedom.”²⁴³ Thus, the American free enterprise system “is not pure *laissez-faire*, since it operates within a framework which combines enlightened self-discipline with a substantial measure of intelligent and purposive

²³⁹ National Foreign Trade Council, *Final Declaration of the Thirty-Fifth National Foreign Trade Convention, 1948*, page 6, NARA, Record Group 59, Department of State File No. 611.0031/11-2948.

²⁴⁰ The process by which major corporate leaders gradually accommodated themselves to the New Deal’s regulatory state is traced in Kim McQuaid, *Big Business and Presidential Power from FDR to Reagan* (New York: William Morrow and Company, 1982). A portion of the story is retold in Kim McQuaid, *Uneasy Partners: Big Business in American Politics, 1945-1990* (Baltimore: The Johns Hopkins University Press, 1994).

²⁴¹ National Foreign Trade Council, *Final Declaration of the Thirty-Fifth National Foreign Trade Convention, 1948*, page 6, NARA, Record Group 59, Department of State File No. 611.0031/11-2948.

²⁴² *Ibid.*, page 7.

²⁴³ *Ibid.*

regulation by government.”²⁴⁴ Legislation to promote the general welfare and to assure public order and safety, to eliminate unfair business practices or to regulate natural monopolies all were consistent with the free enterprise system. Private enterprise, however, “cannot willingly accede to arbitrary governmental intervention in the processes of production, investment, and trade.”²⁴⁵ In short, the government must regulate the capital market, although subject to the basic norm of reasonableness.

The 1948 declaration included a series of recommendations. The first was the preservation and expansion of private enterprise. That is, the first goal of the business community was to project the American system of liberal capitalism onto the rest of the world. The second recommendation was the promotion of foreign trade, while the third was the encouragement of private investment abroad. The declaration commended the efforts of the State Department to “modernize and expand” the network of FCN treaties.²⁴⁶ The declaration stated that the convention was “impressed by the substantial improvements” over earlier FCN treaties that could be found in a recently concluded FCN treaty with Italy and recommended that the treaty be utilized as a model for future FCN negotiations.²⁴⁷ It recommended that the FCN program be pursued “with vigor.”²⁴⁸

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*, page 18.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

Meanwhile, John Parke Young's Foreign Investment Committee continued to work on its own foreign investment policy. By August 1947, the policy had been renamed the United States Foreign Credit and Investment Policy. The August 1947 draft of the policy indicated that the U.S. government had become less sanguine about its ability to direct investment flows to mitigate the effects of economic fluctuations and called for doing so "in so far as practical."²⁴⁹ A year later, when President Truman signed the policy, it would call for mitigating economic fluctuations when mitigating measures were "consistent with other major domestic and international objectives."²⁵⁰ Reflecting the new Cold War rhetoric, the August 1947 policy statement touted foreign investment as a means of promoting "fundamental freedoms" as well as prosperity and international security.²⁵¹

By 1947, as will be seen in Chapter Three, the business community had persuaded the State Department to draft a code of protection for foreign investment for inclusion in the charter of the proposed International Trade Organization. Reflecting the work on the code, the policy in 1947 called for a more detailed list of measures to promote investment. The detailed list included the negotiation of FCN treaties, the negotiation of treaties to prevent double taxation, and "agreements looking toward the elimination of impediments to fair, equitable and nondiscriminatory treatment of

²⁴⁹ "United States Foreign Credit and Investment Policy," August 15, 1947, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Docs 1-4."

²⁵⁰ "United States Foreign Credit and Investment Policy," August 11, 1948, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Docs 1-4."

²⁵¹ "United States Foreign Credit and Investment Policy," August 15, 1947, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Docs 1-4."

foreign capital.”²⁵² As this suggests, the State Department had not yet decided that FCN treaties would be the primary instrument by which the United States would obtain treaty protection for foreign investment. In a separate paragraph, the policy also called for “the establishment of standards of fair practice with respect to the treatment accorded private international investment.”²⁵³

The 1947 draft omitted the description of undesirable forms of investment, instead identifying the desirable attributes of investment. These included an adequate opportunity for the participation of local capital and management, an economically desirable purpose, flexible terms of repayment, reasonable rates of interest, and appropriately long amortization periods. A year later, the policy would add an additional criterion, that the investment was “adequately complemented by the providing of skills and technology where appropriate.”²⁵⁴

By March 1948, the protection of foreign investment had become a much more significant concern of the policy and the policy was becoming increasingly specific about the nature of the investment related provisions that the United States should seek. In the section stating the willingness of the U.S. government to make representations on behalf of U.S. investors involved in disputes with the host country, the policy specifically identified situations when the investor was “subject to arbitrary

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ “United States Foreign Credit and Investment Policy,” March 9, 1948, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

or unreasonable action” as a circumstance when the State Department might assist a U.S. investor.²⁵⁵

At the same time, the policy stated that the U.S. government would assume no responsibility for protecting private investments that had features described in previous drafts as undesirable. These included investment made under terms likely to become the subject of reasonable public resentment in either country or to injure U.S. foreign relations, such as those where the investor received special tax exemptions or exclusive concessions, those involving anticompetitive behavior, or those that exploited labor. It also would assume no responsibility for protecting private investments that were concealed from the State Department or were made against the advice of the Department.

By May 1948, however, the Foreign Investment Policy Committee had reconsidered the idea of declaring certain investments, even if inconsistent with U.S. policy, outside the protection of the State Department.²⁵⁶ The draft policy no longer disclaimed any responsibility for protecting undesirable investments. The May draft stated merely that the U.S. government discouraged such investment.

In June, the years of effort to develop a foreign investment policy culminated in the adoption of the policy by the ECEFP.²⁵⁷ That committee declared that U.S. foreign investment policy was intended “to facilitate the expansion of production and

²⁵⁵ *Ibid.*

²⁵⁶ “United States Foreign Credit and Investment Policy,” May 7, 1948, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Docs 1-4.”

²⁵⁷ *Current Economic Developments*, June 7, 1948, page 2, NARA, Record Group 59, Department of State Lot Files.

trade, to raise standards of living, and to foster economic and social progress and development.”²⁵⁸ The report addressed both U.S. government loans and credits and U.S. policies to promote private foreign investment.

The report asserted that “to promote good international relations,” private investment should adhere to certain principles: “1) be made in a manner consistent with the best interest of both the supplying and recipient countries; 2) provide an adequate opportunity for the voluntary participation of capital and management of the country where the investment takes place; 3) be adequately complemented by furnishing skills and technology where appropriate; 4) be on an equity basis where appropriate; and, when on a loan basis, should provide for reasonable rates of interest and amortization.”²⁵⁹ Further, the report noted that the United States government “discourages private investments the terms of which are likely to give rise to reasonable public resentment in either country or occasion unfriendly relations” between the United States and the other country.²⁶⁰

The report suggested a number of measures that the United States should take in order to facilitate and encourage outward foreign investment flows. The second item on the list was negotiating FCN treaties, treaties to prevent double taxation of foreign earned income, and “agreements looking toward the assurance of fair, equitable and nondiscriminatory treatment of foreign capital.”²⁶¹ That is, the report

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, page 4.

²⁶⁰ *Ibid.*

seemed to contemplate that the United States would negotiate bilateral investment treaties that would complement the more traditional FCN treaties.

Other measures included providing information on investment opportunities abroad; selling to private investors foreign obligations owned by the U.S. Export-Import Bank (ExIm Bank); guaranteeing through ExIm Bank private credits extended by U.S. lenders; the guarantee of foreign exchange convertibility; the reduction of U.S. taxation on foreign earned income; and the promotion of international economic conditions conducive to foreign investment, such as the elimination of restrictions on trade, investment and currency exchange.²⁶²

The report also identified measures that other governments should take. These included facilitating private investment “for purposes economically suited to the area”; according “fair and nondiscriminatory treatment” to foreign investment; and imposing “no unreasonable barriers to the transfer of capital and earnings.”²⁶³ The report noted that, in this connection, the United States favored the “establishment of standards of fair practice with respect to the treatment and conduct of private international investment.”²⁶⁴

Thus, by 1948, the State Department knew that it wanted to seek increased treaty protection for foreign investment, although the Department had not yet decided that FCN treaties would be the primary instrument for that protection. The process by

²⁶¹ *Ibid.*, page 3.

²⁶² *Ibid.*

²⁶³ *Ibid.*, page 4.

²⁶⁴ *Ibid.*, page 3.

which the FCN treaties became the first bilateral investment treaties begins with the launching of the U.S. postwar FCN treaty series, which is the subject of Chapter Two.

Chapter Two

Launching the U.S. Postwar FCN Treaty Program

The negotiation of FCN treaties dates from the very founding of the republic. The war for independence severed the legal ties between the United States of America and the British Empire and placed the new nation outside the imperial trading system. Aware that the United States would need new trading partners to purchase its surplus commodities and to provide it with manufactured goods, the Continental Congress in 1776 authorized the preparation of a model FCN treaty for use in negotiations with the major European powers.²⁶⁵ In July of that year, it adopted a Declaration of Independence in order to provide a legal basis for other nations to treat with the new republic.²⁶⁶ The earliest FCN treaties thus were intended to obtain recognition of U.S. independence and to establish trade and maritime relations with the powers of Europe.²⁶⁷

The first FCN treaty was signed with France in 1778,²⁶⁸ on the same day that the United States concluded its alliance with that country.²⁶⁹ The FCN treaty was signed first and thus became the first treaty concluded in the history of the United

²⁶⁵The early history of the FCN treaties is sketched in Doron S. Ben-Atar, *The Origins of Jeffersonian Commercial Policy and Diplomacy* (New York: St. Martin's Press, 1993).

²⁶⁶ David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007), pages 35-36.

²⁶⁷ Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States*, March 1952, NARA, Record Group 59, Department of State File No. 611.004/3-453.

²⁶⁸ February 6, 1778, 8 Stat. 12, T.S. No. 83.

²⁶⁹ Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States*, March 1952, NARA, Record Group 59, Department of State File No. 611.004/3-453.

States.²⁷⁰ The United States also concluded FCN treaties with the Netherlands in 1782²⁷¹ and with Sweden in 1783.²⁷² Following the end of the War of Independence, Congress established a commission comprising John Adams, Benjamin Franklin and Thomas Jefferson to negotiate additional FCN treaties. From 1778 until the second term of the Truman administration, the United States would negotiate some 130 such treaties.²⁷³

While the initial series of FCN treaties was directed at establishing U.S. relations with Europe, during the antebellum period the United States undertook to negotiate FCN treaties with the newly independent Latin American countries.²⁷⁴ FCN treaties concluded before the Civil War, however, were not limited to Europe and Latin America. For example, a leading object of Caleb Cushing's mission to China in 1844 was to conclude an FCN treaty with that country.²⁷⁵ In the first half of the nineteenth century, the United States placed particular importance on the navigation provisions of the treaties, which gained access to foreign ports for U.S. vessels and

²⁷⁰ John Bassett Moore, *The Principles of American Diplomacy* (New York: Harpeter & Brothers, 1918), page 12.

²⁷¹ Treaty of Amity and Commerce, United States-Netherlands, signed October 8, 1782, 8 Stat. 32, T.S. No. 249.

²⁷² Treaty of Amity and Commerce, United States-Sweden, signed April 3, 1783, 8 Stat. 60, T.S. No. 346.

²⁷³ Herman Walker, Jr., "Provisions on Companies in United States Commercial Treaties," *American Journal of International Law* 50 (1956) 373, 374 n. 4. According to Walker, this estimate was published by the Department of State in 1952.

²⁷⁴ Memorandum dated February 13, 1950, from Director of International Trade Policy Winthrop Brown to Mr. Mills, NARA, Record Group 59, State Department File No. 611.004/3-850.

²⁷⁵ Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States* (Washington: Government Printing Office, 1952).

which protected the right of U.S. vessels to engage in neutral trade with belligerent countries.²⁷⁶

In the years immediately after the Civil War, the pace of negotiations slowed. The construction of a transcontinental railroad allowed U.S. businesses to concentrate on serving a large domestic market and diminished somewhat the focus on international trade. After World War I, however, the growing U.S. industrial surplus created a need for new markets. Thus, after the war, trade emerged as by far the most important element of the FCN treaties.²⁷⁷ By the mid 1920s, the United States was engaged in highly productive negotiations with several countries in Central America and Europe. It concluded FCN treaties with Germany²⁷⁸ in 1923, Estonia²⁷⁹ in 1925, El Salvador²⁸⁰ in 1926, Honduras²⁸¹ in 1927, and Austria,²⁸² Latvia²⁸³ and Norway²⁸⁴

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Treaty of Friendship, Commerce and Consular Rights, United States-Germany, December 8, 1923., 44 Stat. 2132, T.S. No. 725. The treaty with Germany formed the model for those concluded over the ensuing fifteen years. Robert R. Wilson, "Postwar Commercial Treaties of the United States," *American Journal of International Law* 43 (1949) 262.

²⁷⁹ Treaty of Friendship, Commerce and Consular Rights, United States-Estonia, signed December 23, 1925, 44 Stat. 2379, T.S. No. 736.

²⁸⁰ Treaty of Friendship, Commerce and Consular Rights, United States-El Salvador, signed February 22, 1926., 46 Stat. 2817, T.S. No. 827.

²⁸¹ Treaty of Friendship, Commerce and Consular Rights, United States-Honduras, signed December 7, 1927, 45 Stat. 2618, T.S. No. 764.

²⁸² Treaty of Friendship, Commerce and Consular Rights, United States-Austria, signed June 19, 1928, 47 Stat. 1876, T.S. No. 838.

²⁸³ Treaty of Friendship, Commerce and Consular Rights, United States-Latvia, signed April 20, 1928, 45 Stat. 2641, T.S. No. 765.

in 1928. The Great Depression and the embrace of autarchic economic policies throughout the world created an inhospitable environment for negotiations²⁸⁵ and no further treaties were concluded until the mid 1930s.

With the trade provisions growing in importance, the United States during the 1920s incorporated into the treaties a clause requiring unconditional most-favored-nation (MFN) treatment with respect to trade.²⁸⁶ An unconditional MFN treatment clause requires a country to extend to its treaty partner treatment that is at least as favorable as the treatment that the country extends to any other country. Thus, if an importing country lowers the tariff on a particular product imported from a particular exporting country, it must lower the tariff on that same product imported from any other exporting country to which it has promised unconditional MFN treatment. The clause that had appeared in prior treaties was a reciprocal MFN treatment clause. Under that clause, a country was obligated to extend MFN treatment to its treaty partners only if they reciprocated toward that country. An unconditional MFN treatment clause thus leads to a more rapid liberalization of trade because all trade concessions made by a country are immediately generalized to all treaty partners with

²⁸⁴ Treaty of Friendship, Commerce and Consular Rights, United States-Norway, signed June 5, 1928, 47 Stat. Stat. 2135, T.S. No. 852.

²⁸⁵ These policies are described in more elaborate detail in Jeffrey A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W.W. Norton, 2006).

²⁸⁶ The history and rationale of this change is described in William B. Kelly, Jr., "Antecedents of Present Commercial Policy," in William B. Kelly, Jr., ed., *Studies in United States Commercial Policy* (Chapel Hill: University of North Carolina Press, 1963).

which that country has an unconditional MFN treatment obligation, even if those partners do not provide the same concession in return.²⁸⁷

The FCN treaties were not sufficient in themselves to open markets to U.S. exports because they did not reduce U.S. tariffs. They merely promised nondiscriminatory treatment with respect to any reduction in trade barriers that otherwise occurred. Most of the FCN treaty provisions addressed other aspects of trade, such as the treatment of merchants in the territory of the host state.

Because tariffs were taxes and could be reduced only by act of Congress, efforts by the State Department to negotiate reductions in tariffs were impeded by the Department's inability to ensure that Congress would enact legislation to implement any reductions to which the United States might agree during negotiations.²⁸⁸ To remedy this situation, in 1934, Secretary of State Cordell Hull, an ardent free trader, persuaded Congress to enact the Reciprocal Trade Agreements Act, which authorized the executive branch to conclude treaties that reduced tariffs by as much as 50 percent without further approval from Congress. Although the State Department continued to conclude FCN treaties, much of its effort shifted to the negotiation of trade agreements under the 1934 legislation. In the three years after the RTAA was enacted, the State Department concluded fifteen trade agreements under the act.²⁸⁹ By contrast, the

²⁸⁷ As Lloyd Gardner notes, the United States sought more rapid liberalization of trade because its enhanced productive capacity following World War I demanded larger export markets. Lloyd C. Gardner, *Economic Aspects of New Deal Diplomacy* (Madison: University of Wisconsin Press, 1964), page 40.

²⁸⁸ David A. Lake, *Power, Protection, and Free Trade: International Sources of US Commercial Strategy 1887-1939* (Ithaca: Cornell University Press, 1989), page 204.

United States concluded only three FCN treaties during the entirety of the Roosevelt Administration – with Finland²⁹⁰ in 1934, Thailand²⁹¹ in 1937, and Liberia²⁹² in 1938.

World War II reduced commercial affairs “to a bare minimum”²⁹³ and the United States suspended the negotiation of FCN treaties during the war years, even when negotiations were already in progress. For example, the negotiation of an FCN with India ended abruptly when the State Department received a message from the Indian Attorney General stating that it was “wiser, in view of the changed situation in India, to defer the conclusion of the negotiations until conditions are more settled.”²⁹⁴

Inauguration of the Postwar FCN Treaty Program

In 1944, anticipating the imminent end to the war, the State Department launched a program to extend and modernize the U.S. FCN treaty program.²⁹⁵ At that time, some 29 FCN treaties were still in force, the oldest of which was an 1815 treaty

²⁸⁹ John M. Rothgeb, Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington: Congressional Quarterly Press 2001), page 47.

²⁹⁰ Treaty of Friendship, Commerce and Consular Rights, United States-Finland, signed February 13, 1934. 49 Stat. 2659, T.S. No. 868.

²⁹¹ Treaty of Friendship, Commerce and Navigation, United States-Thailand, signed November 13, 1937, 53 Stat. 1731, T.S. No. 940.

²⁹² Treaty of Friendship, Commerce and Navigation, United States-Liberia, signed August 8, 1938, 54 Stat. 1739, T.S. No. 956.

²⁹³ Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W. W. Norton & Co., 1969), page 17.

²⁹⁴ The message is quoted in Acheson, *ibid.*, at pages 17-18.

²⁹⁵ *Current Economic Developments*, January 21, 1946, page 9, NARA, Record Group 59, Department of State Lot Files.

with the United Kingdom.²⁹⁶ More than half of these existing FCN treaties had been concluded in the nineteenth century²⁹⁷ and most of these had been concluded before 1860.²⁹⁸

According to a 1946 State Department publication, the modern FCN treaty program was “designed to provide a legal framework, based on liberal principles and adapted to modern conditions affecting international intercourse, for mutually advantageous relations between two countries over a long period of time.”²⁹⁹ Thus, at the inception of the modern FCN treaty program, the State Department regarded the FCN treaties as instruments of liberal legality. The treaties established a charter of “broad general principles under which economic relations between the United States and various other countries are conducted.”³⁰⁰

The State Department intended Cordell Hull’s trade agreements to expedite the flow of goods between nations. The FCN treaties, by contrast, dealt “largely with the rights of persons and corporations and with instrumentalities by means of which the

²⁹⁶ Airgram dated November 17, 1954, from the Department of State to the U.S. embassy in Cairo, NARA, Record Group 59, Department of State File No. 611.004/11-1754.

²⁹⁷ *Current Economic Developments*, January 21, 1946, page 9, NARA, Record Group 59, Department of State Lot Files.

²⁹⁸ Treaties concluded before 1860 and still in force in the mid twentieth century included those with Argentina (1853), Bolivia (1858), Brunei (1850), Colombia (1846), Costa Rica (1851), Denmark (1826), Morocco (1836), Muscat-Zanzibar (1833), Paraguay (1859), Switzerland (1850), and United Kingdom (1851).

²⁹⁹ Memorandum by Vernon G. Setser headed, “Status of Commercial Treaty Program,” dated November 5, 1946, NARA, Record Group 59, Department of State File No. 711.002/11-546.

³⁰⁰ Memorandum headed “Entry of foreign investors in the United States under treaties of friendship, commerce and navigation,” dated November 23, 1949, NARA, Record Group 59, Department of State File No. 611.004/5-350.

flow of goods and services is carried on.”³⁰¹ In a sense, while trade agreements operated principally at the border to lower barriers to entry for goods, the FCN treaties operated to a large extent behind the border. They addressed the legal climate that would exist within the host country for traders and vessels from abroad.

The business community strongly supported this new initiative and, after the end of World War II, was impatient for the United States to begin concluding FCN treaties with other countries. At its annual meeting in Atlantic City, in late April and early May 1946, the United States Chamber of Commerce adopted a resolution “that the Department of State be urged to negotiate [FCN] treaties with countries with which we have substantial commercial relationships and that negotiations to modernize existing treaties of friendship and commerce be instituted without delay.”³⁰² The National Foreign Trade Convention, meeting in New York the following November, “urge[d] that the negotiation of treaties of friendship and commerce with other nations be pursued vigorously, so that our commercial treaty structure, which has fallen into obsolescence, may be rapidly brought to the point where the needs of American foreign trade and investment can be effectively served.”³⁰³ According to its president, Charles Carroll, the NFTC believed that the

³⁰¹ Memorandum by Vernon G. Setser headed, “Status of Commercial Treaty Program,” dated November 5, 1946, NARA, Record Group 59, Department of State File No. 711.002/11-546.

³⁰² Letter from the Chamber of Commerce to the Department of State, dated June 12, 1946, NARA, Record Group 59, Department of State File No. 711.002/6-1246.

³⁰³ National Foreign Trade Council, *Draft Final Declaration of the Thirty-Third National Foreign Trade Convention*, 1946, page 10, NARA, Record Group 59, State Department File No. 611.0031/11-1446.

conclusion of FCN treaties was of the “utmost importance” to U.S. foreign economic policy.³⁰⁴

Aware that business groups were greatly interested in the FCN treaty program, the State Department from the moment that it launched its new treaty series sought to collaborate with these groups to ensure that the new FCN treaties took account of the needs of the American business community.³⁰⁵ The Department consulted with special frequency with the NFTC, which represented some of the largest companies in the United States.³⁰⁶

In 1944, when the State Department inaugurated the postwar FCN treaty program, the organizational structure of the Department reflected both the importance of trade to U.S. foreign economic policy and the traditionally peripheral importance of investment protection to the FCN treaty program. U.S. foreign economic policy was the responsibility of the Office of Economic Affairs, headed by Harry Hawkins, whom Cordell Hull regarded as the man primarily responsible for the negotiation of the reciprocal trade agreements.³⁰⁷ Hawkins’ position as director of the office suggests

³⁰⁴ Charles Carroll, “Comments on the Suggested Charter for an International Trade Organization,” November 6, 1946, NARA, Record Group 43, ITO Subject Files, Box 60, File marked “National Foreign Trade Council – Carroll Rpt.”

³⁰⁵ Letter from the National Foreign Trade Council to Secretary of State James Byrnes, dated July 10, 1945, NARA, Record Group 59, Department of State File No. 611.031/7-1045.

³⁰⁶ The board of directors of the NFTC included representatives of Bethlehem Steel, Pan American Airways, Socony-Vacuum Oil Company, Firestone Tire and Rubber, Chase National Bank, General Motors, Goodyear Tire and Rubber, Coca Cola, Caterpillar Tractor, Otis Elevator, General Electric, Johnson and Johnson, International Harvester, United Fruit Company, Standard Oil, Chrysler Motors, DuPont, Kodak, Armour, Wrigley, Ford, IT&T, Montgomery Ward, Westinghouse, Pillsbury, IBM, and McGraw-Hill.

³⁰⁷ Cordell Hull, *The Memoirs of Cordell Hull* (New York: Macmillan, 1948), page 366.

the importance of the trade agreements to the Department. Hawkins reported directly to Dean Acheson, who at that time was assistant secretary of state for economic affairs. The Office of Economic Affairs comprised three divisions. One of these, the Division of Commercial Policy, bore primary responsibility for negotiating FCN treaties and trade agreements under the Reciprocal Trade Agreements Act. A separate division, the Division of Financial and Monetary Affairs, bore responsibility for U.S. foreign investment policy. Hawkins' Office of Economic Affairs also included a third division, the Commodities Division.

Changes in senior personnel would occur before the end of the year, just as FCN treaty negotiations were beginning, although none of these changes would result in an important change in policy. In December 1944, Acheson left the economic affairs bureau and assumed responsibility for legislative affairs. He was replaced by Will Clayton, who would serve as assistant secretary of state and then undersecretary of state until 1947.

Clayton, like Hull, was a strong proponent of free trade.³⁰⁸ In urging that he approve the appointment of Clayton, Roosevelt's advisor Harry Hopkins told Roosevelt that Clayton's views were identical to Hull's.³⁰⁹ Born on a cotton farm in Tupelo, Mississippi, in 1880, Clayton had quit school at the age of 13 to drive a

³⁰⁸ The leading biography of Will Clayton is Gregory A. Fossedahl, *Our Finest Hour: Will Clayton, the Marshall Plan and the Triumph of Democracy* (Stanford: Hoover Institution Press, 1993). Also useful is William L. Garwood, Jr., *Will Clayton: Economic Statesman* (Washington: The American Studies Center, 1979). The latter was written by Clayton's grandson and tends toward the hagiographic. My sketch of Clayton draws on these two accounts, except where a different source is cited.

³⁰⁹ Patrick J. Hearden, *Architects of Globalism: Building a New World Order During World War II* (Fayetteville: The University of Arkansas Press, 2002), page 49.

laundry wagon. He taught himself shorthand and then became a court reporter. At the age of 15, he left home to work for a St. Louis cotton merchant, who soon moved, along with Clayton, to New York. In 1902, Clayton married a young woman from Kentucky, Sue Vaughn, who was also being courted by a local prosecutor named Alben Barkley, a future congressman, senator, and vice-president under Harry Truman. The marriage would have important consequences for Clayton's career.

At the age of 24, Clayton left the cotton trading firm at which he had worked for the past eight years and, in partnership with two members of his wife's family, founded his own cotton trading firm with an investment of \$3000 apiece. Cotton was the largest U.S. export at the time and thus Clayton gained considerable experience with foreign purchasers. Clayton's company became one of the first cotton brokerage firms to establish offices overseas and eventually would have offices in Europe, Asia, Latin America and the Middle East. A quarter of a century after Clayton and his partners founded the firm, it had annual sales in excess of \$200,000,000. Clayton himself became known as "King Cotton" and he was featured on the August 17, 1936, cover of *Time* magazine.

Clayton left his company in 1940 to join the New Deal as a deputy to Nelson Rockefeller, who was serving as coordinator of inter-American affairs. He moved from there to the Reconstruction Finance Corporation, then to the Department of Commerce, and then to the Office of War Mobilization, until Secretary of State Edward Stettinius appointed him assistant secretary in December 1944. In August 1946, just prior to the launching of the ITO negotiations, Sue Clayton, suspected by

some of being mentally ill in part because of her habit of insulting and badgering Will Clayton in public,³¹⁰ insisted that Clayton resign so that they could return to their home in Houston. Clayton submitted his resignation to Secretary of State Dean Acheson, who thought that the problem might well have been that Sue Clayton believed that Will Clayton was underappreciated. Accordingly, Acheson created the position of undersecretary of state for economic affairs for Clayton in the hope that the promotion would induce Mrs. Clayton to change her mind. The ploy worked and Clayton would remain at the State Department until October of the following year.

Clayton's experience as an exporter convinced him that American prosperity depended upon opening world markets to American products. He was not, however, a proponent of *laissez-faire* economics.³¹¹ He believed that the government had a responsibility to "regulate the excesses of the economy" as well as to take care of the poor.³¹² Like Cordell Hull, Clayton saw international trade as the central concern of foreign economic policy. He had seemingly little interest in international capital movements or foreign investment policy.

Harry Hawkins, meanwhile, was offered a post as economic counselor in London and was succeeded as director of the Office of Economic Affairs in July 1945

³¹⁰ Willard Thorp Oral History, Harry S. Truman Library. Gregory Fossedal attributes Sue Clayton's "extreme emotional volatility" to her arteriosclerosis. Fossedal, *op. cit.*, page 279.

³¹¹ Garwood, *op. cit.*, page 12. Fossedal quotes a speech that Clayton gave in Augusta, Georgia, in 1928 in which he said, "I do not belong to the *laissez-faire* school, whose philosophy will not permit acceptance of any government regulation. I am sorry to say that business . . . has not always shown itself competent or willing to put its house in order." Fossedal, *op. cit.*, page 40. Clayton nevertheless did believe that the New Deal had been too interventionist and he supported Roosevelt in 1940 largely because of Roosevelt's international trade policy.

³¹² Garwood, *op. cit.*, page 12.

by Clair Wilcox, an economics professor on leave from Swarthmore College. Wilcox had gained national attention in 1930 by sending to President Herbert Hoover a letter enclosing a petition signed by more than a thousand economists opposing the Smoot-Hawley tariff.³¹³ Clayton and Wilcox presented a pair of sharply contrasting figures. Clayton was the self-taught southern businessman who had dropped out of school at the age of 13, while Wilcox was a northern career academic with a Ph.D. in economics from the University of Pennsylvania. These two quite different men shared, however, a strong commitment to free trade as a matter of principle.³¹⁴ During Wilcox's tenure, the Office of Economic Affairs would be renamed the Office of International Trade Policy, reflecting the centrality of trade in U.S. foreign economic policy.

The same month that Wilcox assumed his duties, Winthrop Brown, a Yale educated lawyer who had joined the administration in 1941 to work in the Lend Lease program, assumed responsibilities as chief of the Commercial Policy Division. Brown, too, "was smitten by free trade fervor."³¹⁵ His own involvement in U.S. foreign economic policy over the next three years would center on tariff negotiations. In short, none of the key actors in the offices that oversaw the negotiation of FCN treaties was particularly interested in investment policy.

³¹³ Michael A. Bernstein, *A Perilous Progress: Economists and Public Purpose in Twentieth Century America* (Princeton: Princeton University Press, 2001), page 1.

³¹⁴ Historian Thomas Zeiler calls Wilcox "a free trade idealist" with a "vision of free trade universalism." Thomas W. Zeiler, *Free Trade Free World: The Advent of GATT* (Chapel Hill: The University of North Carolina Press, 1999), pages 56-57.

³¹⁵ *Ibid.*, page 76.

None of these personnel changes resulted in any immediate, discernible alteration in FCN treaty policy. The personnel changes, however, put in place the key officials who would administer the FCN treaty program during the years when the State Department would launch the postwar FCN treaty program.

By September 1944, the Division of Commercial Policy had completed the preparation of a preliminary draft of a new model FCN treaty for use in negotiations.³¹⁶ The substantive articles of the treaty fell into four categories: (1) establishment, (2) trade, (3) navigation, and (4) general and miscellaneous.

Establishment provisions addressed the right of nationals and companies of one party to the treaty to enter the territory of the other party and to engage in various activities there. These provisions guaranteed various rights including freedom of worship, exemption from compulsory military service, access to courts, the right to compensation for expropriated property, and freedom from unreasonable searches and seizures.

None of the provisions expressly mentioned investment. Nevertheless, a few of the establishment provisions did have the effect of promoting or protecting foreign investment. These provisions were those that guaranteed to individuals the right to enter the territory of the host state, the right of corporations to be organized within that territory, the right of both to engage in activities there, and their right to the protection of their property and to access to courts.

³¹⁶ Proposed Articles for Use in Drafting Treaties of Friendship, Commerce and Navigation with Particular Countries (September 1944), NARA, Record Group 59, Department of State File No. 711.002/9-44.

The most important innovation in the proposed postwar model FCN treaty was its guarantee of rights to corporations.³¹⁷ Corporations had scarcely been mentioned in FCN treaties prior to 1911, when the United States concluded an FCN treaty with Japan. Earlier treaties conferred rights on “nationals,” a term that generally referred to natural persons and not to corporations.³¹⁸ The treaty with Japan guaranteed to corporations the right to appear in courts.³¹⁹ Twelve years later, the U.S. FCN treaty with Germany granted to corporations the right to have their juridical status recognized.³²⁰ These provisions, however, did not guarantee to corporations the right to engage in any particular business activity. Rather, their ability to do so was governed entirely by the domestic law of the host state.

Corporations were protected by the treaty only if they had the nationality of one of the parties. The U.S. FCN treaties deemed a corporation to have the nationality of the country where it was incorporated. Each party, however, reserved the right to deny treaty benefits to any corporation organized under the laws of the other party if nationals of a third country owned or controlled the corporation. The United States

³¹⁷ Herman Walker, Jr., “Provisions on Companies in United States Commercial Treaties,” *American Journal of International Law*, 50 (1956), 373-393.

³¹⁸ Harry C. Hawkins, *Commercial Treaties & Agreements: Principles and Practice* (New York: Rinehart & Company, Inc. 1951), page 4; Herman Walker, Jr., “Provisions on Companies in United States Commercial Treaties,” *American Journal of International Law*, 50 (1956), 373-393.

³¹⁹ Treaty of Commerce and Navigation, United States-Japan, signed, February 21, 1911, Article VII, 37 Stat. 1504, T.S. No. 558.

³²⁰ Treaty of Friendship, Commerce and Consular Rights, United States-Germany, signed December 8, 1923, Article XII, 44 Stat. 2132, T.S. No. 725.

inserted this denial of benefits provision at least in part to ensure that during time of war a corporation owned by enemy nationals could be denied treaty protection.³²¹

Although all of the provisions relating to the rights of individuals and companies in the territory of the host state were sometimes described as establishment provisions, the specific right to enter as a natural person or to be legally constituted as a legal person and to engage in activities in the territory of the host state would often be described as the “right of establishment” and would be distinguished from the protection of property, a right that is important in the years following the establishment of the investment. The right of establishment provided access (generally on a nondiscriminatory basis), while the protection of property provided security. The provision on access to courts guaranteed some measure of due process as did a provision, to be discussed below, that authorized dispute resolution before the International Court of Justice. Thus, the property related provisions of the postwar FCN treaty program, at the inception of the program, reflected norms of access, nondiscrimination, security and due process.

The trade provisions included those relating to the imposition of import or export duties, import or export quotas, the internal taxation of imports, the regulation of foreign exchange, and the granting of public contracts and the operation of state trading enterprises. Because the regulation of foreign exchange potentially affects the ability of foreign investors to repatriate an investment or the returns generated by an investment, the State Department and the business community increasingly would

³²¹ Hawkins, *op. cit.*, page 4.

focus on using the treaty to ensure the transfer into a convertible currency of capital and earnings.

The navigation provisions granted a right of vessels of one party to enter the ports of the other party and to be free of discriminatory port charges or other discriminatory treatment. They also provided for assistance to vessels in times of distress.

The general provisions called for perpetual peace and friendship between the two parties, language that generally was considered a formality,³²² and provided for the resolution of disputes concerning the treaty before the International Court of Justice. The latter provision marked the first time that the United States had agreed in its commercial treaties to the compulsory jurisdiction of an international court over treaty disputes prior to the occurrence of the disputes.³²³ The general provisions also included exceptions “to allow necessary freedom of action in national emergencies and to keep the treaty in harmony with the programs of the specialized agencies of the United Nations, such as the International Monetary Fund.”³²⁴

Drafting and Negotiating the FCN Treaties

The model FCN treaty was a long and complex document. At the inception of the postwar treaty program, the standard draft had an estimated length of 10,300

³²² *Ibid.*, page 2.

³²³ Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 23.

³²⁴ Memorandum by Vernon G. Setser headed, “Status of Commercial Treaty Program,” dated November 5, 1946, NARA, Record Group 59, Department of State File No. 711.002/11-546.

words.³²⁵ An October 1946 memorandum written by Herman Walker, an adviser on commercial treaties in the Division of Commercial Policy with a doctorate in economics from Duke University,³²⁶ noted that the model treaty was perceived to be “too verbose and tedious.”³²⁷ On the whole, Walker observed, “it is a forbidding document to read appreciatively.”³²⁸ Some of its provisions were “quite difficult to follow.”³²⁹

Walker blamed the problem in part on the nature of a legal document and in part on “the multiplicity of outside drafting contributions that perforce entered the picture.”³³⁰ Indeed, the drafters had consulted more than 30 government agencies with respect to various aspects of the model treaty.³³¹ The State Department, which had primary responsibility for drafting and negotiating FCN treaties, consulted with other government agencies with respect to provisions that would affect the work of

³²⁵ Memorandum by Herman Walker dated October 15, 1946, “Shortening the Present Draft Treaty of Friendship, Commerce and Navigation,” NARA, Record Group 59, Lot Files, Walter Hollis Papers, Folder marked “Investment Treaties.”

³²⁶ “Herman Walker, 83, Professor and U.S. Foreign Officer, Dies,” *New York Times*, May 13, 1994.

³²⁷ Memorandum dated October 15, 1946, by Herman Walker, “Shortening the Present Draft Treaty of Friendship, Commerce and Navigation,” NARA, Record Group 59, Lot Files, Walter Hollis Papers, Folder marked “Investment Treaties.”

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ Memorandum by Charles Bevans dated August 22, 1951, “Signing of a Treaty of Friendship, Commerce and Navigation with Israel,” NARA, Record Group 59, Department of State File No. 611.84A4/8-2251.

those agencies and it consulted with the Commerce Department with respect to the entire treaty.³³²

Walker hoped to improve the style of the treaty. The FCN treaties were intended to endure for years to come and constituted, in Walker's mind, "an enterprise deserving finesse in language as well as excellence in substance."³³³ Shortening the draft would "speed up its readability, and increase the ease with which it can be comprehended."³³⁴ It would enhance the treaty's prestige, render it less suspect to officials of other countries, decrease the difficulty of translation, and save costs in producing copies. Walker believed that any proposal to modify the language would face two obstacles, however: inherent resistance to change and the fear of having to repeat the laborious interagency clearance process. Thus, Walker proposed to modify the language only in ways that were purely stylistic.

Walker estimated that four stylistic clichés accounted for about 1,075 of the more than 10,000 words. These clichés included, for example, references to the "High Contracting Parties" rather than simply "the parties." He proposed to eliminate these clichés and to streamline the language in other ways that largely eliminated surplus or redundant language.³³⁵

³³² Memorandum of Conversation on Consultation with other Government Agencies and with Business Interests in connection with the Negotiation of Treaties of Friendship, Commerce and Navigation, dated June 29, 1948, NARA, Record Group 59, Department of State File No. 711.002/6-2948.

³³³ Memorandum by Herman Walker dated October 15, 1946, "Shortening the Present Draft Treaty of Friendship, Commerce and Navigation," NARA, Record Group 59, Lot Files, Walter Hollis Papers, Folder marked "Investment Treaties."

³³⁴ *Ibid.*

Despite Walker's efforts, however, a year later the model treaty still was "widely criticized for its length and complexity."³³⁶ Experience had shown that extensive revisions were so time consuming that they foreclosed proposing new treaty negotiations within any reasonable period. Accordingly, the Department decided to proceed with the draft as shortened by Walker's stylistic revisions, dealing with the most serious substantive defects as they became evident. The result is that the model FCN treaty remained long and complex throughout its history and that it was subject to almost continuous revision.

The State Department approached treaty negotiations with the premise that the standard FCN treaty "approximates a practicable ideal; and that the process of negotiation is in no way a bargaining over concessions, but rather a mutual search for right principle to which both countries are willing to subscribe in the interest of each, and a joint formulation of rules which the two countries wish to declare, on a fully equal, friendly and reciprocal basis, as governing their relationship toward one another."³³⁷ The Department thus saw the FCN treaty as a charter of liberal legal principles, not merely a catalogue of concessions. The principles might have varying application, depending upon the circumstances of the other country, but the goal was an agreement on principles, not the extraction of maximum gains. As President Truman would tell Congress in 1949, when negotiating FCN treaties, "we do not, of

³³⁵ *Ibid.*

³³⁶ Memorandum dated March 28, 1947, from Vernon G. Setzer to Seymour J. Rubin, NARA, Record Group 59, Walter Hollis Papers, Folder Marked "Investment Treaties."

³³⁷ Department of State Instruction dated December 14, 1954, NARA, Record Group 59, Department of State File No. 611.554/12-454.

course, ask privileges for American capital greater than those . . . we ourselves grant in this country.”³³⁸

Like the New Deal, FCN treaty policy was pragmatic, rather than doctrinaire. That is, the United States did not believe that every treaty partner must sign the same agreement and was prepared to tailor the treaties, to some extent, to the circumstances of other countries. Although the United States had prepared a standard treaty on which to base negotiations, the standard treaty was not “a model which should be rigidly and inflexibly followed.”³³⁹

The Department’s pragmatism had limits, however. The Department believed that treaty negotiations would be feasible only if the two countries had “substantial agreement” on the “basic treaty philosophy.”³⁴⁰ As Winthrop Brown would observe in 1950, “If a treaty is to be of any value [with regard to promoting investment and raising standards of living], it must contain effective provisions. A watered-down agreement that fails to come to grips with reality is worse than useless, because it tends to give a stamp of official approval to conditions and practices which obstruct the achievement of the announced purposes of the agreement.”³⁴¹

³³⁸ Harry S. Truman, “The Point 4 Program: Aid to Underdeveloped Areas,” June 24, 1949, reprinted in Department of State, *A New Era in World Affairs: Selected Speeches and Statements of President Truman, January 20 to August 29, 1949*, Department of State Publication 3653 (Washington: Government Printing Office, 1949), page 32.

³³⁹ Memorandum of Conversation dated June 20, 1945, NARA, Record Group 59, Department of State File No. 611.9331/6-2045.

³⁴⁰ Airgram dated June 16, 1950, from the Department of State to the U.S. embassy in Greece, NARA, Record Group 59, Department of State File No. 611.814/6-250.

³⁴¹ Memorandum by Winthrop Brown, dated February 13, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-850.

This would remain the Department's approach throughout the years of the FCN treaty program. For example, in 1954, in response to an expression of concern by a Belgian official that the United States might have negotiated a better treaty with Germany than it would with Belgium, the Department of State sent a cable to its embassy in Brussels, written by Herman Walker, explaining the U.S. negotiating posture. The cable noted initially that every FCN treaty negotiated by the United States to date, *i.e.*, by December 1954, differed in some respects from the U.S. standard treaty, although all FCNs were alike in "scope, orientation and fundamental content."³⁴² Thus, in a decade of negotiations, the United States had not persuaded any country to adopt the standard treaty as proposed. Further, no two FCNs were alike. Rather, "[e]ach country negotiates in light of its own circumstances and requirements and its conception of a proper and useful treaty. . . ."³⁴³

The State Department's pragmatism included a procedural as well as a substantive element. That is, the Department never adopted a uniform procedure for negotiating FCN treaties. Rather, it sought "to adapt itself to whatever procedure may seem most expedient in a given situation."³⁴⁴ In a typical case, the State Department provided the other government with a draft of the proposed treaty. After that government reviewed the draft, its representatives would meet with U.S. officials in informal sessions to discuss the purposes of the treaty, clarify any questions, identify

³⁴² Department of State Instruction dated December 14, 1954, NARA, Record Group 59, Department of State File No. 611.554/12-454.

³⁴³ *Ibid.*

³⁴⁴ Department of State Instruction A-100 to the U.S. embassy in Brussels, dated December 13, 1954, NARA, Record Group 59, Department of State File No. 611.554/12-1354.

potential issues in the negotiations, and ascertain whether a sufficient basis existed for productive negotiations. When the negotiations were held abroad, which was typical, the ambassador and the embassy staff bore the responsibility for conducting them, with the guidance of the State Department. In some cases, the Department would send a treaty expert to the embassy to assist in the negotiations for a limited period of time. Any agreement reached by the embassy would be subject to State Department approval.

The Influence of the American Business Community

As the State Department prepared the model treaty and commenced the negotiation of individual treaties, a question that arose continually was the extent to which the Department should involve private business groups in the treaty process. The Department, as has been noted, did consult with selected business groups, particularly the NFTC,³⁴⁵ about the treaty. Consultations with the NFTC, in fact, were routine and involved casual conversations as well as formal discussions. The Department would ask business representatives such as the NFTC for their opinions about potential changes in treaty language and generally offered to share copies of the proposed treaty drafts to those who were interested.³⁴⁶

³⁴⁵ The NFTC had established a committee of “well qualified” persons to study FCN treaty related matters and the Department therefore valued the NFTC’s advice. “Memorandum of Conversation on Consultation with other Government Agencies and with Business Interests in connection with the Negotiation of Treaties of Friendship, Commerce and Navigation,” dated June 29, 1948, NARA, Record Group 59, Department of State File No. 711.002/6-2948.

³⁴⁶ Memorandum of Conversation dated February 24, 1950, prepared by Vernon G. Setser, NARA, Record Group 59, Department of State File No. 611.004/2-2450.

The State Department did not, however, actively seek broad involvement by the business community. Rather, it worked regularly with a small group of business organizations, such as the NFTC, the National Association of Manufacturers (NAM), and the Chamber of Commerce. First, while wanting the treaties to address the needs of the business community, the Department recognized that the interests of the business community did not entirely coincide with those of the U.S. government³⁴⁷ and feared that too much involvement by business groups would stimulate organized political pressure to alter the terms of the treaties in ways that were inconsistent with administration policy.³⁴⁸ Second, the State Department believed that the Commerce Department and the U.S. missions abroad were in continuous contact with the business community and could provide the Department with as much information about the problems and recommendations of the business community as would be useful.³⁴⁹

Although the State Department did discuss the terms of the model treaty with business groups, once the negotiation of a particular treaty began, the Department declined to consult with those groups about specific provisions of that treaty. As justification for that approach, the Department cited its policy of keeping treaty

³⁴⁷ Mira Wilkins has noted that “there was by no means an exact coincidence between U.S. government policies and the desires of international businesses – although often such approaches did coincide.” Mira Wilkins, *The Maturing of Multilateral Enterprise: American Business Abroad from 1914 to 1970* (Cambridge: Harvard University Press, 1974), page 286. She cited, for example, Congressional passage in 1949 of the Export Control Act, which authorized the president to prohibit exports where necessary to national security, a measure designed to prevent the Soviet Union from benefitting from trade with the United States. *Ibid.*, page 287.

³⁴⁸ Memorandum of Conversation on Consultation with other Government Agencies and with Business Interests in connection with the Negotiation of Treaties of Friendship, Commerce and Navigation, dated June 29, 1948, NARA, Record Group 59, Department of State File No. 711.002/6-2948.

³⁴⁹ *Ibid.*

provisions confidential until the Senate lifted the injunction of secrecy, an event that would occur after the president sent the treaty to the Senate for advice and consent to ratification.³⁵⁰ Following the signature of a treaty, business groups were presented with the treaty as an indivisible whole. They could oppose Senate advice and consent to the ratification of the treaty, but they could not easily obtain changes to particular provisions. In a few instances, business groups succeeded in persuading the Senate to attach a reservation to a treaty. Such a reservation, however, would have legal effect only if the other treaty party concurred.³⁵¹

In short, the State Department wished to address the needs of the business community in ways that were consistent with U.S. policy, but it did not want to enable business groups to dictate the substance of the treaty and it sometimes rejected proposals by the business community. In particular, as will be seen, the State Department generally refused demands by business groups that it coerce other countries to conclude an FCN treaty or to agree to provisions more favorable to U.S. investors.

The NFTC, in particular, sought to use U.S. economic power to obtain treaty guarantees of national treatment for American businesses.³⁵² A guarantee of national treatment is a guarantee that a country will treat foreign nationals or companies no less favorably than it treats its own nationals or companies in similar circumstances.

³⁵⁰ *Ibid.*

³⁵¹ A summary of the international law of treaty reservations appears in Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984).

³⁵² Letter from the National Foreign Trade Council to Secretary of State James Byrnes, dated July 10, 1945, NARA, Record Group 59, Department of State File No. 611.031/7-1045.

National treatment could be a very difficult commitment to obtain. First, many foreign countries had few investors with capital to invest in the United States and thus these countries would gain little practical benefit from receiving a promise of national treatment in the United States. Further, foreign governments generally understood that U.S. law would guarantee to their businesses national treatment in the United States even in the absence of a treaty. In effect, a treaty guarantee of national treatment would grant American businesses valuable rights in the territory of the other country, but would grant foreign businesses little that they did not already have under U.S. constitutional law and little that they could use as a practical matter. For these reasons, most other countries saw little benefit in treaty provisions containing mutual promises of national treatment.³⁵³

The NFTC knew that other countries were willing to negotiate trade agreements with the United States to lower the U.S. tariff barriers³⁵⁴ as a result of which the United States market was one of the most protected markets in the world.³⁵⁵ In July 1945, the NFTC proposed that the State Department condition the conclusion of a reciprocal trade agreement on the conclusion of an FCN treaty with a national treatment guarantee.³⁵⁶ That is, under the NFTC proposal, other countries would be

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Post-War Economic Policy and Planning*, Sixth Report of the House Special Committee on Post-War Economic Policy and Planning, House Report No. 541, 79th Congress, 1st Session, May 8, 1945, page 35.

³⁵⁶ Letter from NFTC to Secretary of State James Byrnes, dated July 10, 1945, NARA, Record Group 59, Department of State File No. 611.031/7-1045.

able to gain access to the protected U.S. market only by concluding an FCN treaty as well as a trade agreement with the United States. In 1950, the NFTC would argue that the United States should refuse to provide public capital to developing countries because to do so would diminish the incentive for these countries to conclude FCN treaties in order to attract private capital.³⁵⁷

As was often the case when U.S. business interests tried to persuade the State Department to use its bargaining leverage to obtain more favorable FCN treaty provisions, the Department refused to do so. It declined to eliminate public capital for developing countries or to condition the conclusion of a trade agreement on the conclusion of an FCN treaty. Regarding the latter NFTC proposal, Willard Thorp, the deputy to the assistant secretary of state for economic affairs, replied that the Reciprocal Trade Agreements Act authorized the executive branch to negotiate treaties that lowered U.S. tariffs in exchange for reciprocal reductions in tariffs by other countries. As the Department interpreted this legislation, Congress meant for U.S. tariff reductions to be used solely for the purpose of opening foreign markets to U.S. goods and not for other purposes, however desirable the achievement of those other purposes might be. Thorp also noted that the circumstances surrounding treaty negotiations with each country varied too much for the United States to adopt a single policy, such as that proposed by the NFTC, for all countries. The Department nevertheless was concerned not to damage relations with the NFTC. After rejecting

³⁵⁷ Robert F. Loree, *Position of the National Foreign Trade Council with respect to the Havana Charter for an International Trade Organization* (New York: National Foreign Trade Council, 1950), page 49.

the NFTC proposal, Assistant Secretary Will Clayton sent a further response in which he invited NFTC officials to have lunch with him at the Metropolitan Club.³⁵⁸

The State Department continued to believe that the United States should refrain from coercing other countries to sign an FCN treaty. In 1950, for example, Winthrop Brown, who was by then director of the State Department's Office of International Trade Policy (the successor to the Office of Economic Affairs), in writing about the status of FCN treaty negotiations with Chile, noted that "Several months ago the Chilean Ambassador requested and received copies of a draft [FCN] treaty such as we then had under discussion with certain other governments, and we understand that this draft is now under study in Santiago. It is, of course, no part of the Department's policy to exert any pressure upon Chile to enter into such a treaty. . . ."³⁵⁹ Brown returned to the same point later, noting, "The Chilean government is unquestionably free to reject our treaty proposals for any reason, or for no reason at all. That is its privilege as the government of a sovereign nation."³⁶⁰

The United States made a similar point during its negotiations with Ireland. The head of the U.S. legation in Dublin, Vinton Chapin, when discussing the critical point of disagreement between the two countries, assured the Irish Prime Minister that

³⁵⁸ Letter dated October 4, 1945, from Will Clayton to E. P. Thomas, NARA, Record Group 59, Department of State File No. 611.0031/9-1245.

³⁵⁹ Memorandum by Winthrop Brown, dated February 13, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-850.

³⁶⁰ *Ibid.*

the United States “had no intention of ‘putting a gun’ to any Irish head to gain our point.”³⁶¹

The State Department made the point again during negotiations with Japan. It asked the U.S. mission in Tokyo to emphasize to the Japanese that, while the Department “want[ed] a good treaty or none at all, it does not wish [to] force any treaty provisions” upon the Japanese government.³⁶² That is, it would seek acceptance of U.S. proposals only “on a free-will basis.”³⁶³

The Department’s refusal to exert pressure on other countries was not attributable to a general policy of avoiding the application of economic pressure in international relations. The Truman administration, for example, “had no qualms about using economic aid as a lever to force diplomatic concessions from the Soviets.”³⁶⁴ The United States also exerted considerable economic pressure on the British to dismantle the imperial preference system established in 1932 in response to the Smoot-Hawley tariff.³⁶⁵

³⁶¹ Airgram dated October 28, 1948, from the U.S. legation in Dublin to the Department of State, NARA, Record Group 59, Department of State File No. 711.41D2/10-2848.

³⁶² Airgram dated March 10, 1952, from the Department of State to the U.S. Political Advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/3-1052.

³⁶³ Airgram dated December 31, 1951, from the Department of State to the U.S. Political Advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/12-3151.

³⁶⁴ Randall B. Woods and Howard Jones, *Dawning of the Cold War: The United States’ Quest for Order* (Athens: The University of Georgia Press, 1991), page 46.

³⁶⁵ Alan Dobson, *The Politics of the Anglo-American Economic Special Relationship, 1940-1987* (New York: St. Martin’s Press, 1988), pages 60-97; Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order* (New York: Columbia University Press, 1980); Lloyd C. Gardner, *Economic Aspects of New Deal Diplomacy* (Madison, The University of Wisconsin Press, 1964), pages 275-290.

The Department's refusal to exert pressure on other countries to conclude FCN treaties was to some degree a strategic choice. The State Department recognized that pressure could stiffen resistance and thus be counterproductive.³⁶⁶ The State Department also believed, however, that for a treaty to be an effective basis for economic relations it should be one into which the other party freely entered.³⁶⁷ As has been seen, the State Department did not see an FCN treaty as merely a catalogue of concessions extracted, but as the reflection of a genuine commitment to "right principle."

The State Department also rejected proposals by business groups that the federal government use its power to conclude treaties to preempt state laws that impeded efforts to obtain protection for U.S. business overseas.³⁶⁸ Various state laws discriminated against foreign investors in different ways. For example, thirteen states did not allow foreign ownership of real estate.³⁶⁹ These state laws enabled other countries to refuse to grant national treatment to U.S. investors on the ground that the United States itself did not always extend national treatment to foreign investors. The NFTC proposed that the State Department negotiate treaties that would preempt these conflicting state laws or ask Congress to enact federal legislation that would have the

³⁶⁶ *Current Economic Developments*, September 17, 1945, page 9, NARA, Record Group 59, Department of State Lot Files.

³⁶⁷ Telegram dated February 16, 1948, from the Department of State to the U.S. embassy in Nanking, NARA, Record Group 59, Department of State File No. 611.9331/2-1048.

³⁶⁸ Under the Supremacy Clause of the U.S. Constitution, Article VI, clause 2, treaties are the supreme law of the land and prevail over inconsistent state laws. *See United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

³⁶⁹ Letter dated March 25, 1946, from the National Foreign Trade Council to Secretary of State James Byrnes, NARA, Record Group 59, Department of State File No. 611.0031/3-2546.

same effect.³⁷⁰ The State Department again declined to accept the NFTC proposal. Woodbury Willoughby responded by offering merely to discuss the proposal with NFTC representatives.³⁷¹

Negotiating the First Postwar FCN Treaty: China

The conflict between the interest of the American business community and State Department policy became apparent in a public way at the very inception of the U.S. postwar FCN treaty program. The first negotiation of a U.S. postwar FCN treaty occurred with China, in part because the two countries already had agreed during the war that such a negotiation would occur promptly, but also in part because the State Department believed that China could be a huge export market for surplus U.S. goods.³⁷²

Chinese-American economic relations after the 1840s had been governed by a treaty system based on the doctrine of extraterritoriality. Under that doctrine, many foreign nationals in China, including Americans, were exempted from the application of Chinese law.³⁷³ In 1943, however, the United States, at that time allied with China against Japan and seeking for China a broad role in the postwar world order, concluded with China a treaty in which it agreed to surrender its extraterritorial

³⁷⁰ *Ibid.*

³⁷¹ Letter dated April 18, 1946, from Woodbury Willoughby to E.P. Thomas, NARA, Record Group 59, Department of State File No. 611.0031, 3-2546.

³⁷² Gardner, *op. cit.*, page 248.

³⁷³ The prewar system of extraterritoriality in China is described in John King Fairbank, *The United States and China* (Cambridge: Harvard University Press, 4th ed. 1983), pages 163-171.

rights.³⁷⁴ Because U.S. commercial relationships with China in the past had been based on extraterritoriality, the relinquishment of extraterritorial rights by the United States rendered many existing treaty provisions essentially meaningless.³⁷⁵ If the United States and China were to continue to structure their economic relations through an FCN treaty, they must negotiate a new treaty. Accordingly, Article VII of the 1943 treaty expressed the parties' intention to enter into the negotiation of an FCN treaty within six months of the cessation of hostilities.³⁷⁶

Discussions between U.S. and Chinese officials concerning the negotiation of a new FCN treaty in fact were already in progress by 1943.³⁷⁷ In March 1944, the State Department reported to the U.S. embassy in Chongqing (Chungking) that the Department was in the process of drafting the language of a proposed treaty, but that certain articles were posing difficult problems, particularly those relating to the acquisition of land and the rights of corporations.³⁷⁸ In drafting the proposed treaty,

³⁷⁴ Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, 57 Stat. 767, T.S. No. 984, 6 Bev.739, reprinted in *American Journal of International Law Supplement* 37 (1943), 65. The long process by which extraterritoriality was ended in China is described in Wesley R. Fishel, *The End of Extra-territoriality in China* (Berkeley: The University of California Press, 1952).

³⁷⁵ Statement of Thomas C. Blaisdell, Director, Office of International Trade, U.S. Department of Commerce, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), page 36.

³⁷⁶ Memorandum of Conversation dated July 9, 1945, NARA, Record Group 59, Department of State File No. 611.9331/7-945.

³⁷⁷ Telegram dated March 8, 1944, from the Department of State to the U.S. ambassador in China, NARA, Record Group 59, State Department File No. 711.932/11, reprinted in Department of State, *Foreign Relations of the United States* Vol. VI (Washington: Government Printing Office 1967), pages 1009-1011.

³⁷⁸ *Ibid.*

U.S. officials were soliciting the views of “representative business organizations” with respect to treaty coverage.³⁷⁹ Ambassador Clarence E. Gauss replied that Chinese attitudes regarding potential treaty provisions had not yet “crystallized” and he recommended that a draft of a proposed commercial treaty be given to the Chinese as soon as possible while Chinese policy was still fluid.³⁸⁰

A week later, on April 15, Ambassador Gauss reported to Washington that he had learned that the Chinese were drafting a treaty for proposal to Washington. He again urged that the State Department complete its draft quickly.³⁸¹ As it happened, he need not have worried. Two days later, the embassy reported on the contents of the proposed Chinese treaty. The Chinese draft appeared in a number of respects to be based on existing U.S. FCN treaties, including treaties with Liberia³⁸² and Thailand.³⁸³ Indeed, it appeared that the Chinese government had drafted the treaty in English and

³⁷⁹ Statement of Charles E. Bohlen, Counselor, Department of State, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), page 4.

³⁸⁰ Telegram dated April 8, 1944, from the U.S. Ambassador in China to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.932/12, reprinted in Department of State, *Foreign Relations of the United States* Vol. VI (Washington: Government Printing Office 1967), pages 1011-1014.

³⁸¹ Telegram dated April 15, 1944, from the U.S. Ambassador in China to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.932/10, reprinted in Department of State, *Foreign Relations of the United States* Vol. VI (Washington: Government Printing Office 1967), page 1015.

³⁸² Treaty of Friendship, Commerce and Navigation, United States-Liberia, signed August 8, 1938, 54 Stat. 1739, T.S. No. 956.

³⁸³ Treaty of Friendship, Commerce and Navigation, United States-Siam, signed November 13, 1937, 53 Stat. 1731, T.S. No. 940, 11 Bev. 1016.

then translated it into Chinese.³⁸⁴ On April 22, the State Department sent a proposed draft to the embassy for comments. Revisions on the draft then continued until early the following year.³⁸⁵

The United States finally commenced its first negotiation under the new FCN treaty program on April 2, 1945, when U.S. embassy officials in Chongqing presented a proposed draft FCN treaty to the Chinese government.³⁸⁶ By then, the State Department had spent more than a year attempting to craft a proposed treaty that was appropriate for China's circumstances. The Department proposed the new treaty more than four months before Japan surrendered to the United States and 101 years after Caleb Cushing had extracted extraterritorial rights from the Chinese in the first FCN treaty between China and the United States.

The proposed treaty was based on the last FCN treaty concluded by the United States before the war, the 1938 U.S. FCN treaty with Liberia that the Chinese had also used as a basis for their proposed treaty text.³⁸⁷ The State Department "discreetly" emphasized to Chinese officials the importance of concluding the treaty expeditiously,

³⁸⁴ Telegram dated April 17, 1944, from the U.S. Ambassador in China to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.932/19, reprinted in Department of State, *Foreign Relations of the United States* Vol. VI (Washington: Government Printing Office 1967), pages 1015-1018.

³⁸⁵ Telegram dated February 16, 1945, from the Secretary of State to the U.S. Ambassador in China, NARA, Record Group 59, Department of State File No. 711/932/2-1645, reprinted in Department of State, *Foreign Relations of the United States* Vol. VII (Washington: Government Printing Office 1969), pages 1258-1259.

³⁸⁶ Memorandum of Conversation dated April, 20, 1946, NARA, Record Group 59, Department of State File No. 611.9331/4-2045; *Current Economic Developments*, January 1, 1946, page 9, NARA, Record Group 59, Department of State Lot Files.

³⁸⁷ Memorandum of Conversation dated April, 20, 1946, NARA, Record Group 59, Department of State File No. 611.9331/4-2045.

but also recognized that “undue pressure” could undermine the U.S. bargaining position.³⁸⁸

The proposed treaty consisted of thirty articles, one of which effected the termination of nine prior treaties between China and the United States,³⁸⁹ including those establishing extraterritorial rights for the United States in China. Much of the treaty dealt with matters of trade. For example, the treaty guaranteed nondiscriminatory treatment with respect to trade³⁹⁰ and nondiscriminatory treatment by state trading companies.³⁹¹ No fewer than five articles conferred on each party various navigation rights with respect to the other party.³⁹²

Several articles that are direct antecedents to contemporary investment treaty provisions appeared in the proposed FCN treaty with China. Regarding the norm of access, Article II required each party to provide nationals of each party with national and MFN treatment with respect to the right to engage in commercial, manufacturing, scientific, educational, religious and philanthropic activities. Article III extended similar rights to corporations, an innovation in U.S. treaty practice. Before the war, such rights generally had been limited to individuals,³⁹³ although some prewar FCN

³⁸⁸ *Current Economic Developments*, September 17, 1945, NARA, Record Group 59, Department of State Lot Files.

³⁸⁹ Draft Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, Article XXIX, NARA, Record Group 59, Department of State File No. 771.932/1-1845.

³⁹⁰ *Ibid.*, Article XVI.

³⁹¹ *Ibid.*, Article XX.

³⁹² *Ibid.*, Articles XXI through XXV.

treaties had required that the host country recognize the juridical status of corporations and grant them free access to the courts of law.³⁹⁴ Some FCN treaties concluded prior to the war also had guaranteed national and MFN treatment with respect to the right to organize corporations.³⁹⁵

Article XIX provided limited protection against the imposition of currency exchange controls, regulations that can prevent an investor from transferring capital or earnings from the host country to the investor's home country. In particular, that article required each party to provide "fair and equitable treatment" as well as national and MFN treatment with respect to exchange controls. The provision on exchange controls prior to the war had applied primarily to trade related payments, although it did guarantee MFN treatment with respect to exchange controls generally.³⁹⁶

Regarding the norm of security, Article VI(1) required each party to provide the most constant protection and security to property owned by nationals and companies of the other party, a provision under which the host state must exercise due diligence to protect foreign investment.³⁹⁷ The FCN treaties of the late 1930s included a similar provision and added that the protection must be "that degree . . . required by

³⁹³ Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Liberia, August 8, 1938, Article I, 54 Stat. 1739, T.S. No. 956, 9 Bevans 595. The treaty did grant corporations MFN treatment with respect to the right to explore and exploit mineral resources.

³⁹⁴ *Ibid.*, Article XVII.

³⁹⁵ *Ibid.*, Article XVIII.

³⁹⁶ *Ibid.*, Article X.

³⁹⁷ The early history and meaning of this provision is traced in Robert R. Wilson, "Property-Protection Provisions in United States Commercial Treaties," *American Journal of International Law* 45 (1981), 83-107.

international law.”³⁹⁸ Article VI(2) prohibited a party from taking property owned by nationals or companies of the other party except in accordance with due process and upon prompt payment of just and effective compensation.³⁹⁹ In the late 1930s, U.S. FCN treaties had required that takings be in accordance with due process and upon payment of just compensation.⁴⁰⁰ Thus, the requirement of effectiveness was an innovation. This requirement meant that compensation must be paid in a form usable to the recipient, such as in a freely convertible currency as opposed to a nonconvertible local currency.

Regarding the norm of due process, Article VI(4) guaranteed to nationals and companies “freedom of access” to the courts of justice and national and MFN treatment with respect to such access. The prewar FCN treaties also guaranteed freedom of access to the courts for both nationals and companies.⁴⁰¹ Article XXVIII required that disputes concerning the interpretation or application of the treaty be submitted to judicial or arbitral settlement, a provision that had no counterpart in the FCN treaties of the late 1930s. Thus, the treaty made provision for recourse to both local and international tribunals.

³⁹⁸ Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Liberia, August 8, 1938, Article I, 54 Stat. 1739, T.S. No. 956, 9 Bevens 595.

³⁹⁹ The early history of the expropriation provision is traced in Robert R. Wilson, “Property-Protection Provisions in United States Commercial Treaties,” *American Journal of International Law* 45 (1981), 83-107.

⁴⁰⁰ *Ibid.*

⁴⁰¹ The early history of the judicial access provision in U.S. FCN treaty practice is traced in Robert R. Wilson, “Access-to-Courts Provisions in United States Commercial Treaties,” *American Journal of International Law*, 47 (1953), 20-48.

The term “due process” appeared in the FCN treaties, although not in the judicial access provision. The term appeared in the FCN treaties concluded during the interwar period in a provision requiring that expropriation be in accordance with due process. When this provision first appeared in 1923 in the FCN treaty with Germany, some question arose as to its meaning. A memorandum from the Solicitor of the State Department observed that “[t]his stipulation will operate to secure protection against arbitrary and unjust treatment in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized by international law.”⁴⁰² Thus, the explicit reference to due process appears to have reflected the norm of reasonableness as embodied in the U.S. constitutional doctrine of substantive due process. U.S. officials at the time argued that the reference to due process referred to the due process required by international law rather than that required by the U.S. Constitution,⁴⁰³ but that position may have been intended to preempt claims that the term incorporated the constitutional norms of other countries, which might be less demanding than either international law or U.S. constitutional law. U.S. officials in any event likely formed their understanding of the requirements of international law by reference to U.S. constitutional norms. Indeed, the Solicitor’s view that due process prohibited arbitrariness essentially tracked the U.S. constitutional law on substantive due process.

⁴⁰² The solicitor’s memorandum is quoted in Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 114.

⁴⁰³ *Ibid.*, page 115.

The proposed treaty did not incorporate a general requirement of nondiscrimination. As the foregoing summary shows, however, the proposed treaty did require nondiscrimination with respect to a wide variety of matters.

The Chinese negotiators raised several objections to the treaty very early in the discussions. First, the Chinese negotiators objected to a treaty provision that protected corporations because it was not completely reciprocal. Specifically, Article III(3) of the proposed treaty required that the individual states of the United States provide to Chinese corporations in their territory treatment as favorable as that which they provided to out-of-state (as opposed to in-state) U.S. corporations. China, however, was required to provide U.S. corporations treatment as favorable as that provided to any Chinese corporation. The U.S. negotiators responded that this was unavoidable because of the nature of the U.S. federal system. The Chinese negotiators understood the reason, but noted that the lack of mutuality existed nonetheless.⁴⁰⁴ Similarly, the Chinese objected to protecting U.S. corporations in the financial services sector because U.S. law at that time did not allow out-of-state banks and thus Chinese banks would not be able to enjoy the same treatment in the United States that U.S. banks received.⁴⁰⁵

Ultimately, the State Department would compromise with the Chinese negotiators. The final treaty language at Article III would subordinate the right of corporations to national treatment with respect to engaging in business activities in

⁴⁰⁴ Memorandum of Conversation dated July 9, 1945, NARA, Record Group 59, Department of State File No. 611.9331/7-745.

⁴⁰⁵ *Ibid.*

China to local law. In other words, China could deny national treatment to U.S. corporations merely by enacting legislation to that effect.

Second, the Chinese negotiators objected to Article IX, which protected intellectual property rights. Dr. Kan Lee, the commercial counselor to the Chinese Embassy, told State Department officials at a June 22, 1945, meeting that copyright laws conflicted with the goal of cultural exchange. He suggested that “the best way for the United States to make information available to China is to permit Chinese to translate American books freely.”⁴⁰⁶ China insisted in all of its treaty negotiations that any writing, once translated into Chinese, be exempted from treaty protection.⁴⁰⁷ The State Department compromised on this point as well.

Third, the Chinese negotiators objected to a provision in Article VIII granting to U.S. nationals and corporations the right to acquire land in China. They expressed the concern that, if Americans were permitted to acquire Chinese real property, the depreciated Chinese currency would allow them to purchase so much land that relations between the two countries might be damaged.⁴⁰⁸ Once again, the State Department would compromise and agree to a guarantee of MFN treatment alone with respect to the acquisition of real property.⁴⁰⁹

⁴⁰⁶ Memorandum of Conversation dated June 22, 1945, NARA, Record Group 59, Department of State File No. 611.9331/6-2245.

⁴⁰⁷ Statement of Winthrop Brown, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948 (Washington: Government Printing Office, 1948), page 16.

⁴⁰⁸ Memorandum of Conversation dated June 25, 1945, NARA, Record Group 59, Department of State File No. 611.9331/6-2645.

The political demands of a wartime alliance had demolished the old order in China. As negotiations began, the U.S. business community desperately sought a new order that would preserve American privileges as much as possible. If they were not to be exempt from Chinese law, as they had been under the regime of extraterritoriality, U.S. business interests wanted Chinese law to conform to American norms.

Accordingly, the U.S. business community in China was deeply interested in the progress of the negotiations. About three weeks after the draft treaty was provided to Chinese officials, on April 24, State Department officials met with representatives of the China-America Council on Commerce and Industry, which represented about 300 U.S. companies in China.⁴¹⁰ These business representatives told the State Department that it was “highly desirable that a new commercial treaty should be concluded prior to the resumption of normal trade relations anticipated for the post-war period.”⁴¹¹ They inquired as to whether a draft treaty had been given to the Chinese government.

During the April 24 meeting, the China-America Council representatives expressed special interest in the real property provision, which, as has been seen, was one of the provisions that concerned Chinese officials as well. Chinese law forbade

⁴⁰⁹ U.S.-China FCN treaty, Article VIII(1).

⁴¹⁰ These companies included Bristol Meyers, B.F. Goodrich, Firestone, Goodyear, Alcoa, Boeing, Coca Cola, IT&T, Standard Oil, Marine Midland, Pepsi Cola, International Harvester, Union Pacific Railroad, General Electric, Chase Bank, Reynolds, Socony-Vacuum Oil (which later became Mobil Oil Company), Time, Kodak, and Pan American Airways.

⁴¹¹ Memorandum of Conversation dated April 30, 1945, NARA, Record Group 59, Department of State File No. 611.9331/4-3045.

foreign ownership of land unless the right was granted by treaty. Other countries had treaty rights, but the United States had not obtained such a right for U.S. nationals.⁴¹² In a letter to the Secretary of State dated September 28, 1945, the China-America Council asserted that securing a right for U.S. nationals to purchase real estate on the same basis as Chinese nationals was “highly essential” to the future of American business in China.⁴¹³

The State Department, however, declined to support the position of the council. Assistant Secretary of State Will Clayton explained to the council that many American states restricted alien ownership of land and, for this reason, the United States did not believe that it could demand a right for Americans in China to acquire real property.⁴¹⁴ The most that the United States could demand was MFN treatment for nationals and companies from states that allowed foreign ownership of land. As noted above, the United States ultimately would agree to provision guaranteeing only MFN treatment in that regard.

The American business community continued to lobby the State Department with respect to the proposed treaty with China. On April 5, 1946, Secretary of State George C. Marshall received a report on Chinese-American commercial relations

⁴¹² China-America Council on Commerce and Industry, Memorandum on Real Property Rights of Americans in China and of Chinese in America, NARA, Record Group 59, Department of State File No. 611.9331/ 6-1845.

⁴¹³ Letter dated September 28, 1945, from Blackwell Smith to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.9331/9-2845.

⁴¹⁴ Letter dated November 8, 1945, from Assistant Secretary of State William L. Clayton to Blackwell Smith, NARA, Record Group 59, Department of State File No. 611.9331/9-2845.

jointly authored by the two leading associations of U.S. businesses in China, the China-America Council on Commerce and Trade and the NFTC.

The memorandum set forth a series of points that the two organizations regarded as “fundamental for the establishment of a healthy trade with China and the encouragement of maximum investment of American capital in China.”⁴¹⁵ The first point listed in the memorandum was “China-America Treaty of Commerce and Amity.” More specifically, the memorandum argued that “[a] healthy economic climate must be provided for the maximum development of two-way trade between America and China. The most effective results can be attained only by the fullest enlistment of free enterprise with Government encouragement. *A modern treaty of commerce and amity on a most-favored-nation basis should be consummated immediately between the United States and China.*”⁴¹⁶ The memorandum characterized the FCN treaty as “the cornerstone upon which the foundation of our trade will be laid” and asserted that the treaty “must be concluded before the resumption of normal trade relations can take place.”⁴¹⁷ The memorandum noted that the two organizations “would like to know the current status of the Chinese-American negotiations regarding this treaty.”⁴¹⁸ After observing that a tax convention “should also be concluded,” the memorandum said that the two organizations “would like to

⁴¹⁵ Memorandum presented April 5, 1946 to General George C. Marshall, American ambassador to China, regarding Chinese-American commercial and fiscal relations, NARA, Record Group 59, Department of State File No. 611.9331/2-1346.

⁴¹⁶ *Ibid.* Emphasis in original.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

know too, what opportunity, if any, will be afforded business for examining the proposals with a view to ascertaining the suitability of both the treaty and convention (as referred to above) to commercial requirements.”⁴¹⁹

This seven page memorandum from two major American business organizations with interests in China is revealing in several respects. First, the preeminent position of the FCN treaty in the memorandum demonstrates the paramount importance placed by the business community on the conclusion of such a treaty with China. The passage regarding the treaty appears as the first enumerated point on the first page of the seven page memorandum. The sentence regarding the FCN treaty is the only underscored sentence in the memorandum.

Second, the business community acknowledged the constitutive and regulatory role of government in creating economic relations. Indeed, the second enumerated point in the memorandum was headed “Revised Chinese Company Law.”⁴²⁰ The paragraph under that point began “Adequate and consistent commercial legislation is essential.”⁴²¹ Similarly, the third enumerated point was headed “Other Chinese Laws,” under which the first sentence asserted that “it is essential that the tax laws be revised to encourage the development of business.”⁴²² The memorandum called for

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

free enterprise with “[g]overnment encouragement.”⁴²³ U.S. business interests were not advocating a policy of *laissez-faire*.

Because the proposed FCN with China was the first to be negotiated following the war, it provided a setting in which to address a number of new questions. One was whether the United States should seek to limit the power of other countries to impose exchange controls on capital transactions. The draft treaty provided to China prohibited restrictions on the transfer of compensation for expropriation, a provision that was intended at least in part to discourage expropriation.⁴²⁴ It also prohibited discriminatory controls. The United States believed that the provision imposed a legitimate requirement on China, given that China had a relatively strong foreign exchange position with respect to the dollar. Other countries, however, had smaller dollar reserves and might not be able to abide by a requirement of free transfer.

The Department concluded ultimately that it would seek a currency transfers provision as a general policy, but to withdraw it if the other country made a “convincing case” that adherence to such a provision would be difficult.⁴²⁵ In so doing, the Department evidenced its pragmatic and empirical approach to negotiations under which it was prepared to compromise with respect to important provisions of the treaty if the particular circumstances of the other country so required.

⁴²³ *Ibid.*

⁴²⁴ Memorandum of Conversation headed “Exchange Control Provisions in Commercial Treaties,” dated July 13, 1946, NARA, Record Group 43, ITO Subject Files, Box 61, Folder marked “Nationalization”.

⁴²⁵ *Ibid.*

Treaty negotiations were concluded on November 4, 1946. Five days later, the Chinese Legislative Yuan approved the treaty.⁴²⁶ Two days later, on November 11, 1946, President Jiang Jieshi (Chiang Kai-shek) conferred his approval.⁴²⁷

The U.S. business community initially applauded this first achievement of the postwar FCN treaty program. The National Foreign Trade Convention, meeting in New York City between November 11 and 13, 1946, issued a final declaration that “welcome[d] the evidence of the Government’s intention to modernize and expand our existing commercial treaty structure afforded by the signing” of the FCN treaty with China.⁴²⁸ Charles Carroll, Chairman of the NFTC, noted “wholehearted satisfaction” with the announcement of the conclusion of the FCN treaty with China.⁴²⁹ He called for the conclusion of FCN treaties “with as many nations as are agreeable, substantially earlier than 1948,” which meant, in effect, the following year.⁴³⁰

The 1946 National Foreign Trade Convention, which strongly endorsed the new FCN treaty program, occurred barely a week after the FCN treaty with China was signed, before the business community had had the opportunity to review the text. When that opportunity came, however, much of the U.S. business community turned

⁴²⁶ Statement of Charles E. Bohlen, Counselor, Department of State, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), page 4.

⁴²⁷ *Ibid.*

⁴²⁸ National Foreign Trade Council, *Draft Final Declaration of the Thirty-Third National Foreign Trade Convention*, 1946, page 10, NARA, Record Group 59, State Department File No. 611.0031/11-1446.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

against the treaty because it believed that the State Department had conceded too much to the Chinese government.

Representatives of the NFTC admitted that the China treaty was a “great improvement” over past FCN treaties concluded by the United States. They expressed disappointment, however, regarding the limited rights for corporations to engage in business activities in China and suggested that the United States should make use of “all bargaining power available to it” to obtain for U.S. corporations the same right to conduct business in China that the treaty gave to individuals. In particular, they suggested that loans from the United States to China be used as bargaining leverage to improve corporate rights.⁴³¹

In fact, the United States already had considered the relationship between foreign assistance and the conclusion of FCN treaties. In December 1945, as the United States and China were commencing negotiations, the Chinese government had requested a \$2 billion credit to be made available over a three year period, including an immediate credit of \$560 million.⁴³² In response, the U.S. Export-Import Bank announced that it was prepared to offer China several loans, each worth tens of millions of dollars. Secretary Marshall, however, believed that funds for reconstruction and development in China should be “preceded by appropriate Chinese actions or assurances,” including the negotiation of an FCN treaty, provision for the

⁴³¹ Memorandum of Conversation dated January 6, 1947, NARA, Record Group 59, Department of State File No. 611.9331/1-647.

⁴³² *Current Economic Developments*, December 29, 1945, pages 1-2, NARA, Record Group 59, Department of State Lot Files.

transfer of funds at a reasonable rate, and the adoption of a satisfactory plan for currency stabilization.⁴³³ Marshall's argument was not that the credit should be used to bribe China to conclude a treaty on the terms sought by the U.S. business community, but rather that the United States should not provide assistance to China unless China adopted measures that would help to ensure that the assistance would have its intended effect.⁴³⁴ By the time that Marshall wrote, negotiations were already in progress and China ultimately would conclude a treaty with the United States, although on terms sufficiently favorable to China that, as will be seen, a large part of the U.S. business community eventually would oppose the treaty. If the United States used leverage from its foreign assistance at all during the treaty negotiations to obtain a treaty or to obtain a treaty more favorable to the United States, the negotiating history does not reflect it.

As the treaty awaited hearings in the Senate, the U.S. business community continued to insist that the United States use its economic leverage to force China to make greater concessions. An official of the NFTC reported in January 1948 that the council still was undecided as to the position it would take with respect to the China

⁴³³ *Ibid.*

⁴³⁴ E.F. Penrose argues that U.S. postwar policy generally was that "financial aid should not be used as a weapon to force concessions on commercial policy" but that financial assistance could be effective only in a world shaped by liberal trade principles. E. F. Penrose, *Economic Planning for the Peace* (Princeton: Princeton University Press, 1953), pages 208-209. As will be seen in Chapter Three, however, the United States did use financial assistance to pressure Britain to dismantle its imperial preference system.

treaty. The council believed it “possible that we might use the prospective aid program as bargaining power to obtain further concessions on some points.”⁴³⁵

A committee formed by the American Chamber of Commerce of Shanghai to review the treaty recommended that the treaty not be ratified, claiming that “American business in China would be better off without the 1946 treaty than with it.”⁴³⁶ The chamber particularly objected to the provision that abrogated prior agreements between the United States and China dating from the era of extraterritoriality. The Shanghai Chamber of Commerce in effect was attempting to preserve the old regime to the extent possible, believing it preferable to that promised by the new treaty.

After the Shanghai Chamber of Commerce voiced its opposition, the Tianjin (Tientsin) Chamber of Commerce formed a special committee to review the treaty and that committee similarly recommended against ratification.⁴³⁷ The American consul in Tianjin believed that the recommendation of the committee was “fairly representative of the views of the American business community in Tientsin as a whole.”⁴³⁸ The Tianjin chamber decried the fact that since 1946 the Chinese government had imposed “strangling” controls on foreign trade and that Chinese in the

⁴³⁵ Memorandum of Conversation dated January 21, 1948, NARA, Record Group 59, Department of State File No. 611.9331/1-2148.

⁴³⁶ Memorandum dated March 22, 1948, NARA, Record Group 59, Department of State File No. 611.9331/3-2248.

⁴³⁷ Letter dated May 5, 1948, from American Consul General Frederick W. Hinke to U.S. Ambassador J. Leighton Stuart, NARA, Record Group 59, Department of State File No. 611.9331/5-548.

⁴³⁸ *Ibid.*

United States were treated much better than Americans in China.⁴³⁹ It argued that the United States would be in a better position to protect American interests in China if it were not bound by the provisions of the proposed treaty.

According to the Tianjin chamber, the treaty would produce several ill effects. First, it would abrogate existing treaties that conferred “substantial rights” on Americans in China. Second, it would create a false impression that the problems of U.S. businesses in China had been remedied. Finally, it would likely preempt the negotiation of a better treaty at a later time. Thus, the chamber contended that the treaty should not be ratified and that the State Department should defer the conclusion of any commercial agreement “until such time as the two nations concerned can offer each other something approaching equality of treatment.”⁴⁴⁰

The Senate Foreign Relations Committee held hearings on the treaty on April 26, 1948. By that time, division within the business community concerning whether the United States should use its foreign aid as leverage to obtain a more favorable treaty had prevented the NFTC and Far East-America Council of Commerce and Industry (apparently the renamed China-America Council of Commerce and Industry) from taking a position on whether the Senate should approve the treaty.⁴⁴¹

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ Telegram dated February 16, 1948, from the Secretary of State to the U.S. embassy in Nanjing (Nanking), NARA, Record Group 59, Department of State File No. 611.9331/2-1048.

At the hearings, Bruce Smith, the former president of the Shanghai Chamber of Commerce, testified in opposition to the treaty.⁴⁴² He proposed that the United States renegotiate the treaty and renewed the business community's suggestion that the United States use its intended financial aid to China as leverage to obtain more treaty concessions.

Also appearing in opposition to the treaty was William Sloane, a representative of the American Book Publishers Council. Sloane complained that the intellectual property protection provision of the treaty did not require payment of a royalty to an author for translations of his or her work.⁴⁴³

Opposition came as well from Maud Russell, the executive director of the Committee for a Democratic Far Eastern Policy, an advocacy group whose board of directors included Paul Robeson, an internationally acclaimed singer and actor, and Edgar Snow, an American journalist who had been the first western reporter to interview Mao Zedong. Its members also included in the 1940s future president Ronald Reagan.⁴⁴⁴ An April 1946 committee fundraiser in New York was publicly endorsed by a number of celebrities, including Reagan, Gregory Peck, Edward G.

⁴⁴² Statement of Bruce Smith, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), pages 70-75.

⁴⁴³ *Ibid*, page 66. The objectionable provision was Paragraph 5(c) of the Protocol, added at China's insistence.

⁴⁴⁴ Reagan's membership was reported by the *San Francisco Chronicle* on June 9, 2002. See "Secret FBI files reveal covert activities at UC Bureau's campus operations involved Reagan, CIA," *available online* at <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2002/06/09/MNCFLEADIN.DTL>

Robinson and Artie Shaw.⁴⁴⁵ Russell opposed ratification of the treaty because it had been concluded with Jiang Jieshi's government, which she characterized as corrupt and undemocratic,⁴⁴⁶ a characterization not inconsistent with the views of the Truman administration.⁴⁴⁷

No business organizations appeared in support of the treaty, although the treaty was endorsed by Alfred Kohlberg, on behalf of the America-China Policy Association, an advocacy group headed by Clare Boothe Luce, a former Republican congresswoman. Kohlberg, an importer of Chinese lace, regarded himself as an expert on communist subversion and later worked covertly with Senator Joseph McCarthy to discredit critics of Jiang's government.⁴⁴⁸ He urged that the treaty be approved as a demonstration of support for Jiang in his battle against communist forces.⁴⁴⁹ Kohlberg argued that opposition to the treaty was led by communists, although under

⁴⁴⁵ Karen Garner, *Precious Fire: Maud Russell and the Chinese Revolution* (Amherst: University of Massachusetts Press, 2003), page 190.

⁴⁴⁶ Statement of Maud Russell, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), pages 52-65.

⁴⁴⁷ Truman "regarded Jiang's regime as the world's 'rottenest,' comprising 'grafters and crooks,' and he likened giving aid to China to 'pouring sand in a rat hole.'" Arnold A. Offner, *Another Such Victory: President Truman and the Cold War, 1945-1953* (Stanford: Stanford University Press, 2002), page 307. This view predated the Truman administration. Roosevelt's Secretary of the Treasury, Henry Morgenthau, in 1944 referred to Jiang's regime as "just a bunch of crooks." Robert Dallek, *Franklin Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1979), page 486. Yet, Truman continued to support the Jiang regime because, as Cold War tensions increased, he did not want to negotiate with Mao's Chinese Communist Party. Though, in 1945, Truman had tried to persuade Jiang to form a coalition government with the communists, he would later deny that he had ever made such an effort. Offner, *op. cit.*, pages 344-345.

⁴⁴⁸ Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982), page 187.

⁴⁴⁹ Statement of Alfred Kohlberg, *Friendship, Commerce, and Navigation with China*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 80th Cong. 2d Session, April 26, 1948, (Washington: Government Printing Office, 1948), pages 46-48.

questioning he conceded that the American Chamber of Commerce in Shanghai was not a communist organization but was “purely and truly American.”⁴⁵⁰ He went on to note, however, that the Committee for a Democratic Far Eastern Policy had been cited as a communist front by the House Committee on Un-American Activities.⁴⁵¹

Despite opposition from the U.S. business community in China, the Senate Committee on Foreign Relations reported the treaty favorably to the Senate on May 26.⁴⁵² The Senate approved the treaty on June 2.⁴⁵³ In approving the treaty, however, the Senate included in the resolution of ratification a reservation stating that the United States “does not accept” paragraph 5(c) of the Protocol, the paragraph that exempted translations from copyright protection. Further, the United States understood that copyright protection would be governed by the 1903 Treaty as to Commercial Relations between the United States and China. The 1903 treaty, however, was one of the treaties from the era of extraterritoriality terminated by Article XXIX of the new FCN treaty. On the issue of copyright protection at least, the opposition of the U.S. business community had succeeded in altering U.S. policy, although the sympathetic ear belonged to the Senate, rather than the Truman administration. Otherwise, the administration disregarded the business community’s demands, including in particular

⁴⁵⁰ *Ibid.* page 49.

⁴⁵¹ *Ibid.* page 51. Ronald Reagan would later deny membership in any organizations deemed subversive, a denial that, in light of his membership in the council was incorrect, and that, as the *San Francisco Chronicle* has reported, could have been prosecuted as a felony. See “Secret FBI files reveal covert activities at UC Bureau’s campus operations involved Reagan, CIA,” available online at <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2002/06/09/MNCFLEADIN.DTL>

⁴⁵² *Congressional Record*, Vol. 94, page 6484 (May 26, 1948).

⁴⁵³ *Congressional Record*, Vol. 94, page 6928 (June 2, 1948).

the demand that the United States use its economic leverage to negotiate more favorable terms.

Negotiating an FCN Treaty with Italy

The first European country with which successful FCN treaty negotiations commenced was Italy. In December 1945, Secretary of State James Byrnes exchanged notes with the Italian ambassador committing the two countries to the negotiation of an FCN treaty as soon as possible.⁴⁵⁴ A year passed, however, before the State Department completed its proposed treaty with Italy.

In January 1947, the State Department forwarded a draft treaty to the U.S. mission in Rome for comments.⁴⁵⁵ The mission responded by expressing concern that Italy could not abide by the MFN requirement with respect to exchange controls.⁴⁵⁶ Nevertheless, in April, the Department sent to the embassy for transmission to the Italian government copies of a draft treaty that included such a requirement.⁴⁵⁷ The Department indicated that the draft was still subject to revision and that the United States reserved the right to propose changes to the draft at a later time. In September,

⁴⁵⁴ Memorandum of Conversation dated June 4, 1947, "Proposed Commercial Treaty with Italy," NARA, Record Group 59, Walter Hollis Files, Folder marked "Italy."

⁴⁵⁵ Despatch dated January 21, 1947, from the Secretary of State to the U.S. mission in Rome, NARA, Record Group 59, Department of State File No. 711.652/1-2147.

⁴⁵⁶ Telegram dated March 25, 1947, from the U.S. mission in Rome to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.652/3-2447.

⁴⁵⁷ Memorandum of Transmittal dated April 17, 1947, NARA, Record Group 59, Department of State File No. 711.652/4-1747.

the Department proposed several changes to the draft.⁴⁵⁸ Days later, having finally achieved a draft treaty with which it was satisfied, the State Department commenced negotiations with Italy.⁴⁵⁹

The FCN treaty with Italy was similar to that with China. The single most important change relative to the treaty with China was that Article II(3) guaranteed to corporations, and not just to individuals as in the treaty with China, national and MFN treatment with respect to engaging in various activities. In effect, U.S. corporations would have a right to invest in most sectors of the Italian economy where investment by Italian or foreign corporations was permitted.

The provision granting a right of establishment to U.S. corporations was not in itself troubling to the Italian negotiators. Rather, as the embassy had anticipated, the major investment related issue concerned the treaty provision that required nondiscrimination with respect to the transfer of capital and earnings. The Italian negotiators also objected to language under which the exchange rate for expropriation compensation would be that on the date of expropriation rather than that on the date of payment.⁴⁶⁰

⁴⁵⁸ Despatch dated September 5, 1947, from the Secretary of State to the U.S. mission in Rome, NARA, Record Group 59, Department of State File No. 711.652/9-547.

⁴⁵⁹ Telegram dated September 16, 1947, from the U.S. mission in Rome to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.652/9-1647.

⁴⁶⁰ Telegram dated September 25, 1947, from the U.S. embassy in Rome to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.652/9-2047. Using the rate on the date of expropriation is more favorable to the investor because the investor avoids the risk of adverse changes in the exchange rate between the date of the expropriation and the date of payment.

The United States addressed the Italian concerns by revising the language relating to transfers generally as well as the language regarding the transfer of expropriation compensation. The general transfers language was weakened by deleting language that had appeared in the treaty with China⁴⁶¹ requiring fair and equitable treatment with regard to exchange controls, while the language with regard to the transfer of expropriation compensation was weakened by replacing the absolute right to transfer that had appeared in the China treaty⁴⁶² with a right merely to nondiscriminatory treatment with respect to transfers. As will be seen in Chapter Six, Italy later would conclude that the weakened language regarding transfers had discouraged U.S. investors from investing in Italy and would request the negotiation of a supplemental agreement strengthening this language. The negotiations otherwise were completed without great difficulty and the parties signed the treaty on February 2, 1948.

The results of the negotiations pleased everyone. The Italian government congratulated itself on the concessions that it had obtained from the United States, particularly regarding trade. The State Department hailed the FCN with Italy as “the most liberal and comprehensive treaty of this type that the US has ever negotiated.”⁴⁶³ The NFTC regarded the Italian FCN as “by far” the best FCN treaty ever

⁴⁶¹ U.S.-China FCN treaty, Article XIX(3).

⁴⁶² U.S.-China FCN treaty, Article XIX(1).

⁴⁶³ *Current Economic Developments*, January 5, 1948, page 7, NARA, Record Group 59, Department of State Lot Files.

negotiated.⁴⁶⁴ Further, it enthusiastically endorsed ratification because the treaty included a right of national treatment with respect to the establishment of investment by U.S. corporations. The FCN treaty with Italy became the first U.S. FCN treaty in which corporate and individual investors would have parity of treatment on all important investment related matters.

Proposing an FCN Treaty with the Soviet Union

In the days immediately following the end of the war, the State Department encouraged commercial relations with its wartime ally, the Soviet Union, envisioning a vast market for U.S. exports.⁴⁶⁵ In October 1945, for example, Robert G. Hooker, the assistant chief of the State Department's Division of East European Affairs, told Lewis H. Brown, the president of Johns-Manville Corporation, that the Department was "anxious to give assistance" to plans by American companies to develop trade relations with the Soviet Union. Hooker advised Brown regarding the best way to proceed in order to avoid "delay and difficulties."⁴⁶⁶ That same month, the Department sent a memorandum to the U.S. mission in Moscow stating that the State and Commerce Departments were "interested in the problem of developing commercial relations" between American businesses and Soviet commercial

⁴⁶⁴ Letter dated June 1, 1950, from National Foreign Trade Council President E.P. Thomas to Senator Arthur H. Vandenberg, NARA, Record Group 59, Department of State File No. 611.004/5-350.

⁴⁶⁵ Patrick J. Hearden, *Architects of Globalism: Building a New World Order During World War II* (Fayetteville: The University of Arkansas Press, 2002), pages 84-89; Lloyd Gardner, *op. cit.*, pages 313-314.

⁴⁶⁶ Letter from Robert G. Hooker to Lewis H. Brown dated October 11, 1945, NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

organizations.⁴⁶⁷ The two departments were coordinating joint efforts to advise American businesses on the commercial policies and procedures followed by Soviet economic organs.⁴⁶⁸ As early as 1943, Roosevelt had been convinced that the United States should extend a large postwar reconstruction loan to the Soviet Union, which could be used to purchase U.S. exports, although by 1945 Roosevelt had concluded that the loan must be conditioned upon Soviet cooperation with U.S. postwar foreign policy.⁴⁶⁹

Even before the war ended, the State Department had begun to contemplate the negotiation of an FCN treaty with the Soviet Union. Between May 19, 1945, and March 6, 1946, a team of State Department officials that included representatives of the Division of Commercial Policy and the Office of the Legal Adviser met some 42 times to develop a special draft of a model FCN treaty that would be suitable for conclusion with a communist country.⁴⁷⁰ This project more than any evidences the State Department's understanding of the FCN treaties as essentially a reflection of the rule of law rather than a doctrinaire prescription for a particular set of economic policies. Provided that the Soviet Union was willing to accept certain rule of law

⁴⁶⁷ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Randall B. Woods and Howard Jones, *Dawning of the Cold War: The United States' Quest for Order* (Athens: The University of Georgia Press, 1991), pages 26-29. Woods and Jones argue that, by the end of the war, Roosevelt and Truman were more interested in using the loan to extract political concessions than to open markets to U.S. exports. *Ibid.*, pages 60-61.

⁴⁷⁰ Memorandum entitled "The Forty-second Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held March 6, 1946," NARA, Record Group 59, Department of State File No. 711.612.

principles, the Department was prepared to conclude an FCN treaty with a country that had abolished the free enterprise system.

In drafting the proposed treaty, these officials were prepared to accommodate some of the distinctive features of the Soviet economy. For example, they observed that national treatment with respect to engaging in various commercial and manufacturing enterprises would give U.S. companies only “nominal” access to the Soviet economy and that the value of a national treatment obligation would be “virtually nil,” given that Soviet citizens did not enjoy the right to engage in private enterprise.⁴⁷¹ They recognized that no possibility existed that U.S. companies would receive the same treatment as Soviet state enterprises, noting that the Soviet Union imposed the death penalty for theft from a state enterprise.⁴⁷² Similarly, they were prepared to accept that the right of U.S. nationals to enter and to travel within the Soviet Union would be curtailed.⁴⁷³ They did, however, retain in their draft those provisions that guaranteed to U.S. nationals protection in accordance with international law and, in particular, a right to compensation in the event of an expropriation of U.S. owned property.⁴⁷⁴ In short, they expected the Soviet Union to

⁴⁷¹ Memorandum entitled “The Third Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held May 24, 1945,” NARA, Record Group 59, Department of State File No. 711.612.

⁴⁷² Memorandum entitled “The Eleventh Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held August 7, 1945,” NARA, Record Group 59, Department of State File No. 711.612.

⁴⁷³ Memorandum entitled “The Third Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held May 24, 1945,” NARA, Record Group 59, Department of State File No. 711.612

grant U.S. property security under the rule of law, but acknowledged that access to the Soviet economy would be greatly restricted. By October 1945, the State Department could report internally that “considerable study” had been given to the preparation of a proposed FCN treaty with the Soviet Union and that “many changes” had been made in the standard language to accommodate the absence of free enterprise in that country.⁴⁷⁵

On February 21, 1946, the United States delivered a diplomatic note to the Soviet Union proposing that the two countries begin the negotiation of a \$1 billion credit from the United States to the Soviet Union “as soon as possible.”⁴⁷⁶ The USSR had requested such a credit in August of the prior year. The United States also suggested that the discussions should cover a number of other topics, including the negotiation of an FCN treaty.⁴⁷⁷

A few days later, John N. Hazard, an expert on Soviet law serving as an adviser on state trading and government monopolies in the Division of Commercial Policy, met with the first secretary of the Soviet embassy, a man named Orekhov, to discuss a U.S. proposal for an international trade organization. Hazard told Orekhov that the United States was “pleased” that the Soviet Union would be participating in

⁴⁷⁴ Memorandum entitled “The Eighth Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held June 28, 1945,” NARA, Record Group 59, Department of State File No. 711.612.

⁴⁷⁵ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

⁴⁷⁶ *Current Economic Developments*, March 25, 1946, NARA, Record Group 59, Department of State Lot Files.

⁴⁷⁷ *Ibid.*

the preliminary conference to establish the entity.⁴⁷⁸ Hazard also told Orekhov that the proposed FCN treaty between the United States and the Soviet Union would be “very desirable” for both countries because it would “establish rules and avoid misunderstandings.”⁴⁷⁹ The meeting ended on a “most cordial” note.⁴⁸⁰ Orekhov asked Hazard for advice on how to research U.S. economic agreements, which Hazard agreed to provide, and offered to lend Hazard books on the Soviet system for the purpose of making photostatic copies.

Hazard returned to the embassy on March 12 to deliver copies of U.S. commercial treaties, for which Orekhov was “very grateful.”⁴⁸¹ Orekhov commented that the restoration of commercial relations between the United States and the Soviet Union was “very important” and said that he was sorry about the delays in reestablishing them.⁴⁸² Orekhov mentioned the shortages in the USSR of housing and steel and described how a friend from Minsk recently had told Orekhov that residents there, having no building materials, were constructing earthen huts in which to live. He again offered to lend books from his library to Hazard. On March 15, the Soviet

⁴⁷⁸ Memorandum of Conversation dated February 26, 1946, between John N. Hazard and Mr. Orekhov regarding Commercial Relations with the USSR, NARA, Record Group 59, Department of State File No. 611/6131/2-2646.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Memorandum dated March 12, 1946, of Conversation between John N. Hazard and Mr. Orekhov, NARA, Record Group 59, Department of State File No. 611.6131/3-1246.

⁴⁸² *Ibid.*

Union sent a diplomatic note to the United States agreeing that the two countries should commence the negotiation of an FCN treaty.⁴⁸³

The Cold War, however, soon overtook the proposed FCN treaty. On February 22, three weeks before Hazard's second visit to Orekhov, George N. Kennan, the interim American Charge d'Affaires in Moscow, sent his famous "long telegram" from Moscow warning of Soviet expansionist intentions. On March 5, a week before Hazard's second visit, Winston Churchill delivered his speech in Fulton, Missouri, warning that an "iron curtain" had descended over Europe.

On March 13, the day after Hazard's second meeting with Orekhov, Hazard sent a letter to Kennan in Moscow enclosing a copy of the proposed FCN treaty on which the Division of Commercial Policy had been laboring for nearly a year. Hazard explained that the Department had "done its best to suit the conventional form of treaty to Soviet conditions."⁴⁸⁴ As a result, the Department had introduced into the draft "numerous departures" from the language of the standard U.S. FCN treaty.⁴⁸⁵ Hazard solicited Kennan's suggestions with respect to additional ways in which the treaty could be made more effective and indicated that the proposed treaty would be circulated to other agencies of the U.S. government for comment. The embassy sent a

⁴⁸³ *Current Economic Developments*, April 22, 1946, NARA, Record Group 59, Department of State Lot Files..

⁴⁸⁴ Letter dated March 13, 1946, from John N. Hazard to George F. Kennan, NARA, Record Group 59, Department of State File No. 611.6131/3-1346.

⁴⁸⁵ *Ibid.*

telegram to the Department on April 4 urging that it not submit the draft treaty to the Soviet Union for negotiation until Kennan's response was received.⁴⁸⁶

Kennan's response, soon received by diplomatic pouch, was devastating. He began with an attempt to soften the blow that would follow. Kennan explained that he had read the proposed draft "with as much care as a very hectic period here will permit."⁴⁸⁷ He acknowledged that "a great deal of work and of careful thought" went into the proposed treaty and that "the persons who worked on this made a genuine and loyal effort to combine our traditional treaty procedures with the peculiar situation existing in the U.S.S.R."⁴⁸⁸

Then Kennan delivered the punch. "I have to tell you," he wrote, "(and I hope you will forgive my frankness) that I consider it quite useless to attempt to negotiate an agreement of this nature with the Russians and I am afraid that the entire approach to it in Washington must have rested on an imperfect understanding of Russian realities as we know them today."⁴⁸⁹ Kennan added that he did not have the time to go into details, but that he would adduce a few points in support of his general reaction to the proposed treaty.

Kennan's first point was directed at the very nature of the FCN treaty as a treaty to promote the rule of law. "Russia is not," Kennan explained, "a Rechtsstaat.

⁴⁸⁶ Telegram dated April 4, 1946, from the U.S. embassy in Moscow to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.612/4-446.

⁴⁸⁷ Letter dated April 3, 1946, from George F. Kennan to John N. Hazard, NARA, Record Group 59, Department of State File No. 611.6131/3-1346.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

The relationships between its citizens and the State are governed only in minor degree by legal norms and rights. Of far greater importance is the sheer administrative will of the executive authority, even in minor matters.”⁴⁹⁰

Further, the arbitrary nature of Soviet administration was even more apparent in the government’s dealings with aliens. As Kennan explained, “If this is true with respect to relationships between Soviet citizens and the State, it is far more true with respect to residence and activities of foreigners in Russia. Questions involving residence and activities of foreigners rest, I should say, 100% on the arbitrary will of the administrative authorities. There is no Soviet law which is worth the paper it is written on in so far as it bears on foreigners in the Soviet Union.”⁴⁹¹ In short, the Soviet Union was not a nation constructed on the principle of the rule of law. A treaty predicated on the rule of law was doomed to fail.

Kennan argued that the effect of the treaty would be to “give to the Russians a legal basis for claiming as a treaty right many privileges in the United States which they now enjoy simply by custom and by the good will of our Government.”⁴⁹² As a result, he contended, “We would be in a much better position vis-à-vis the Russians if we had it in our power to extend or withdraw these privileges at will, depending on treatment we are getting here.”⁴⁹³

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

Kennan believed that the Soviet authorities had no intention of allowing “more than a handful of private Americans to live in this country for years to come.”⁴⁹⁴ Thus, even to the extent that Americans in the Soviet Union benefited from a treaty provision, the number of beneficiaries would be small and “the practical significance would be negligible.”⁴⁹⁵ He concluded by noting, as many others had before him, that the U.S. draft was “long, legalistic, [and] obscure in wording.”⁴⁹⁶ He added that “[i]t would take the Russians weeks to translate it, months to study it and years to understand it.”⁴⁹⁷

Even as Kennan was denouncing in confidential internal communications the very idea of an FCN treaty with the Soviet Union, the two countries ostensibly were moving toward the negotiation of such a treaty. On April 18, the United States sent the Soviet Union a note proposing a schedule for negotiation of the FCN treaty and other agreements, including the extension of the \$1 billion credit.⁴⁹⁸ In May, the Soviet government responded that it was prepared to commence the negotiations.⁴⁹⁹

Meanwhile, on May 10, Hazard responded to Kennan. Hazard characterized Kennan’s pessimism about the usefulness of the treaty as “disheartening.”⁵⁰⁰ Yet, he

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Current Economic Developments*, May 27, 1946, NARA, Record Group 59, Department of State Lot Files.

⁴⁹⁹ *Ibid.*

acknowledged the power of Kennan's concern about the absence in the Soviet Union of the particular conception of the rule of law reflected in the U.S. FCN treaties. "I would be the first to agree with you," wrote Hazard, "that the U.S.S.R. is not a 'Rechtsstaat'. Those who have followed events in the field of municipal or international law, as you and I have, can hardly take heart in the trend toward negation of all the Anglo-Saxon jurists have held sacred for years."⁵⁰¹ Hazard, however, did not share Kennan's pessimism about the future prospects for the rule of law in the Soviet Union. Hazard believed that "if our relations with the Soviet Union are made the subject of written rules, it is not too much to anticipate that these rules will become eventually a charter, even though they may be violated at frequent intervals during the early months."⁵⁰² Hazard went on to comment that many of the protections guaranteed by the treaty already were extended to Soviet citizens as a matter of right by the U.S. Constitution. He said that he looked forward to having Kennan in Washington in the near future "so that we may proceed with the necessary revisions in the draft."⁵⁰³

Kennan's reply appears to have ended any further work within the State Department on an FCN treaty with the Soviet Union, although the idea had not been formally abandoned. Five days after Hazard sent his reply to Kennan, the

⁵⁰⁰ Letter dated May 10, 1946, from John N. Hazard to George F. Kennan, NARA, Record Group 59, Department of State File No. 611.6131/5-1046.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

Department's U.S.S.R. Committee circulated Kennan's message and Hazard's reply in anticipation of a discussion about the desirability of concluding such a treaty.⁵⁰⁴ If any further discussions occurred, no record of them has survived. On June 15, the U.S. embassy in Moscow sent a telegram to the State Department endorsing Kennan's views in their entirety.⁵⁰⁵ At the end of the summer, Hazard would leave the State Department for a post at Columbia University teaching Soviet law, where he would remain for the rest of his career.

In July, Democratic Congressman Jerry Voorhis of California wrote a letter to Undersecretary of State Dean Acheson enclosing his remarks from the Congressional Record, in which he urged the Department to negotiate an FCN treaty with the Soviet government.⁵⁰⁶ Acheson replied on August 1, stating that such a treaty would be "most desirable" and informing him, "for [his] confidential information," that the Department had been in the process of preparing such a treaty for more than a year.⁵⁰⁷ Voorhis also wrote to Clair Wilcox, the director of the Office of International Trade Policy.⁵⁰⁸ Wilcox explained that the State Department had "given a great deal of

⁵⁰⁴ Memorandum dated May 15, 1946, from William Adams Brown, Jr., to the State Department U.S.S.R. Committee, NARA, Record Group 59, Department of State File No. 611.6131/3-1346.

⁵⁰⁵ Telegram dated June 15, 1946, from the U.S. embassy in Moscow to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.612/6-1546.

⁵⁰⁶ Letter dated July 20, 1946, from Congressman Jerry Voorhis to Undersecretary of State Dean Acheson, NARA, Record Group 59, Department of State File No. 611.6131/7-2046.

⁵⁰⁷ Letter dated August 1, 1946, from Undersecretary of State Dean Acheson to Congressman Jerry Voorhis, NARA, Record Group 59, Department of State File No. 611.6131/7-2046.

⁵⁰⁸ Letter dated July 20, 1946, from Congressman Jerry Voorhis to Clair Wilcox, NARA, Record Group 59, Department of State File No. 611.6131/7-2046.

thought to the problem of negotiating” an FCN treaty with the Soviet Union.⁵⁰⁹ Then, without further elaboration, Wilcox told Voorhis, “If you should at any time wish to discuss this matter with officers of the Department I shall be happy to arrange a meeting.”⁵¹⁰ If the Department had still been engaged in any activity related to the negotiation of such a treaty, Wilcox presumably would have mentioned it. Instead, he responded with a polite offer to arrange a meeting at some unspecified time in the future, should Voorhis wish to take the initiative to request it. The clear inference is that the Department had abandoned the project, but sought not to antagonize Voorhis unnecessarily.

Voorhis replied to Acheson on August 5, expressing his pleasure at knowing that the Department was studying the matter of an FCN treaty with the Soviet Union. He added that he wished that he were not compelled to leave for California right away so that he could take advantage of Acheson’s offer to discuss the treaty.⁵¹¹ Voorhis seems not to have pursued the matter further and, three months later, he was defeated for reelection by a little known Navy veteran named Richard Milhous Nixon.

⁵⁰⁹ Letter dated July 31, 1945, from Clair Wilcox to Congressman Jerry Voorhis, NARA, Record Group 59, Department of State File No. 611.6131/7-2046.

⁵¹⁰ *Ibid.*

⁵¹¹ Letter dated August 5, 1946, from Congressman Jerry Voorhis to Undersecretary of State Dean Acheson, NARA, Record Group 59, Department of State File No. 611.6131/8-546.

Chapter Three

Seeking a Multilateral Treaty on Investment:

The International Trade Organization

Prior to the end of the Second World War, the U.S. government believed that the principal problems of the international economy revolved around trade and monetary policy, although policymakers knew that after the war they would also face the temporary problem of European reconstruction. As discussed in Chapter One, the 1944 Bretton Woods conference addressed the problem of monetary policy through the establishment of the International Monetary Fund and the problem of European reconstruction through the creation of the International Bank for Reconstruction and Development.

The United States intended to address the problem of international trade through a third multilateral institution, an international trade organization. Months before formally entering the war, the United States was already publicly linking postwar economic prosperity with liberalized trade. For example, the Atlantic Charter, adopted by the United States and the United Kingdom on August 12, 1941, declared that these two countries would “endeavor, with due respect for their existing obligations, to further the enjoyment by all states, greater or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.”⁵¹²

The Atlantic Charter was not a free trade manifesto. In 1932, the United Kingdom had established its imperial preference system, which provided for special trade preferences within the British Empire while imposing barriers to trade with countries outside the empire. A major goal of U.S. foreign trade policy after 1932 was to dismantle that system.⁵¹³ The reference to “due respect for . . . existing obligations” was a concession to the United Kingdom, which hoped to maintain the imperial preference system after the war.⁵¹⁴ Roosevelt, always the pragmatist, accepted the idea that compromises with respect to trade liberalization would be necessary.⁵¹⁵ The Atlantic Charter nevertheless did call for liberalized trade and the destruction of the British system remained a primary objective of U.S. postwar trade policy.⁵¹⁶

The United States continued to pressure the British, particularly during the negotiation of the agreement governing the operation of the Lend Lease program under which the United States provided military assistance to Britain. When the two countries signed the agreement in February 1942, Article VII stated that the terms and conditions of the assistance

⁵¹² The negotiations with respect to this language are described in Alan P. Dobson, *The Politics of the Anglo-American Economic Special Relationship, 1940-1987* (New York: St. Martin's Press, 1988), pages 25-31; Robert Dallek, *Franklin Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1979), pages 281-284; and Lloyd C. Gardner, *Economic Aspects of New Deal Diplomacy* (Madison: The University of Wisconsin Press, 1964), pages 275-280.

⁵¹³ John M. Rothgeb, Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington: Congressional Quarterly Press 2001), pages 66-68.

⁵¹⁴ Patrick J. Hearden, *Architects of Globalism: Building a New World Order During World War II* (Fayetteville: The University of Arkansas Press, 2002), pages 31-32.

⁵¹⁵ Thomas W. Zeiler, *Free Trade Free World: The Advent of GATT* (Chapel Hill: The University of North Carolina Press, 1999), page 26

⁵¹⁶ Rothgeb, *op. cit.*, pages 66-68.

shall not be such as to burden commerce between the two countries, but to promote mutually advantageous relations between them and the betterment of world-wide economic relations. To that end, they shall include provisions for agreed action by the United States and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers.⁵¹⁷

The Lend Lease agreement seemed to commit the United Kingdom to the eventual end of the imperial preference system⁵¹⁸ and to the creation of an international regime to promote trade liberalization, a commitment that the United States wanted in exchange for its assistance during the war.⁵¹⁹ During the course of the war, the United States entered into similar Lend Lease agreements with more than thirty countries, including most members of the United Nations.⁵²⁰

Secretary of State Cordell Hull had been calling for the creation of an “international trade agreement congress” at least since 1916, when he was a

⁵¹⁷ Clair Wilcox, *A Charter for World Trade* (New York: The MacMillan Company, 1949), page 38.

⁵¹⁸ Despite the language of Article VII, Roosevelt sent a private letter to Churchill in which he assured Churchill that the United States was not asking Britain for “a commitment in advance” to abolish the imperial preference system and that Article VII contained no such commitment. Dobson, *op. cit.*, page 33.

⁵¹⁹ Patrick Hearden argues that the Treasury Department wanted to require Great Britain to repay the United States after the war with natural resources, such as rubber and tin. The State Department, however, did not wish to impose repayment requirements that might impede British recovery and sought instead to trade military assistance for a British commitment to dismantle the imperial preference system. Hearden, *op. cit.*, pages 29-30.

⁵²⁰ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

congressman from Tennessee.⁵²¹ In 1942, an inter-agency committee led by Hull's State Department began work on a formal proposal for an international trade organization to promote multilateral trade negotiations.⁵²² The committee included representatives of the Departments of State, Treasury, Commerce, Justice, Agriculture and Labor and the Tariff Commission and was chaired by the assistant secretary of state for economic affairs, first Myron Taylor, then Dean Acheson and then Will Clayton.⁵²³

Beginning in September 1943, the United States and the United Kingdom began "informal exploratory conversations at the expert level" regarding the implementation of Article VII of the Lend Lease Agreement,⁵²⁴ discussions known as "Article VII conversations." That same month, even before the discussions with the British began, the United States extended a similar invitation to its wartime ally, the Soviet Union.⁵²⁵ In October, the United States submitted a formal proposal to the

⁵²¹ Statement of Clair Wilcox, *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Cong. 1st Session, Parts 1 and 2, (Washington: Government Printing Office 1947), pages 42-43.

⁵²² *Ibid.*, page 44.

⁵²³ *Ibid.*

⁵²⁴ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145; Statement of Clair Wilcox, *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Cong. 1st Session, Parts 1 and 2, (Washington: Government Printing Office 1947), page 52.

⁵²⁵ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

Soviet Union, but no discussions ever occurred.⁵²⁶ The Soviet Union believed that the developed countries sought free trade so that they could dominate overseas markets and that the development of Eastern Europe required a protected market.⁵²⁷ In 1944, the United States began conversations with Canada.⁵²⁸

The trade discussions between the United States and the United Kingdom progressed much more slowly than their discussions leading to the postwar Bretton Woods system. The United States remained committed to the system of bilateral trade negotiations authorized by the Reciprocal Trade Agreements Act, in part because it feared the difficulties of obtaining Congressional approval of anything more ambitious, and thus initially exercised caution in the development of a proposal for a multilateral trading regime. The United Kingdom, by contrast, was willing to abandon its imperial preference system only in exchange for a multilateral reduction in trade barriers, in order to ensure that it would find sufficient new markets for its exports, particularly in the developing world, to replace those that would be lost when the preference system was abolished.⁵²⁹ By 1943, however, the British government had become the principal cause of delay.⁵³⁰ The British cabinet was deeply concerned that nothing it could expect to gain from the ITO negotiations would be sufficient to

⁵²⁶ *Ibid.*

⁵²⁷ E. F. Penrose, *Economic Planning for the Peace* (Princeton: Princeton University Press, 1953), page 112.

⁵²⁸ Clair Wilcox, *op. cit.*, page 38.

⁵²⁹ Penrose, *op. cit.*, pages 87-103, 107.

⁵³⁰ *Ibid.*, page 104.

offset the loss to its export trade attributable to the abandonment of the imperial preference system. Further, the United States wanted to prohibit quantitative restrictions on trade and the British cabinet believed that the United Kingdom needed to retain the discretion to impose such restrictions in the event of a balance of payments crisis. As a result, discussions between the two countries halted from late 1943 until early 1945, well after the conclusion of the Bretton Woods conference.⁵³¹

The Proposal for an International Trade Organization

By July 1945, the United States and the United Kingdom had prepared a formal “Proposal to Establish an International Trade Organization.”⁵³² The proposed ITO would address five concerns: the relaxation of trade barriers, the maintenance of full employment, the elimination of private restrictive business practices, the regulation of international commodity agreements (which in effect were cartel agreements negotiated by sovereign nations to fix prices), and the establishment of an international organization to discuss trade problems.

The promotion of full employment, of course, was the quintessential goal of New Deal economic policy and the liberalization of trade and the regulation of restrictive business practices were longstanding New Deal policies. The proposed ITO charter reflected a projection of the New Deal onto the international economy.

⁵³¹ Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of our International Economic Order* (New York: Columbia University Press, 1980), page 145.

⁵³² Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

The State Department forwarded the proposal to President Truman on September 7, 1945.⁵³³ No part of the memorandum to the president referred to investment promotion or protection. Four days after receiving the State Department's memorandum, Truman approved the proposal.⁵³⁴

The two governments did not immediately publish their proposal. In late August 1945, Truman had abruptly cancelled U.S. assistance to Britain under the Lend Lease program, the rationale being that Germany's surrender had ended the military action that justified the program. The sudden loss of assistance threatened Britain with financial disaster. In September, John Maynard Keynes led a delegation to the United States to settle accounts under Lend Lease and to request new assistance to take the place of the Lend Lease program. The negotiations were exceedingly difficult, with the parties trapped between American public opinion, which with the end of the war opposed any further U.S. assistance to Europe, and British public opinion, which felt that Britain's extraordinary sacrifices during the war to defeat a common enemy justified further assistance.⁵³⁵ After several weeks, the two countries agreed that the United States would forgive Britain's obligation to repay some \$20 billion in Lend

⁵³³ Memorandum dated September 7, 1945, from Dean Acheson to the President, NARA, Record Group 59, Department of State File No. 611.0031/9-1145.

⁵³⁴ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

⁵³⁵ Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order* (New York: Columbia University Press, 1980), page 188.

Lease assistance and extend to Britain a \$3.75 billion interest bearing loan.⁵³⁶ To convey the impression that the United States had obtained something in exchange for the Lend Lease settlement and the loan, specifically, British support for the creation of the ITO, the State Department delayed announcement of the ITO proposal until the financial negotiations were completed. The impression conveyed was not entirely false. Clayton had told the British that the United States could not extend any further assistance without a promise that the British would participate in establishing the ITO and ratify the Bretton Woods agreements.⁵³⁷ Yet, the United States and the United Kingdom had reached agreement on the ITO proposal weeks before the financial negotiations began.

In December 1945, with the financial negotiations between the two countries completed, the United States published the ITO proposal under a new name, *Proposals for Expansion of World Trade and Employment*.⁵³⁸ As this indicates, U.S. policy was to advocate trade liberalization as a means to full employment. Even internal State Department documents described the purpose of the ITO as to “reduce trade barriers and promote employment.”⁵³⁹ The proposed name for the conference to create the ITO was the “International Conference on Trade and Employment.”⁵⁴⁰

⁵³⁶ *Ibid.* page 208.

⁵³⁷ *Ibid.*, page 191.

⁵³⁸ Department of State, *Suggested Charter for an International Trade Organization of the United Nations* (Washington, D.C.: Government Printing Office 1946), page III; William Diebold, Jr., *The End of the I.T.O.* (Princeton: Princeton University, 1952), page 3; *Current Economic Development*, November 17, 1947, page 13, NARA, Record Group 59, Department of State Lot Files.

Copies of the proposal were sent to every country in the world.⁵⁴¹ Although the United States sponsored the proposal, the British government announced that it was in “full agreement on all important points” with the proposal.⁵⁴² Between October 1945 and December 1946, Belgium, Czechoslovakia, France, Greece, the Netherlands, Poland, and Turkey also endorsed the proposal.⁵⁴³

Hoping to include the Soviet Union in the organization, the United States and the United Kingdom included provisions to establish nondiscriminatory trade between free market economies and state trading economies.⁵⁴⁴ Trade on the basis of “commercial considerations” would be treated as the equivalent of trade on the basis of the most-favored-nation.⁵⁴⁵ As a substitute for reduced tariffs, state trading economies would agree to purchase a certain quantity of imports.⁵⁴⁶ This reflected the

⁵³⁹ *Current Economic Developments*, October 7, page 1, NARA, Record Group 59, Department of State Lot Files.

⁵⁴⁰ *Current Economic Developments*, July 9, 1945, page 3, NARA, Record Group 59, Department of State Lot Files; *Current Economic Developments*, October 7, page 1, NARA, Record Group 59, Department of State Lot Files.

⁵⁴¹ Wilcox, *op. cit.*, page 40.

⁵⁴² Joint Statement by the United States and the United Kingdom, December 6, 1945, reprinted in *Anglo-American Financial and Commercial Agreements*, Department of State Publication 2439, Commercial Policy Series 80, December 1945.

⁵⁴³ Wilcox, *op. cit.*, page 39.

⁵⁴⁴ Memorandum dated October 11, 1945, concerning the commercial and economic program of the United States in relation to the U.S.S.R., NARA, Record Group 59, Department of State File No. 611.6131/10-1145.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

same pragmatism that prompted the State Department to consider negotiating an FCN treaty with the Soviet Union in 1945 and early 1946.

Following publication of its proposal, the United States invited fifteen countries -- Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, the Netherlands, New Zealand, South Africa, the USSR and the United Kingdom – to attend a preparatory meeting to draft a proposed charter for the ITO.⁵⁴⁷ The countries were chosen because of their “commercial importance and diverse economic systems.”⁵⁴⁸ All of the countries except the Soviet Union accepted.⁵⁴⁹

At the behest of the United States, the United Nations Economic and Social Council, at its first meeting on February 18, 1946, adopted a resolution whereby it decided to sponsor the proposed conference.⁵⁵⁰ The Council also formed a 19 nation preparatory committee to prepare the draft charter.⁵⁵¹ The preparatory committee

⁵⁴⁷ *Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba*, NARA, Record Group 43, ITO Files, Box 148, Folder marked “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba.”

⁵⁴⁸ Zeiler, *op. cit.*, page 61.

⁵⁴⁹ The USSR’s official reason for refusing to participate in the work of the committee was that “it had not found it possible to devote sufficient preliminary study to the important questions” to be discussed. Department of State, *Draft Charter for the International Trade Organization of the United Nations*, Department of State Publication 2927, Commercial Policy Series 106 (Washington: Government Printing Office, 1947), page 6.

⁵⁵⁰ *Current Economic Development*, November 17, 1947, page 13, NARA, Record Group 59, Department of State Lot Files; Department of State, *Suggested Charter for an International Trade Organization of the United Nations* (Washington: Government Printing Office, 1946), page III.

⁵⁵¹ *Ibid.*, page 13.

comprised the United States, the 15 countries invited by the United States, and Chile, Lebanon and Norway.

In September 1946, the United States published a draft charter as a basis for public discussion.⁵⁵² Article I(3) of the proposed charter identified one of the charter's purposes as "[t]o encourage and assist the industrial and general economic development of Member countries, particularly those still in the early stages of industrial development."⁵⁵³ Internal State Department documents also identified the promotion of the economic development of member nations as one of the purposes of the charter.⁵⁵⁴ The protection or promotion of foreign investment, however, was not cited in internal State Department reports as one of the charter's purposes⁵⁵⁵ nor was it included as a purpose in Article 1 of the proposed charter. Rather, the charter would promote economic development primarily by increasing world trade.

Most provisions of the charter dealt with free and nondiscriminatory international trade, including limitations on subsidies and prohibitions on discriminatory practices by state trading enterprises and on anticompetitive business practices. Article 23 of the proposed charter prohibited exchange controls on trade

⁵⁵² Department of State, *Suggested Charter for an International Trade Organization of the United Nations* (Washington: Government Printing Office, 1946).

⁵⁵³ *Ibid.*, page 1.

⁵⁵⁴ *Current Economic Developments*, July 29, 1946, page 15, NARA, Record Group 59, Department of State Lot Files.

⁵⁵⁵ *Ibid.*

transactions, but allowed them with respect to capital transfers,⁵⁵⁶ an approach that was consistent with that of the IMF Articles of Agreement.

The proposed charter also included a dispute resolution mechanism. Article 76 provided that questions regarding the interpretation of the charter would be referred to an executive board and then to a conference of the members. Justiciable issues arising out of the ruling of the conference could be referred to the International Court of Justice.

The proposed charter did include a reference to investment protection. Under Article 50, one of the functions of the ITO was “[t]o make recommendations for international agreements designed to improve the bases of trade and to assure just and equitable treatment for the enterprises, skills, capital, arts and technology brought from one country to another, including agreements on the treatment of foreign nationals and enterprises, on the treatment of commercial travelers, on commercial arbitration, and on the avoidance of double taxation.” This portion of the charter was based on the evolving language of the U.S. policy statement on investment, discussed in Chapter One, which by this time called for intergovernmental cooperation to ensure just and equitable treatment for private investment.

⁵⁵⁶ *Ibid.*, page 17; *Current Economic Developments*, July 23, 1945, page 3, NARA, Record Group 59, Department of State Lot Files; *Current Economic Developments*, July 29, 1946, page 17, NARA, Record Group 59, Department of State Lot Files.

The London Preparatory Meeting

The Preparatory Committee met for the first time in London from October 15 to November 26, 1946, using the United States' suggested charter as the principal basis for discussion.⁵⁵⁷ The committee adopted a draft charter, consisting of 74 articles.

At the opening of the London conference “a considerable number of countries emphasized their interest in industrialization and other aspects of economic development, indicated that in their view the provisions in the Draft Charter were inadequate to meet the needs of under-developed countries, and asked that the provisional agenda be modified to allow full discussion of this subject.”⁵⁵⁸ These “underdeveloped countries,” led by Australian, India, Brazil and Chile,⁵⁵⁹ believed that provisions on economic development were a “necessary and proper” part of the Charter.⁵⁶⁰ The United States recognized that developed countries were the most lucrative markets for U.S. exports and that the wealth created when a country

⁵⁵⁷ Department of State, *Charter for the International Trade Organization of the United Nations* (Washington: Government Printing Office, 1947), page I.

⁵⁵⁸ Official Report of the United States Delegation to the First Meeting of the Preparatory Committee for the International Conference on Trade and Employment, London, England, October 15, 1946, reprinted as Exhibit IV-D in *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Congress, First Session, on Trade Agreements System and Proposed International Trade Organization Charter, Part 2 (Washington: Government Printing Office, 1947), page 909.

⁵⁵⁹ Richard Gardner, *op. cit.*, page 365.

⁵⁶⁰ Statement of Under Secretary William Clayton, *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Congress, First Session, on Trade Agreements System and Proposed International Trade Organization Charter, Part 1 (Washington: Government Printing Office, 1947), page 4.

developed economically, through trade, would be shared with other countries.⁵⁶¹ Thus, the promotion of economic development abroad was in the economic interest of the United States.

At the suggestion of the United States,⁵⁶² the London meeting established a Joint Committee on Industrial Development, which decided that the charter should be expanded to include a chapter on economic development.⁵⁶³ Discussions within the joint committee stressed that economic development required “adequate supplies of capital funds, materials, equipment, advanced technology, trained workers, and managerial skill.”⁵⁶⁴ Further, “unless capital funds are available it may often be impossible to obtain the various other facilities in question.”⁵⁶⁵ The joint committee recognized that developing countries usually will need to obtain these facilities from abroad and thus delegations from developing countries formulated the problem of development as “securing agreement that such facilities would be obtainable from other countries on as favorable terms as possible.”⁵⁶⁶

⁵⁶¹ *Ibid.*, pages 5-6.

⁵⁶² Wilcox, *op. cit.*, page 42.

⁵⁶³ Official Report of the United States Delegation to the First Meeting of the Preparatory Committee for the International Conference on Trade and Employment, London, England, October 15, 1946, reprinted as Exhibit IV-D in *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Congress, First Session, on Trade Agreements System and Proposed International Trade Organization Charter, Part 2 (Washington: Government Printing Office, 1947), page 909.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*, page 910.

The joint committee also recognized that the charter must consider as well the interests of the countries supplying the facilities. Accordingly, the joint committee approved a text that recognized the “reciprocal obligations” of countries providing and countries receiving assistance.⁵⁶⁷

The text recognizing these reciprocal obligations comprised two articles, Article 11 and Article 12. Under Article 11, the members undertook “to promote the continuing industrial and general economic development of their respective countries. . . .”⁵⁶⁸ Further, under Article 12, the members recognized that “progressive economic development is dependent upon the availability of adequate supplies of: (a) capital funds; and (b) materials, equipment, advanced technology, trained workers and managerial skill.”⁵⁶⁹ Accordingly, the members agreed “to impose no unreasonable impediments that would prevent other Members from obtaining access to facilities required for their economic development.”⁵⁷⁰

The language was the result of a compromise.⁵⁷¹ Developing countries sought language that would impose on developed countries an obligation to provide resources

⁵⁶⁷ *Ibid.*

⁵⁶⁸ Department of State, *Charter for the International Trade Organization of the United Nations* (Washington: Government Printing Office, 1947), page 4.

⁵⁶⁹ *Ibid.*, Article 12(1).

⁵⁷⁰ *Ibid.*, Article 12(2).

⁵⁷¹ Statement of Clair Wilcox, *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Congress, First Session, on Trade Agreements System and Proposed International Trade Organization Charter, Part 1 (Washington: Government Printing Office, 1947), page 143.

to countries in the process of development.⁵⁷² The United States replied that the facilities necessary for development should be obtained through trade and that the charter provision should do no more than prohibit members from imposing unreasonable impediments on private sellers willing to trade with developing countries.

In any event, this language was balanced by a provision that host states would take no “unreasonable action injurious” to the interests of members, business entities or persons supplying them with facilities for their development.⁵⁷³ Further, upon receipt of a complaint of a violation of these obligations, the organization was authorized to request the members concerned to consult regarding the complaint and to lend its good offices toward that end.⁵⁷⁴

The London conference thus took three important steps with respect to capital movements. First, it linked economic development to the provision of foreign capital. Second, it imposed obligations regarding international capital movements on both capital exporting and capital importing states. Third, it adopted a principle of “reasonableness” to govern the extent of those obligations. That is, capital exporting countries were obligated to impose no unreasonable impediments to capital

⁵⁷² Cleona Lewis, an economist at the Brookings Institution who specialized in international investment, reported that the ITO charter negotiations featured a proposal for a provision “making it a crime for any nation to discourage investors from sending their capital abroad, even to a country whose history shows expropriation of foreign property without compensation.” Cleona Lewis, *The United States and Foreign Investment Problems* (Washington: The Brookings Institution, 1948), page 264.

⁵⁷³ Memorandum dated December 18, 1946, and headed “Chapter on Economic Development in ITO London Draft Charter,” NARA, Record Group 43, ITO Subject Files, Box 60, File marked “National Foreign Trade Council – Carroll Rpt.”

⁵⁷⁴ Article 12(2).

movements, while capital importing countries were obligated not to take unreasonable action injurious to investment.

The London conference marked the high point of U.S. influence with respect to the investment related provisions of the ITO charter. The negotiation of the charter would continue through two more major conferences over a period of more than a year, but, at least with respect to investment policy, the United States would accomplish little more than it had already accomplished by the end of the London conference.

The London Preparatory Committee appointed a Drafting Committee, which met at the United Nations headquarters, then located at Lake Success, New York, from January 20 to February 15, 1947. The committee held 29 meetings to edit the draft charter produced in London.⁵⁷⁵ The Soviet Union was a member of the committee, but declined to attend.⁵⁷⁶ Colombia and Mexico, which were not members, sent observers.⁵⁷⁷

The Proposal for an Investment Chapter

In February and March of 1947, the United States held hearings on the ITO charter in seven cities around the country “to afford all interested persons and groups

⁵⁷⁵ Department of State, *Charter for the International Trade Organization of the United Nations* (Washington: Government Printing Office, 1947), page 5.

⁵⁷⁶ Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, NARA, Record Group 43, ITO Files, Box 123, Folder marked “E/PC/T/34”.

⁵⁷⁷ *Ibid.*

an opportunity to present their views on the proposed Charter as a whole or on any part of it.”⁵⁷⁸ More than 240 witnesses testified, of which the great majority supported the charter.⁵⁷⁹ Witnesses included major business organizations such as the NFTC, the NAM, the United States Chamber of Commerce and the United States Associates of the International Chamber of Commerce (ICC).⁵⁸⁰ Only 16 witnesses expressed opposition to the charter, although more than 60 witnesses suggested improvements.

The 1946 elections had brought the Republican Party to power in Congress. Senator Eugene Millikin of Colorado, the new chair of the Senate Finance Committee, decided that the committee should hold its own hearings on the proposed ITO charter. The Senate Finance Committee conducted extensive hearings over a period from March 20 to April 3, 1947.⁵⁸¹

As Will Clayton himself acknowledged in October 1946, American investors long had complained that the United States government did not give them “adequate political backing” with respect to the protection of their overseas investments.⁵⁸²

⁵⁷⁸ Report on Informal Hearings on Proposed Charter for an International Trade Organization, Exhibit V, *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Congress, First Session, on Trade Agreements System and Proposed International Trade Organization Charter, Part 1 (Washington: Government Printing Office, 1947), page 917. The seven cities were Boston, Chicago, Denver, New Orleans, New York, San Francisco, and Washington, D.C. .

⁵⁷⁹ *Ibid.*, page 936; *Current Economic Developments*, March 31, 1947, page 15, NARA, Record Group 59, Department of State Lot Files.

⁵⁸⁰ Wilcox, *op. cit.*, page 44.

⁵⁸¹ “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba,” page 4, NARA, Record Group 43, ITO Files, Box 148, Folder marked “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba”.

⁵⁸² “American Holdings Abroad Now Vital, Clayton Declares,” *New York Times*, October 26, 1946.

Clayton noted that the United States traditionally had insisted upon payment of compensation for expropriation, but otherwise had largely left American investors to rely upon their own “initiative and enterprise.”⁵⁸³ Business groups lamented that the State Department refused to “use muscle” against foreign governments that defaulted on their loans and yearned for the days when the marines would seize the customs houses of countries in default on their loans from foreign lenders.⁵⁸⁴ In short, mere reliance upon diplomatic representation by the State Department had not provided sufficient protection, in the view of the U.S. investor community.⁵⁸⁵

By early 1947, when the State Department conducted its hearings, U.S. business groups already were on record as supporting the creation of an international legal regime for the protection of foreign investment. As noted in Chapter Two, the negotiation of the first FCN treaty with China had occurred amid strong expressions of

⁵⁸³ *Ibid.*

⁵⁸⁴ David A. Baldwin, *Economic Development and American Foreign Policy, 1943-1962* (Chicago: The University of Chicago Press, 1966), page 55.

⁵⁸⁵ An extended discussion of efforts by the State Department to protect U.S. foreign investment against expropriation and bond defaults in the early twentieth century may be found in Cleona Lewis, *The United States and Foreign Investment Problems* (Washington: The Brookings Institution, 1948), pages 220-227. Lewis found that the United States generally intervened only in cases where a foreign government discriminated against the entry of U.S. investment, “grossly violated” the rights of U.S. investors, expropriated U.S. investment, or discriminated against U.S. bondholders. She concluded that these efforts had “not always given the protection required to prevent real losses on existing investments, but to some extent they have encouraged new investments abroad.” *Ibid.*, page 279. U.S. government efforts to protect foreign investors in the raw materials sector are discussed in Stephen D. Krasner, *Defending the National Interest: Raw Materials Investment and U.S. Foreign Policy* (Princeton: Princeton University Press, 1978). Krasner concludes that “American policy-makers have consistently placed general foreign policy aims above security of supply. . . .” (148) In other words, “Nationalized companies have not been able to use state power for their own ends.” (149) He attributes this to divisions within the business community prompted by fears that intervention on behalf of one injured investor will invite retaliation against other investors and to the fact that decisions regarding a U.S. response typically are within the purview of the executive branch, which is less subject than Congress to the importuning of a particular investor. (149-150).

support from the NFTC and the Chamber of Commerce for the negotiation of FCN treaties with as many nations as feasible. The business community's desire for stronger legal protection for foreign investment predated the inauguration of the postwar FCN treaty program, however. For example, on January 5, 1940, the NFTC had sent a letter to the State Department requesting that the FCN treaties be strengthened in ways useful to investors. Specifically, the NFTC had requested that the treaties guarantee that U.S. corporations receive national treatment with respect to the protection of their property, require that compensation for expropriation be prompt and effective, and provide for arbitration of any dispute under the treaty.⁵⁸⁶ That is, the NFTC wanted provisions that reflected norms of nondiscrimination, security, and due process. The NFTC also requested that the treaties clarify that the protection for U.S. owned property extended to local corporations in which U.S. investors owned a controlling interest. The State Department replied by noting that U.S. FCN treaties protecting property abroad extended to all property in the host state of whatever character, that the United States already had arbitration treaties in force with many countries, and that the Department was already considering the addition of the requirements of promptness and effectiveness to the provision on expropriation.⁵⁸⁷

So intent was the American business community on promoting international legal protection for investment that, following the announcement of the U.S. proposal

⁵⁸⁶ Letter dated January 5, 1940, from the National Foreign Trade Council to Secretary of State Cordell Hull, NARA, Record Group 59, Department of State File No. 711.002/60.

⁵⁸⁷ Letter dated February 1, 1940, from Assistant Secretary Henry F. Grady to the National Foreign Trade Council, NARA, Record Group 59, Department of State File No. 711.002/60.

for an international trade organization, the NAM and the Chamber of Commerce recommended the creation of a fourth international organization to deal with international investment.⁵⁸⁸ The NFTC, by contrast, believed that FCN treaties could provide the necessary protection. It urged the negotiation of FCN treaties with “as many nations as are agreeable” with particular emphasis on those regions where U.S. foreign investment already existed or where such investments would be mutually advantageous.⁵⁸⁹ Indeed, the NFTC’s initial response to the ITO charter was that the charter should not be accepted as a substitute for the expansion of the FCN treaty program.⁵⁹⁰

Business groups soon realized, however, that the ITO charter provided another means by which foreign investment could obtain legal protection. In December 1946, two months before the hearings began, the ICC, at its annual meeting in Paris, adopted a resolution calling upon the negotiators of the ITO charter to include a section on capital movements that would provide for the development of a code of “fair” practice with respect to foreign investment.⁵⁹¹

When the State Department held its hearings in February and March of 1947, various business groups, particularly the NFTC, the NAM and the United States

⁵⁸⁸ Foreign Investment Policy Committee Minutes, July 11, 1946, NARA, Record Group 43, ITO Subject Files, Box 37, Folder marked “FIP Agenda & Lists.”

⁵⁸⁹ Charles Carroll, “Comments on the Suggested Charter for an International Trade Organization,” November 6, 1946, NARA, Record Group 43, ITO Subject Files, Box 60, File marked “National Foreign Trade Council – Carroll Rpt.”

⁵⁹⁰ *Ibid.*

⁵⁹¹ Letter dated January 31, 1947, from Arvid L. Frank to Clair Wilcox, NARA, Record Group 43, ITO Files, Box 136, Folder marked “Trade (Geneva) Investment.”

Associates of the ICC, recommended amendment of the charter to include provisions for the protection of foreign investment.⁵⁹² The proposal by U.S. business groups to inject investment related matters into the ITO negotiations reflected more than a simple desire to use any opportunity to gain legal protection for U.S. investments abroad. The NFTC in particular long had been concerned that the best bargaining leverage that the United States possessed for strengthening the position of U.S. investors abroad was the offer to lower U.S. trade barriers. When the ITO negotiations began, the NFTC expressed the concern that the lowering of trade barriers by the United States in the ITO negotiations would amount to a surrender of bargaining power.⁵⁹³ Any concessions with respect to the protection of investment that the United States did not obtain in exchange for its lowering of tariffs might not ever be obtained. Initially, the NFTC hoped that the United States would offer some concessions outside the multilateral framework so that they could be used in bilateral negotiations to protect investment. An alternative tactic was to bring investment matters into the ITO negotiations, thereby permitting U.S. negotiators to use the bargaining leverage represented by the offer to lower trade barriers to obtain better protection for U.S. foreign investment.

⁵⁹² *Current Economic Developments*, March 31, 1947, page 15, NARA, Record Group 59, Department of State Lot Files.

⁵⁹³ Letter dated March 26, 1946, from National Foreign Trade Council President E.P. Thomas to Assistant Secretary of State Will Clayton, NARA, Record Group 59, Department of State File No. 611.0031/3-2646.

In early April, the ICC released a lengthy report on the draft ITO charter.⁵⁹⁴ The ICC criticized the prohibition in Article 12 on “unreasonable” action on the grounds that the term “unreasonable” was too vague and provided a basis for justifying host state action. That is, rather than seeing Article 12 as introducing a new norm of investment protection that improved the position of foreign investors, the ICC regarded the reasonableness principle as providing a shelter for host state regulatory action that met the “vague” norm of reasonableness.⁵⁹⁵ The report was not entirely critical. For example, the ICC welcomed the role of the ITO in dispute settlement. The ICC again recommended that the ITO adopt a code of fair practice with respect to private foreign investment

Drafting an Investment Chapter

Following the February and March hearings, in which U.S. business interests called for the insertion of investment related provisions into the ITO charter, a working group within the State Department began to discuss the kinds of provisions that might be included.⁵⁹⁶ For the first time in its history, the United States government would attempt to formulate a legal code to structure international capital movements. The effort came at the behest of the business community, which wanted a

⁵⁹⁴ Report from the International Chamber of Commerce, dated April 14, 1947, NARA, Record Group 43, ITO Files, Box 123, Folder marked “E/PC/T/35 to 125.”

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Memorandum headed “Investment Provisions for ITO Charter,” dated April 25, 1947, from Mr. Coppock to Mr. Wilcox, NARA, Record Group 43, ITO Files, Box 136, Folder marked “Trade (Geneva) Investment.”

code that would create opportunities for the establishment of foreign investment and would protect existing investment. Steeped in New Deal liberalism, however, and aware of the adverse consequences attributable to foreign investment in the past, the State Department could not imagine a code that was limited solely to the protection of investor interests. Any investment code must call for a regulated market to protect both the interests of foreign investors and the broader public interest.

This historic effort fell under the leadership of John Parke Young. Young in the spring of 1947 was a 51 year old economist with a Ph.D. from Princeton. He had taught economics at Occidental College for 15 years and then joined the administration in 1941. Young had represented the United States at conferences leading to the establishment of the IMF and the IBRD. In March 1944, he had been appointed assistant chief of the State Department's Division of Financial and Monetary Affairs, which was responsible for foreign investment policy. A year later, the division was renamed the Division for Economic Development and Young held the titles of associate chief of the division and advisor on investment. Young would remain at the State Department until 1965, the year he turned 70. He was the author of a successful economics textbook, *The International Economy*, the first edition of which was published in 1942, with subsequent editions published at least until 1963. Young thus brought to the task the benefit of a broad understanding of international economics and the approach of a systemic thinker.

On March 28, 1947, Young circulated a proposed outline of an investment code.⁵⁹⁷ Young's responsibilities at that time included chairing the Foreign Investment Policy Committee established by the ECEFP in July 1945 and Young's outline followed closely the committee's notion of foreign investment policy, which was that the United States should promote outward investment, but only if it was desirable from a developmental perspective. The outline did not attempt to provide the language of the code itself, but rather it described the kinds of provisions that should be included.

A plurality of its provisions sought to eliminate barriers to capital movements and to protect investment once established. The proposal called for free entry of capital, except where "the national interest is paramount"; national and MFN treatment of investment, again subject to limited exceptions in the national interest; payment of prompt, adequate and effective compensation for expropriation; free transfer of funds, except in cases of extreme scarcity of foreign exchange; settlement of loan defaults; sharing of "investment information"; third party settlement of investment disputes; and the negotiation of FCN and double taxation treaties. It also would prohibit local participation requirements (*i.e.*, host country laws requiring foreign investors to permit local investors to acquire an interest in the investment), again except where the national interest was paramount, and unfair competition by state enterprises. Young's far-sighted proposal thus embraced principles of access, nondiscrimination, security, due process, and transparency. Reflecting the novelty of

⁵⁹⁷ Memorandum from John Parke Young headed, "Investment Code," dated March 28, 1947, NARA, Record Group 43, ITO Files, Box 136, Folder marked "Trade (Geneva) Investment."

the reasonableness principle in foreign investment policy, Young's proposal did not include a general obligation of reasonable treatment, notwithstanding that a reasonableness standard was already in the London draft of the charter.

Several provisions would regulate foreign investment in the public interest. Young's proposal called for preventing anticompetitive practices and discouraging investments that required tariff protection or subsidies to be competitive. It stated that foreign investors should provide opportunities for local participation in the investment.

The proposed code also imposed obligations on capital exporting states. It provided that states should impose no obstacles to the export of capital goods, except in the case of temporary scarcities, and should prevent anticompetitive practices. The obligation of capital exporting states thus was largely to facilitate the operation of the market, by removing state imposed capital export controls and preventing monopolistic practices.

Finally, Young's proposed code addressed the behavior of foreign investors. It provided that they should refrain from participation in local political affairs and should observe the laws of the host country.

On April 18, Young and two other members of the working group, Woodbury Willoughby and Herman Walker, met at the Federal Reserve Bank with some twenty representatives of seven groups representing the interests of foreign investors to discuss the prospect of including investment provisions in the charter.⁵⁹⁸ The business

⁵⁹⁸ Memorandum of Conversation, dated April 23, 1947, headed "Foreign Investment Policy – Meeting with Business Groups at the Federal Reserve Bank of New York, April 18, 1947," NARA, Record Group 43, ITO Files, Box 136, Folder marked "Trade (Geneva) Investment."

groups represented were the American Bankers Association, the Chamber of Commerce, the Foreign Bondholders Protective Council, the Investment Bankers Association of America, the NAM, the NFTC, and the U.S. Associates of the ICC. The meeting thus included representatives of major direct and portfolio investors.

All three State Department representatives were professional economists. Young's Ph.D. was from Princeton, Walker had a Ph.D. from Duke and a master's degree from Harvard, and Willoughby earned his Ph.D. from Johns Hopkins. Yet, the three men brought to the meeting not an argument about the economics of foreign investment, but an assessment of the harsh political realities of seeking an investment code.

Young opened the meeting by explaining that the State Department had given "considerable thought" to some kind of international agreement on investment principles and in particular to the idea of including an investment section in the ITO charter.⁵⁹⁹ He then gave the floor to Walker and Willoughby, who would deliver some sobering truths. Walker argued that developing countries sought foreign capital, but wanted it on their own terms and would not sign a treaty with the assurances desired by the United States unless the treaty was "full of escape clauses."⁶⁰⁰ Willoughby contended that any kind of treaty that emerged from a multilateral meeting would be based on the "least common denominator" and would be so weak as to be unsatisfactory. The existence of such a multilateral treaty would render more

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

difficult the task of negotiating bilateral treaties with stronger protection. Finally, he said, the United States would not have sufficient bargaining power at the next preparatory conference, to be held in Geneva, to obtain investment provisions that other countries did not want. Young tried to end the Department's presentation with a mildly positive comment. He explained that, while the Department "was impressed with the difficulties," it nevertheless was desirous of doing what it could under the circumstances.⁶⁰¹

The business representatives, for their part, sought to stiffen the spines of the three economists. The first business representative to speak was Warren Pierson of the U.S. Associates of the ICC, who raised the question of obtaining national treatment for American investors overseas.⁶⁰² Pierson's question, however, failed to have its intended effect. The attendees generally acknowledged that the United States did not itself provide unqualified national treatment and, therefore, was not in a position to demand it from other countries. The ensuing discussion nevertheless gave several business representatives the opportunity to criticize the State Department for failing to do enough to assist American investors abroad. Young, again trying to maintain a positive atmosphere, replied that the Department stood ready to assist investors whenever they were unable through their own efforts to obtain "fair" treatment.⁶⁰³

⁶⁰¹ *Ibid.*

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

Several business representatives also challenged Willoughby's claim that the United States would not have sufficient bargaining power at Geneva to obtain a satisfactory investment code. W. W. Cumberland of the NAM argued that the United States could use its lending power as leverage to obtain a satisfactory code. The United States should withhold all capital from countries that refused to promise fair treatment for foreign investment. The group as a whole shared this sentiment.⁶⁰⁴ As would happen repeatedly during the Truman administration, the U.S. business community urged that the State Department use U.S. economic power to coerce other countries to conclude an agreement committing them to the protection of foreign investment.

Asked how the United States should proceed if agreement on acceptable principles proved impossible, the business representatives said that, as a last resort, the United States should agree simply to the formation of a commission that would prepare model agreements for future bilateral negotiations. The group again suggested that the State Department perhaps failed to recognize how much bargaining power it really had. The meeting closed with a suggestion by the State Department representatives that the business groups establish a committee to draft the provisions that they wanted included in the charter.⁶⁰⁵

Following the meeting, Young's working group completed its proposed draft, which it forwarded to Clair Wilcox, the deputy head of the U.S. delegation in Geneva,

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

on April 25.⁶⁰⁶ The proposed draft called for national and MFN treatment with respect to the right to establish investment, although it contemplated exceptions in the national interest; payment of prompt, adequate and effective compensation for expropriation; consultations with respect to loan defaults; and free transfer of payments except in times of scarcity of foreign exchange. It would discourage unfair competition by state enterprises, local participation requirements, and any other practices that would “increase unduly the burdens” on foreign investment. It proposed a role for the ITO in resolving disputes between investors and host countries. It also allowed each member to file with the ITO a statement of the treatment that it intended to afford investment, in effect allowing each member to declare that it would provide more favorable treatment than required by the charter. Thus, the draft sought to promote norms of access, nondiscrimination, security, due process, transparency and, if “undue” meant “unreasonable,” reasonableness.

The draft code also called for the regulation of international investment flows by both capital importing and capital exporting countries. Under the draft code, all members would agree to discourage investment that would result in unfair economic or political advantages, that would lower or impede the progressive development of labor standards, or that would give rise to anticompetitive practices.

The draft sent to Wilcox on April 25 was substantively quite similar to that proposed by Young four weeks before, although slightly less ambitious. Some of the

⁶⁰⁶ Memorandum headed “Investment Provisions for ITO Charter,” dated April 25, 1947, from Mr. Coppock to Mr. Wilcox, NARA, Record Group 43, ITO Files, Box 136, Folder marked “Trade (Geneva) Investment.”

provisions imposing obligations on host states were softened so that mandatory language became precatory. The obligations that the earlier draft imposed on investors disappeared as did the obligation on capital exporting states to remove export controls. In short, the April 25 draft weakened, to some degree, the obligations imposed on everyone. Yet, in some respects it was stronger. It imposed a new general prohibition on “undue” burdens on foreign investment and sought to prevent the lowering of labor standards. Further, the novel concept of a statement describing the treatment that each member intended to afford foreign investment in some respects addressed the weakened nature of some of the investment protection provisions, while increasing transparency.

In the same memorandum in which the working group transmitted its proposed code, the group reported to Wilcox that, despite the effort expended in developing the code, the members had “serious misgivings” about the entire project.⁶⁰⁷ The group noted that the U.S. business community wanted both increased business opportunities abroad and greater protection for foreign investment. The business community believed that the State Department had not given U.S. foreign investors sufficient assistance in the past. Business leaders were prepared to see such assistance provided through bilateral treaties, multilateral treaties or otherwise, but they wanted more than they believed that they were getting through the FCN treaty program, diplomacy or U.S. economic policies.

⁶⁰⁷ *Ibid.*

The working group believed, however, that it would be impossible at Geneva to negotiate detailed provisions to protect foreign investment. As the group explained to Wilcox, “It would mean all of the complications of the China [FCN] Treaty negotiations multiplied by the number of countries present.”⁶⁰⁸ Even if a multilateral convention could be negotiated, the result would “almost certainly” provide less protection than custom⁶⁰⁹ or existing treaties.⁶¹⁰ Developing countries likely would demand an assurance that they would receive investment in exchange for concessions with regard to investment protection and the United States was not in a position to promise that private investment would be forthcoming. Further, countries might be unwilling to grant in the ITO charter concessions regarding foreign investment protection that they could offer the United States in exchange for something of value in bilateral negotiations, such as developmental assistance.

The United States might attempt to avoid detailed provisions that provided low standards of protection by proposing language in the form of vague, general principles. Such language, however, would likely be useless. Thus, the working group believed, the best approach was simply to include in the charter language providing for the negotiation of investment treaties in the future, an idea already

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Under international law, nations are bound by certain rules of law that originate not in treaties, but in the customary practice of states. Such rules must reflect a general and consistent practice in which states engage under a sense of legal obligation. Ian Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 7th ed. 2008), page 6.

⁶¹⁰ Memorandum headed “Investment Provisions for ITO Charter,” dated April 25, 1947, from Mr. Coppock to Mr. Wilcox, NARA, Record Group 43, ITO Files, Box 136, Folder marked “Trade (Geneva) Investment.”

contemplated by the London draft. Another alternative favored by the working group was to treat the ITO as a body for resolving investment disputes between the investor and the host state.

The working group also feared that any attempt to propose investment related provisions would be characterized as an act of imperialist capitalism. A resulting anti-imperialist backlash could threaten the negotiation of the entire charter. Injecting investment into the charter might taint it in the mind of the American public, which was suspicious of U.S. multinational corporations.

State Department policymakers recognized that developing countries would not be concerned merely about U.S. multinationals, but about the entire American free enterprise system. In a memorandum dated April 17, Woodbury Willoughby feared that developing countries would regard a proposed investment code as an American attempt to impose its economic system on them.⁶¹¹ In light of this possible problem, Willoughby believed that the United States should not use its limited bargaining power at Geneva in a futile attempt to obtain more than it had already obtained in London.

Proposing an Investment Chapter in Geneva

The Preparatory Committee met again in Geneva from April 10 to August 22, 1947. By the time that the State Department representatives met with the business

⁶¹¹ Memorandum dated April 16, 1947, from Willoughby to Ness, headed "Some problems relating to Article on Investment for Inclusion in the ITO Charter," NARA, Record Group 43, ITO Subject Files, Box 55, Folder marked "Investment."

groups at the Federal Reserve in New York, Will Clayton, who was heading the U.S. ITO delegation, was already in Geneva.

On May 1, the State Department sent a telegram to Clayton in Geneva to report on the New York meeting and to inform the Geneva delegation that the Department was considering the inclusion of an investment section in the charter, a draft of which in fact the Department had already sent to Clair Wilcox,⁶¹² although it appears that Wilcox had not yet received it. The State Department reported that the business representatives “strongly” desired inclusion of “certain basic investment principles.”⁶¹³ At the same time, the Department perceived numerous obstacles to the inclusion of an investment section, including “shortness of time, [the] attitude of underdeveloped and nationalistic countries whose conception of [an] investment code differs from that of US business groups, [the] possibility of final provisions['] being watered down and full of escape clauses due [to] weak US bargaining position thereby perhaps prejudicing further bilateral negotiations, [and the] possibility [that] other countries will be critical [of a] US attempt to obtain protection for capitalist investments.”⁶¹⁴ The Department also thought, however, that an investment section would yield “important advantages if feasible.”⁶¹⁵ The Department told Clayton that the business representatives with whom it had met quoted him as assuring them that he

⁶¹² Telegram dated May 1, 1947, from the Secretary of State to the U.S. delegation in Geneva, NARA, Record Group 43, ITO Files, Box 134, Folder marked “ITO (Geneva) Conference – From May 1, 1947 to June 1, 1947.”

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

would endeavor to include investment provisions in the charter and asked Clayton for confirmation.⁶¹⁶

Five days later, on May 6, the same business groups that had met with State Department officials at the Federal Reserve in New York asked the Department to relay a message to Clayton reaffirming their support for investment provisions in the ITO charter. “We feel,” said the business groups, “that the drafting and adopting of an international code of principles to govern foreign investment is an urgent and practicable object.”⁶¹⁷ The business groups favored inclusion in the Geneva draft of either an investment code or an authorization for a commission to draft an investment code in the future. They also wanted the charter to proclaim that the encouragement of foreign investment was one of its purposes.

Two days later, at the May 8 meeting of the U.S. delegation in Geneva, Clair Wilcox reported on the May 6 telegram received from the State Department relaying the business groups’ call for an investment code. Wilcox noted the “restrained nature” of the communication.⁶¹⁸ These business groups were willing to give the U.S. delegation latitude in deciding whether to seek detailed investment provisions in the charter or merely an agreement on general principles coupled with a commitment to form a commission that would develop an investment code later.

⁶¹⁶ *Ibid.*

⁶¹⁷ Telegram dated May 6, 1947, from the Department of State to the U.S. delegation in Geneva, NARA, Record Group 43, ITO Files, Box 134, Folder marked “ITO (Geneva) Conference – From May 1, 1947 to June 1, 1947.”

⁶¹⁸ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 8, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

The delegation wanted to respond favorably to the wishes of the investor community, but that community had not expressed its wishes clearly. Herman Walker, who was not in Geneva but who had met with the business representatives at the Federal Reserve in New York, believed that business interests were using the ITO charter negotiations as an opportunity to pressure the State Department to adopt a stronger policy in favoring of protecting foreign investment and did not necessarily expect the Department to succeed in persuading the Geneva conference to incorporate an investment code into the charter.⁶¹⁹

At a delegation meeting in Geneva, Wilcox speculated that the indefiniteness in the position of the business groups reflected the fact that they had been unable to agree among themselves on the best strategy. After some discussion about how to proceed, Winthrop Brown, the Yale educated lawyer who was then serving as the chief of the Division of Commercial Policy and who was the chief negotiator for the United States in Geneva on trade, suggested that the delegation attempt to obtain an investment code in Geneva, but if that effort should fail the delegation could “fall back on a commission.”⁶²⁰ John Walker Evans, a Commerce Department official sent to Geneva to work on the trade negotiations, observed that the first alternative might be feasible. With momentum in the delegation moving toward adoption of Brown’s suggestion, Harry Hawkins, the former director of the Office of Economic Affairs,

⁶¹⁹ Walker’s view was recorded in undated handwritten notes taken by State Department attorney Walter Hollis at a meeting on the ITO charter. The notes may be found in NARA, Record Group 59, Lot Files, Folder marked “Walter Hollis Notes.”

⁶²⁰ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 8, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

then serving as an economic advisor to the U.S. embassy in London, proposed that the delegation cable Washington immediately and ask for a draft by June 1 from the private groups of the kind of code that they wanted.

Following the meeting, Clayton notified the Department that the U.S. delegation would endeavor to include investment provisions in the charter, if they were received by early June.⁶²¹ He said that, even if it was not possible to include investment provisions in the charter, the delegation could urge inclusion of investment related language in the charter's statement of purposes and a provision establishing a commission. Clayton and the rest of the Geneva delegation thus had embraced the more ambitious goal of obtaining provisions in the charter itself, rather than seeking only to obtain agreement on a commission to draft a code in the future.

The following day, Clair Wilcox reported that he had received the State Department working group's latest draft of a proposed investment code. He also noted that the draft was accompanied by "long arguments" as to why it should not be used.⁶²²

Despite the doubts expressed by the State Department working group and the ambivalence of the business groups, the Geneva delegation adhered to its decision of the day before to propose a detailed provision on investment protection. The men responsible for the decision -- men such as Clayton, Wilcox, Hawkins, Brown and

⁶²¹ Telegram dated May 8, 1947, from the U.S. delegation in Geneva to the Department of State, NARA, Record Group 43, ITO Files, Box 134, Folder marked "ITO (Geneva) Conference -- From May 1, 1947 to June 1, 1947."

⁶²² Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 9, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April -- June 20, 1947."

Evans -- were all men whose primary interest and experience lay in the field of international trade, rather than international investment. Those primarily responsible for investment policy – the members of Young’s working group -- had advised against any attempt to incorporate an investment code into the ITO charter, but the senior officials serving on the Geneva delegation, wanting to ensure business support for the ITO charter and to honor the commitment that Clayton had made to business representatives to seek an investment code, ignored the advice of their subordinates toiling back in Washington. They believed that there would be little harm in at least making a proposal and then gauging the reaction. Not having yet received a formally approved policy from the Department⁶²³ and facing a deadline for submission of amendments to the draft charter, the Geneva delegation decided to prepare its own proposal.⁶²⁴

By May 20, the U.S. delegation had drafted its proposal.⁶²⁵ The Geneva delegation’s proposal was much shorter than the more elaborate code drafted by Young’s working group. It added two important substantive provisions to the charter, both in Article 12. First, it required members to grant to nationals and companies of the other members national treatment with respect to the opportunity to establish investment and with respect to the treatment of investment once established, subject to

⁶²³ The draft sent to Clair Wilcox on April 25 was the product of John Parke Young’s working group, but had not yet been approved by the ECEFP.

⁶²⁴ Memorandum dated June 16, 1947, from John Parke Young to Will Clayton, NARA, Record Group 43, ITO Files, Box 38, Folder marked “FIP Documents.”

⁶²⁵ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 20, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

the right of the host state to make exceptions where “essential national interests” so required, provided that the exceptions were notified to the ITO.⁶²⁶ In any event, members must accord MFN treatment to the nationals and companies of the other members. Second, it required members to pay prompt, adequate and effective compensation for the expropriation of property.⁶²⁷ These requirements of nondiscrimination and compensation for expropriation were the protections most desired by the business community.

The Geneva delegation’s proposal also placed greater emphasis on the concept of fair and equitable treatment as a way of describing the general nature of the treatment that foreign investment should receive. It added to the statement of the ITO’s purposes in Article 1 the encouragement of “the international flow of capital for productive investment through measures designed to ensure fair and equitable treatment of the legitimate interests of investors.”⁶²⁸ The New York draft, at Article 61, had authorized the ITO to recommend and promote international agreements on measures designed to ensure “just and equitable” treatment for the enterprise, skills, capital, arts and technology brought from one member country to another. The U.S. proposal moved this language to Article 12, where it would appear with the other investment protection provisions, and added a specific reference to the future

⁶²⁶ U.S. Proposal dated May 22, 1947, NARA, Record Group 43, ITO Files, Box 55, Folder marked “ITO – Investment (2).”

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*

elaboration of a code on investment principles as one of the kinds of agreements that the ITO was authorized to recommend and promote.

The U.S. proposal would have made other changes as well. For example, to promote transparency, it would have added a new paragraph to Article 12 authorizing members to file with the ITO a statement of any conditions, requirements or restrictions relating to the treatment or establishment of investment by nationals or companies of other members. The charter would prohibit a member from acting inconsistently with any such statement, although a member could amend its statement. To execute the various responsibilities of the organization relating to investment, the U.S. proposal would have amended Article 72 to authorize the establishment of a commission on economic development and international investment.

Wilcox suggested a “comprehensive lobbying” campaign to build support among other delegation for the U.S. proposal.⁶²⁹ He recommended, in particular, a series of lunches with members of the other delegations. He said that he would meet with the delegates from the United Kingdom, Canada, Belgium, the Netherlands and India. Wilcox expected the first four delegations to be among the strongest supporters of the U.S. proposal and India to be one of the harshest critics and thus these were the most important meetings. Wilcox suggested a schedule whereby different pairs of U.S. delegates would hold separate lunches with the delegates from Australia, Brazil, Chile, China, and Cuba.

⁶²⁹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 20, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

Two days later, Wilcox reported on his lunch with the U.K., Canadian, Belgian and Dutch delegations. He said that the U.S. proposal had been greeted with “enthusiasm” and that some delegates suggested that the U.S. proposal did not go far enough.⁶³⁰ Although the minutes of the meeting do not identify those delegates, presumably they were the Belgian and Dutch delegates. As time would show, however, those two delegations along with that of the United States were the delegations most sympathetic to the protection of foreign investment. Wilcox, in any event, acknowledged that the U.S. proposal “might run into more difficulties” with other delegations.⁶³¹ The lunches later in the week with other delegations would provide some indication of the general sentiment.

By May 27, the deadline to submit amendments to Chapter IV, the chapter on economic development where the U.S. investment provision would appear, had passed. Wilcox noted at the delegation meeting that morning that a large number of amendments to the chapter had been submitted by various delegations. Chapter IV was scheduled for discussion at a meeting of Commission A that morning. Harry Hawkins suggested that Wilcox open the meeting with a statement on behalf of the proposed investment article. John Walker Evans warned that this would simply provide a target for opponents. After some discussion, the delegation decided to adopt Hawkins’ suggestion.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

At the first meeting of Commission A, the United States faced the delicate task of reorienting the discussion of economic development that had occurred in London toward a discussion of investor protection. Consideration of Chapter IV began at the May 27 meeting when the first two speakers, the delegates of Cuba and Czechoslovakia, inquired about the U.S. proposal.⁶³² Wilcox explained that, while economic development could be promoted through international financial institutions and public and private loans, the United States believed that the flow of direct investment capital that had been interrupted by the war should be renewed. The minimum rules required to encourage private foreign investment were nondiscrimination and compensation for expropriation. Responding to a concern expressed by the delegate from Czechoslovakia, he denied that the U.S. proposal would require any country to accept foreign investment that it did not want.

The immediate reaction to the proposal was favorable. Delegates from a variety of countries – including Australia, Belgium, Brazil, Chile, China, France and the Netherlands – expressed support for the proposal, while reserving the right to suggest amendments. The delegate from India, however, urged the United States not to press its proposal at this time. He argued that it could completely alter the nature of the charter and render its acceptance more difficult. The delegate from Czechoslovakia argued that capital investment could not be treated the same way as trade in goods and that rules regarding investment must be different from those

⁶³² United Nations Conference on Trade and Development, Commission A, Summary Record of First Meeting, held on Tuesday, 27 May 1947, NARA, Record Group 43, ITO Files, Box 123, Folder marked “E/PC/T/A/SR/1 to 43.”

relating to trade. Wilcox replied that, in light of the sympathy for the U.S. proposal expressed by the other delegates, the United States did not think that acceding to India's request would be appropriate. The commission referred the U.S. amendments to a subcommittee consisting of Australia, Brazil, Chile, France, India, the United Kingdom and the United States.⁶³³

At a general staff meeting the following day, Wilcox reported that his extemporaneous speech on behalf of the proposed investment provision at the committee meeting the previous had received "extraordinary support" from Australia, Belgium, Brazil, Chile, China, Cuba, France and the Netherlands.⁶³⁴ He believed that this reflected the success of the lunches held by the U.S. delegation the previous week to build support for the proposal. The British and Canadian delegations had remained silent at the committee meeting, but Wilcox thought that their silence was fortunate because it helped to avoid criticism that the U.S. proposal was "a put up job by the industrialist countries."⁶³⁵ He anticipated that both delegations would support the proposal, as would those from New Zealand and South Africa.

Wilcox had been surprised, however, that the delegation from India had attacked the U.S. proposal "vigorously," referring to the ITO charter as a "banker's Charter," complaining that the United States had introduced the proposal without adequate preliminary consideration and requesting that the United States withdraw the

⁶³³ *Ibid.*

⁶³⁴ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of General Staff Meeting, May 28, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947."

⁶³⁵ *Ibid.*

proposal.⁶³⁶ Wilcox had left his lunch with the Indian delegation the previous week with the impression that the Indians were “not particularly opposed” to the proposal.⁶³⁷

On the second day of Commission A’s meeting, May 28, New Zealand defied Wilcox’s optimistic prediction by expressing strong opposition to the U.S. proposal, arguing that it upset the balance of the charter and that the language was both too general and too specific.⁶³⁸ The delegate from India took the floor to suggest that the charter must be revised to impose greater obligations on member states.⁶³⁹ He said that the facilities needed for rapid economic development were not equally available to every country and, therefore, the charter should make some arrangement for a sharing of such facilities on “fair and reasonable” terms.⁶⁴⁰ The Indian delegation told that U.S. delegation that the Indians had been “caught napping” on the investment provisions, implying that they were now awake and vigilant.⁶⁴¹ The Cuban delegate

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ United Nations Conference on Trade and Development, Commission A, Summary Record of Third Meeting, held on Wednesday, 28 May 1947, NARA, Record Group 43, ITO Files, Box 123, Folder marked “E/PC/T/A/SR/1 to 43.”

⁶⁴⁰ *Ibid.*

⁶⁴¹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation, TAC and Charter Working Group Meeting, May 29, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

later that day proposed redrafting the U.S. language so that foreign investment would not be placed in a better position than domestic investment.⁶⁴²

Amending the U.S. Proposal in Geneva

Meanwhile, on May 27, the very day on which Commission A began its discussion of the U.S. proposal, the ECEFP finally approved the proposed investment code on which the John Parke Young's working group had been laboring since March. The approved proposal would have made extensive changes to the New York draft of the ITO charter.⁶⁴³

First, it would have added new language to Article 9, which in the New York draft merely recognized the importance of economic development. The new language stated that economic development would be promoted by an increase in international investment, that capital should be available on reasonable terms and conditions, that it should be invested for productive purposes economically suited to the area and in a manner consistent with the best interests of both the capital exporting and the capital importing countries, and that it should be accorded fair and equitable treatment.

The proposal would have added to Article 12 several protections for investment beyond those in the New York draft. The proposed new language would

⁶⁴² United Nations Conference on Trade and Development, Commission A, Summary Record of Fourth Meeting, held on Wednesday, 28 May 1947, NARA, Record Group 43, ITO Files, Box 123, Folder marked "E/PC/T/A/SR/1 to 43."

⁶⁴³ "Revision of Chapter IV of the ITO Charter" as approved by the ECEFP on May 27, 1947, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

have required the payment of prompt, adequate and effective compensation for expropriation and MFN treatment with respect to the establishment and operation of an investment. The first requirement, relating to expropriation compensation, was substantively identical to the language proposed by the Geneva delegation. The second requirement, relating to MFN treatment, was weaker than the language proposed by the Geneva delegation, which also called for national treatment.

The investment protection provisions of the ECEFP approved proposal were more extensive than the Geneva delegation's proposal in many respects. They would have guaranteed the right to transfer earnings from investment and a moderate amount for amortization of loans, except as permitted by the IMF Articles of Agreement. They would have required the parties, in the event of a loan default, to negotiate with a view toward arriving at a fair and nondiscriminatory settlement of the loan obligations. Finally, under the new language, any member could submit a dispute related to investment to the organization, which would utilize its good offices in an effort to resolve the dispute.

The proposal approved by the ECEFP also included provisions intended to prevent some of the potential undesirable effects of investment. One provision stated that members and their investors should avoid "misuse of investment," which meant the employment of investment in a manner that would result in unfair political or economic advantage or harm to the member receiving the investment or to the relations among members; that would lower prevailing wages or labor standards or impede the progressive improvement of wages and working standards; that would give

rise to anticompetitive conditions; or that would constitute interference in the political affairs of other members. Another provision stated that the managers of foreign investment should provide adequate and effective opportunities for the participation of local capital and management.

Finally, the ECEFP approved proposal would have authorized the ITO to promote international agreements designed to achieve several purposes. These included ensuring just and equitable treatment of investment, avoiding double taxation, permitting the freest possible flow of capital and returns, and guaranteeing national treatment for investment.

Just as it was completing work on its proposed language, the State Department received word from the Geneva delegation that the latter had already submitted its own proposal in order to meet the deadline. John Parke Young complained that the Geneva delegation had never informed the Department of the deadline.⁶⁴⁴ Indeed, as noted above, the Geneva delegation had sent the Department a telegram on May 8 asking that any recommendations regarding the content of an investment code be sent to Geneva by early June, far too late to meet the deadline in Geneva. In any event, the Geneva delegation's proposal met with "considerable disapproval" in Washington.⁶⁴⁵ The various agencies involved in preparing the ECEFP approved policy objected both to the substance of the Geneva delegation's proposal and to the process by which it

⁶⁴⁴ Memorandum dated June 16, 1947, from John Parke Young to Will Clayton, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

⁶⁴⁵ *Ibid.*

had been prepared, that is, by the Geneva delegation without consulting any of the agencies in Washington..

A further problem arose from the fact that, at the April 18 meeting with business representatives at the Federal Reserve Bank in New York, Young and his colleagues had solicited suggestions from the business groups concerning the content of any investment provisions to be proposed by the Department and had given these groups a deadline of June 1 to submit their suggestions. Most of these groups had submitted suggestions, only to learn that the Geneva delegation had already submitted its proposal on behalf of the United States, a fact that was embarrassing to the Department.⁶⁴⁶

Meanwhile, contemporaneously with the ECEFP's review of the language proposed by Young's working group, the Committee on Foreign Investment Policy chaired by Young had been reviewing the language proposed by the Geneva delegation. On May 24, the State Department sent a cable to the Geneva delegation lamenting the delegation's "considerable departure in fundamental policy" from the language approved by the ECEFP.⁶⁴⁷ The cable noted, first, the numerous omissions from the ECEFP approved policy. The cable also identified objections to two provisions in the Geneva delegation's language.

First, the Geneva delegation had drafted language guaranteeing national treatment, except when contrary to essential national interests. The State Department

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Copy dated July 15, 1947, of May 24, 1947, telegram from the Department of State to the U.S. delegation in Geneva, NARA, Record Group 43, ITO Files, Box 38, Folder marked "FIP Documents."

observed that the United States itself could not abide by this guarantee inasmuch as it had enacted laws that denied national treatment to foreign investment and that such laws could not be defended under the essential national interest exception, without a strained interpretation of the exception, which the Department did not wish to encourage. The Department noted that its proposal had addressed national treatment through the language calling for fair and equitable treatment.⁶⁴⁸ The Department also noted that even the MFN treatment obligation in the Geneva proposal was too absolute.

Second, the Department questioned the “efficacy” of the language in the Geneva delegation’s proposal permitting members to submit to the ITO a statement of their laws relating to foreign investment, from which no departures would be permitted.⁶⁴⁹ The Department contended that the difficulty of identifying all such laws would discourage most countries from utilizing this procedure. Even those countries that attempted to comply likely would find that they had omitted some laws and that investors would feel misled when they discovered that the host country sought to enforce laws not included in the statement submitted to the ITO.

The Geneva delegation replied that it would modify its proposal to take account of the concerns about its nondiscrimination provision and the provision for filing statements of investment policy.⁶⁵⁰ Regarding the other provisions of the

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

ECEFP approved policy, *i.e.*, the language on loan defaults, transfers, misuse of investment, local participation, and unfair competition, the Geneva delegation told the Department that it had consulted with other delegations and that any attempt to introduce these other provisions would meet strong opposition that might result in the loss of all investment related provisions.

Meanwhile, if the State Department was displeased with the terms of the delegation's proposal, the business community was delighted. The delegation's proposal, unlike the ECEFP approved proposal, was limited to protecting the rights of investors and it offered strong protection that went beyond even U.S. law. In June, Clair Wilcox traveled to Montreux to attend an ICC Convention.⁶⁵¹ He spoke with several U.S. business representatives, including a representative of the NAM. The NAM representative said that U.S. business interests were "thoroughly pleased" with the positions taken by the United States at the Geneva conference. The representative said that the United States could "count on the full and vigorous support" of these business representatives in obtaining Congressional support of the charter.

In mid July, in response to the State Department's objections, the U.S. delegation submitted amendments to its own proposal. By this time, the delegation had been joined by Seymour J. ("Sy") Rubin, the 34 year old assistant legal adviser for economic affairs, who was then not quite ten years out of Harvard Law School, where

⁶⁵¹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of the General Staff Meeting, June 12, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947."

he had been one of Felix Frankfurter's protégés.⁶⁵² Rubin was a late addition to the delegation and was serving as the delegation's legal counsel. Upon his arrival, Rubin was assigned primary responsibility for the negotiation of the investment related provisions of the charter, while the more senior members of the delegation continued to concern themselves principally with trade. Before enrolling at Harvard Law School, Rubin had attended the University of Michigan, where he was a member of the university's wrestling team, an experience that may have presaged the metaphorical hand-to-hand combat in which he would soon engage with the Indian delegation over the proposed investment provisions of the charter.

One change embodied in the U.S. amendment was that the prohibition in Article 12(a) on unreasonable action injurious to the rights of foreign nationals and their investment conduct was modified so that it became a prohibition on "unfair and inequitable" action. Rubin explained to the other delegations that the change was in the nature of a clarification. He believed that the terms "unfair" and "inequitable" had "a broader and more precise connotation."⁶⁵³ In other words, fair and equitable treatment included reasonable treatment, but went beyond merely reasonable treatment. The change, however, also had the effect of placing more emphasis, as the Department seemed to wish, on the concept of fair and equitable treatment.

⁶⁵² A brief biographical sketch of Sy Rubin's early years appears in Bennett Boskey, "Seymour J. Rubin – Some of the Origins," *American University International Law Review* 4 (1995), 1245.

⁶⁵³ Minutes of Delegation Meeting, July 17, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes – U.S. Delegation (Geneva 1947) April – June 20, 1947."

After objections from Australia and India to the word “inequitable,” the U.S. delegation would suggest that “unfair and inequitable” become “unfair and unreasonable.”⁶⁵⁴ The objection to “inequitable” was that it suggested the Anglo-American system of equity jurisprudence, which did not exist in civil law countries.⁶⁵⁵ The U.S. delegation had noted that the term “equitable” was in paragraph 1 of the article, in the language calling for the conclusion of multilateral agreements providing for fair and equitable treatment, but that argument was unavailing.⁶⁵⁶ In any event, Rubin did not believe that the change was of much substance.⁶⁵⁷

A second change would require national and MFN treatment with respect to the right to establish investment, “except as otherwise deemed necessary in the national interest.” Once investment was established, each member must provide national and MFN treatment, except for limitations or conditions existing at the time the investment was made or at the time the charter entered into force. This exception addressed objections by India that it was about to gain its independence, after which it wished to adopt measures that would promote Indian investment in India and to end the period of British domination of the Indian economy.⁶⁵⁸ The language of the national and MFN treatment provision also made explicit that the provision prohibited

⁶⁵⁴ *Ibid.*

⁶⁵⁵ Letter dated August 5, 1947 from Seymour Rubin to Walter S. Surrey, NARA, Record Group 59, Department of State Lot Files, Folder marked “Walter Hollis Notes.”

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Minutes of Delegation Meeting, July 17, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes – U.S. Delegation (Geneva 1947) April – June 20, 1947.”

placing “more onerous” burdens on covered investment, but did not require the host country to extend subsidies or other benefits to covered investment.⁶⁵⁹

Negotiating the U.S. Proposal in Geneva

By the time the United States submitted its amended proposal in July, work on the U.S. proposal had shifted to the subcommittee level, where the proposal led to a “prolonged debate.”⁶⁶⁰ The United States faced much difficulty with Article 12 because many countries believed that its purpose was to impose an American conception of economic organization on the rest of the world.⁶⁶¹

The principal U.S. representative on the subcommittee, Sy Rubin, later recounted that “We had vey [very] tough going in the subcommittee at first. We got almost no support. We were attacked viciously on the grounds that the proposals came too late, that the Delegations had no investment experts here, that they distorted the ‘balance’ of the Charter by magnifying only one aspect of economic development, etc.”⁶⁶²

⁶⁵⁹ Minutes of Delegation Meeting, July 19, 1947. NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes – U.S. Delegation (Geneva 1947) April – June 20, 1947.”

⁶⁶⁰ Wilcox, *op. cit.*, page 146.

⁶⁶¹ Meeting of the American Delegation to the Havana ITO Conference, November 18, 1947, 10:15 a.m. to 12:25 p.m., pages E-1-E-2, NARA, Record Group 43, ITO Files, Box 147, Folder marked “Trade – Briefing Sessions – Habana.”

⁶⁶² Letter dated August 5, 1947 from Seymour Rubin to Walter S. Surrey, NARA, Record Group 59, Department of State Lot Files, Folder marked “Walter Hollis Notes.”

Within the subcommittee, India and Australia led the attack against the U.S. proposal, with support from the British. Only Brazil strongly supported the United States, with France offering modest support. Chile remained neutral.

Rubin was able to persuade the subcommittee that it needed to analyze the proposal line by line before voting on it. He believed that the delegates ultimately approved a modified version of the U.S. proposal because they did not want the time invested in reviewing it to have been for naught.⁶⁶³

The substance of Article 12 was negotiated by Rubin and the Indian delegate and was driven by India's desire to gain control over the Indian economy. Rubin believed that the United States could hardly argue that India under no circumstances could do so and thus the goal became to place "safeguards" around the process. Rubin did not believe that it was possible to get much more than the U.S. achieved.⁶⁶⁴

The subcommittee rewrote the chapter on economic development to include the investment protection provisions sought by the United States, but in a substantially modified form. The obligations with respect to foreign investment contained in the New York draft were largely retained in the Geneva draft in Article 11 with minor changes. The prohibition on the imposition of unreasonable impediments that would prevent a member from obtaining facilities for their economic development was recast in Article 11(1) as a prohibition on "unreasonable or unjustifiable impediments" that would prevent another member from obtaining facilities for development "on

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

equitable terms.” Similarly, the prohibition on “unreasonable action injurious” to the interest of other members, business entities or persons providing facilities for development became in Article 11(2) a prohibition on “unreasonable or unjustifiable action . . . injurious to the rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied.” The requirement of reasonableness introduced in London thus survived.

Article 12 was headed “International Investment for Economic Development.” Article 12(1) recognized that “development would be facilitated if Members were to afford, for international investments acceptable to them, reasonable opportunities upon equitable terms to the nationals of other Members and security for existing and future investments.” Accordingly, the members “agree[d] to provide, consistent with the limitations recognized as necessary in this Article, the widest opportunities for investment and the greatest security for existing and future investment.” Article 12(1), in other words, included vaguely worded commitments to access and security.

Article 12(2), which was destined to become one of the most controversial provisions of the entire charter, set forth two more specific obligations, one relating to nondiscrimination against foreign capital and one relating to the security of foreign capital. These were the successors to the nondiscrimination and expropriation provisions of the U.S. delegation’s original proposal submitted in May. The nondiscrimination obligation prohibited the imposition of requirements on foreign investment that were “appreciably more onerous” than those imposed “in similar

circumstances” upon nationals of the host state or nationals of any third state.⁶⁶⁵ That is, foreign investment was entitled to national and MFN treatment. Article 12, however, recognized important exceptions to the nondiscrimination obligation. These included requirements in force at the time the charter came into force or at the time the investment was made, whichever was later; requirements in force at the time of any substantial addition to the investment or change in the nature of the business based upon the investment; and reasonable measures to transfer ownership of foreign investment to local investors. In effect, the exceptions allowed the host state to preserve existing discriminatory measures and to adopt new discriminatory measures prior to the establishment of an investment. They also permitted discriminatory expropriation programs.⁶⁶⁶

The obligation relating to security required that the host state pay “just compensation” for the expropriation of foreign investment, regardless of whether the expropriated property was transferred to local investors, was taken into public ownership, or was placed under public management or occupation.⁶⁶⁷ The United States was unable to obtain agreement to include the requirement of prompt, adequate and effective compensation because of concerns about the requirement of effectiveness.⁶⁶⁸ Many countries lacked sufficient dollars to make payment in a

⁶⁶⁵ Article 12(2)(a).

⁶⁶⁶ Article 12(2)(a)

⁶⁶⁷ Articles 12(2)(a)(iv) and 12(2)(b). The former related to transfers to private ownership and the latter related to transfers to public ownership, occupation or management.

convertible currency. Even the British and the French were concerned that dollar shortages could preclude them from engaging in nationalization programs, such as the nationalization of the British railway system, if they were required to make prompt payment in dollars.⁶⁶⁹ Further, Rubin conceded that nationalization in some instances could lead to an improvement in a country's balance of payments.⁶⁷⁰ Ultimately, the United States was required to accept language calling for "just" compensation. Rubin believed that the requirement of "just" compensation implicitly required some degree of transferability.⁶⁷¹

The requirement of just compensation was critical because it provided the only security against expropriation. An explanatory note to Article 12(2) stated that the requirement of just compensation did not apply where the property was taken because of a violation of law or pursuant to the terms of a treaty of peace or another international agreement related to the conclusion of the war. The note further explained that, where just compensation required payment of currency, payment in local currency would satisfy the obligation. This language responded to the argument that a dollar shortage should not preclude a country from exercising its sovereign right to expropriate.⁶⁷² Further, the transferability of the payment into another currency

⁶⁶⁸ Meeting of the American Delegation to the Havana ITO Conference, November 18, 1947, 10:15 a.m. to 12:25 p.m., page D-14, NARA, Record Group 43, ITO Files, Box 147, Folder marked "Trade – Briefing Sessions – Habana."

⁶⁶⁹ Letter from Seymour Rubin to Walter S. Surrey, date July 16, 1947, NARA, Record Group 59, Department of State Lot Files, Folder marked "Walter Hollis Files."

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.*

would be determined in accordance with the host country's general foreign exchange policy maintained in a manner consistent with the IMF Articles of Agreement. The IMF articles, as has been seen, allowed members to restrict capital transfers without IMF approval.

The investment related provisions of the charter constituted only one small part of the negotiations in Geneva. Indeed, the ITO charter itself was only a part of the Geneva negotiations. At its first meeting in London in the autumn of 1946, the Preparatory Committee had agreed that the creation of the ITO "would be facilitated if concrete action were taken by the principal trading nations to enter into reciprocal negotiations directed to the substantial reduction of tariffs and to the elimination of preferences on a mutually advantageous basis."⁶⁷³ Secretary of State James Byrnes wanted the tariff negotiations delayed until the Geneva conference so that they would not become an issue in the 1946 elections.⁶⁷⁴ Thus, even while they were negotiating the draft ITO charter, the governments represented at the Geneva conference commenced the negotiation of trade concessions that were to be incorporated, along with appropriate provisions of the draft ITO charter, into a separate General Agreement on Tariffs and Trade (GATT) that would implement immediate reductions

⁶⁷² Meeting of the American Delegation to the Havana ITO Conference, November 18, 1947, 10:15 a.m. to 12:25 p.m., page D-13, NARA, Record Group 43, ITO Files, Box 147, Folder marked "Trade – Briefing Sessions – Habana."

⁶⁷³ Department of State, *Draft Charter for the International Trade Organization of the United Nations*, Department of State Publication 2927, Commercial Policy Series 106 (Washington: Government Printing Office, 1947), page 70.

⁶⁷⁴ Zeiler, *op. cit.*, page 63.

in trade barriers even before the ITO charter entered into force.⁶⁷⁵ The GATT negotiations ended successfully and twenty-three countries signed the agreement.⁶⁷⁶

The Cold War Comes to Geneva

The drafting of the ITO charter required that the United States weigh its foreign economic policy against other aspects of its foreign policy. The Second World War had demonstrated the extent of U.S. dependence on critical raw materials from abroad⁶⁷⁷ and the War and Navy Departments were concerned that ITO charter commitments to free trade could interfere with measures that the military wished to take in order to ensure the availability of natural resources needed for defense purposes. They also wanted to ensure that trade commitments would not prevent efforts by the United States to halt the shipment of fissionable materials and military technology to the Soviet Union.⁶⁷⁸

Article 32 of the suggested charter proposed by the United States in September 1946 had set forth a number of exceptions to Chapter IV of the charter, which was the chapter on trade. That article provided,

⁶⁷⁵ Although not a member of the Preparatory Committee, Syria participated in the GATT negotiations because it was a member of a customs union with Lebanon, which was a member of the committee. Department of State, *Draft Charter for the International Trade Organization of the United Nations*,

Department of State Publication 2927, Commercial Policy Series 106 (Washington: Government Printing Office, 1947), page 6.

⁶⁷⁶ William Diebold, Jr., *The End of the I.T.O.* (Princeton: Princeton University Press, 1952), page 27.

⁶⁷⁷ Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945-1950* (New York: Columbia University Press 1985), page 21.

⁶⁷⁸ Zeiler, *op. cit.*, pages 64-65.

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . .

d. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

e. in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; . . . [or]

h. undertaken in pursuance of obligations under the United Nation Charter for the maintenance or restoration of international peace and security.

Article 49 included a similar exception for the chapter on commodity agreements. It provided that none of the provisions of that chapter shall be “interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.”

The national security exception became a matter of serious contention within the U.S. delegation at Geneva. At a delegation meeting on May 30, Captain W. B. Thorp, the Navy Department’s representative on the delegation, had expressed the concern that the chapter on international commodity agreements would prevent the United States from entering into international commodity agreements needed to supply materials for military use. Thorp wanted a broader exception to the commodities chapter for actions taken in pursuit of national security. Wilcox

countered that “such an exception would be unquestionably used as a means of evading responsibilities. . . .”⁶⁷⁹ He added that “most of the countries present would be entirely happy if they could find a means of evading the responsibilities which they may have to assume here.”⁶⁸⁰

By early June 1947, nearly two months after the Geneva conference began, Clair Wilcox had decided that at least some of the exceptions to the commercial policy chapter, including the national security exception, should be revised to apply to all obligations under the charter.⁶⁸¹ A member of the U.S. delegation, Edmund H. Kellogg, a Harvard educated lawyer who had reached the rank of major in the U.S. Army Air Force during the war and then joined the foreign service after the war,⁶⁸² prepared draft language for a general exception for measures necessary to protect national security. The proposed language provided that “[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of any measure which it may deem necessary” relating to fissionable materials, traffic in arms, traffic in any goods to supply a military establishment, in time of war or other emergency in

⁶⁷⁹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation, TAC and Charter Working Group Meeting, May 30,

1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

⁶⁸⁰ *Ibid.*

⁶⁸¹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of the General Staff Meeting, June 4, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

⁶⁸² “Edmund H. Kellogg, Professor Emeritus and Diplomat, 81,” *The New York Times*, April 14, 1993.

international relations, or undertaken pursuant to obligations under the U.N. Charter for the maintenance or restoration of international security.⁶⁸³

On June 16, after seeing Kellogg's draft of a general national security exception, Howard H. Neff, the War Department's representative on the delegation, and Captain Thorp sent Wilcox a memorandum arguing that Kellogg's language was not adequate to protect U.S. national security interests.⁶⁸⁴ In particular, the United States needed the sole discretion to enter into intergovernmental commodity agreements that would ensure the availability of copper, lead, zinc, petroleum and lumber products, critical materials that the United States did not produce in sufficient abundance. They also wanted latitude for the United States to protect the market for synthetic rubber.

At its July 2 meeting, the U.S. delegation considered a proposal by Howard Neff to revise Edmund Kellogg's language.⁶⁸⁵ Neff's proposal added a qualifying phrase at the beginning that read "without limiting the generality of any other exception or qualification." It reformulated the reference to "any measure" as a reference to "any measure or agreement" so that the exception would apply to international commodity agreements explicitly. It qualified the reference to supplying

⁶⁸³ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Staff Meeting of Entire Delegation, July 2, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947."

⁶⁸⁴ Memorandum from Mr. Neff and Captain Thorp to Mr. Wilcox, dated June 16, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947."

⁶⁸⁵ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Staff Meeting of Entire Delegation, July 2, NARA, Record Group 43, ITO Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947."

a military establishment with the additional phrase “directly or indirectly.” This last change was intended to render the language of the exception consistent with the language of the Munitions Control Act, a measure pending before Congress to authorize various export controls. Neff’s draft also deleted the word “essential” from the phrase “essential security interests.” This change too was intended to render the language of the exception consistent with the pending Munitions Control Act. Finally, Neff’s draft added a specific exception for the supplying of information if to do so would be contrary to a member’s national security. Neff wished to ensure that the ITO charter would not require the United States to disclose information that could compromise national security, such as certain defense production processes.

Neff’s proposed draft provoked “considerable discussion.”⁶⁸⁶ Many members of the delegation questioned the need for the changes. Because of the legal importance of the exception, Wilcox asked Rubin to study Neff’s draft carefully and to submit a report to the delegation with respect to the questions raised at the meeting. Rubin responded by preparing a new draft of the national security exception, which the delegation considered at its July 4 meeting.⁶⁸⁷

Rubin effectively decided against Neff on nearly every point. He did retain the new language on furnishing information. Rubin, however, omitted Neff’s introductory qualifying phrase and the reference to “directly or indirectly,” while restoring the word

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947”.

“essential.” He left in the reference to agreements, but offered his opinion that the word was unnecessary. This led to an extended discussion of whether the word “measure” included an agreement, with Rubin, Robert Terrill and John M. Leddy all insisting that it did, while Neff argued that it did not. At Rubin’s suggestion, the delegation compromised by using the term “any action” in lieu of “any measure or agreement.”

The delegation then turned to the most contentious issue raised by Neff’s proposal. Kellogg’s proposed language had applied to “any measure which [a Member] may deem necessary” and that related to various enumerated topics, such as fissionable materials or a national emergency. The implication was that each member had sole discretion to determine whether a measure it took was necessary, but not whether it related to one of the enumerated topics. Neff’s draft had deleted the quoted language, but added a new paragraph stating that each member shall have “independent power of interpretation” of the language of the exception and that the provisions of Article 86 relating to disputes concerning the interpretation or application of the charter would not apply to the national security exception. Neff’s revision made quite explicit that any invocation of the national security exception by a party was conclusive and not reviewable in any respect.

Rubin apparently disliked the new paragraph that Neff drafted, but he did not restore the original language either. Instead, he drafted new language under which the Charter did not preclude any action “which [a Member] may consider to be necessary and to relate to” the various enumerated topics, such as fissionable materials, traffic in

arms, or an emergency in international relations. The change from the original language was subtle, but Rubin, Neff and Wilcox all recognized what was at stake. Under the new language, the member could determine both whether the measure was necessary and whether it related to the enumerated topics and these determinations would not be subject to review in any respect. A member could avoid any charter obligation by a mere unilateral invocation of its essential security interests.

Wilcox asked that the words “and to relate to” be replaced with the original phrase “relating to.” The purpose of Wilcox’s proposal was to make clear that the determination to be made by each member was whether a measure was necessary and not whether it related to the enumerated topics. That is, the ITO could determine that a measure adopted under the national security exception violated the charter because, while a member may have determined it to be necessary, the measure did not relate to any of the enumerated topics. Rubin then reported that he had favored the same language that Wilcox was proposing, but that Neff had objected “vigorously” to the change.⁶⁸⁸ Neff argued that the phrase “and to relate to” in Rubin’s draft made clear that the United States “may take unilateral action.”

John Evans, John M. Leddy and Robert Terrill concurred “strongly” with Wilcox that Neff’s preferred language should be deleted.⁶⁸⁹ As the minutes of the meeting explained, “They argued that such a provision destroyed the efficacy of the

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.*

entire Charter.”⁶⁹⁰ The most important consideration was not the scope of action left to the United States by the charter. Rather, the most important consideration was that “[p]roviding the means for unilateral action will surely be abused by some countries.”⁶⁹¹ As they noted, “Under Mr. Neff’s language any country could, under the pretext of national security, take any measure whatsoever it might wish in complete disregard of all provisions of the Charter.”⁶⁹² Leddy argued “that it would be far better to abandon all work on the Charter” than to place a provision in it that would, “under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter.”⁶⁹³

Neff stood his ground. He replied that “when matters of national security are involved the US must be given a free hand to make whatever decisions may be necessary without challenge by the ITO.”⁶⁹⁴

Other members of the delegation contended, however, that as a practical matter the United States simply did not need a right to engage in unfettered unilateral action. Both John Walker Evans and Winthrop Brown, for example, argued that the United States would be such an important member of the organization that the ITO would

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

have no choice but to decide in favor of the United States in any case where the United States had a *bona fide* national security claim. Oscar Ryder, the chairman of the U.S. Tariff Commission and one of the members of the working group negotiating trade issues, agreed that “as a practical matter no injury could possibly come to the US by ITO intervention to determine whether the measures introduced by the US in a particular instance were in fact taken in the interest of national security.”⁶⁹⁵ Wilcox added that “he did not think that the ITO would ever become an international forum to discuss national security interests.”⁶⁹⁶

Following this discussion, Wilcox called for a vote on his proposal. Ten members of the delegation, counting Wilcox, favored the change that he had proposed. Only three members favored the language sought by Neff. Neff asked that the record show clearly his dissent to the delegation’s decision.

The discussion and its resolution indicate unambiguously that the U.S. delegation rejected the idea that the any member of the ITO, including the United States, should have a right to take nonreviewable action under the national security exception. The delegation recognized that to permit any member to be the sole judge of its own claim to an exception would render the charter legally meaningless. As Leddy argued, no charter at all would be better than one that appeared to bind countries but that did not.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.*

Neff understood the significance of his defeat. On July 10, he sent a memorandum to the rest of the U.S. delegation noting that the language did not confer upon a member the power to decide “with finality” whether any action that it took related to any of the enumerated topics, such as fissionable materials or traffic in arms.⁶⁹⁷ He concluded that “[t]he content therefore of the exceptions does not fall within the power of any individual Member to determine but rests solely within the general power to interpret otherwise conferred by the Charter.”⁶⁹⁸ He noted that the U.S. delegation’s choice of this language “would seem to indicate that there is *not* the intent to reserve full power of unilateral interpretation.”⁶⁹⁹ Neff went on to lament the deletion of the phrase “directly or indirectly” and the inclusion of the word “essential.” He continued to be concerned that these changes rendered the language of the charter inconsistent with pending legislation in Congress. He observed that “[t]he exclusion of these words is all the more important because the interpretation of the content of the security exceptions is not reserved to the country taking action.”⁷⁰⁰

The next day, Captain Thorp circulated a memorandum supporting Neff’s position. He argued that a security exception “subject to definition or interpretation in any way by the ITO is certainly not satisfactory from a national security

⁶⁹⁷ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Howard H. Neff dated July 10, 1947, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947”.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Ibid.*

⁷⁰⁰ *Ibid.*

standpoint.”⁷⁰¹ Responding to the argument that the language preferred by Neff would be subject to abuse, Thorp noted that “[i]f the Members of the ITO do not intend to follow the spirit as well as the letter of the ITO Charter, there might as well not be a Charter.” He did add that he did “not feel too strongly” about the phrases “directly or indirectly” or “essential.” He thought that the former phrase was implied and that any security interest was essential.

On July 14, Rubin circulated a response to Neff’s memorandum in which he argued that the phrasing desired by Neff “would in fact make the Charter in terms an illusory document.”⁷⁰² An exception phrased as Neff wished would be invoked by other countries, rather than by the United States. The United States could justify any security measures that it contemplated under the language approved by the U.S. delegation.

The language approved by the U.S. delegation was forwarded to the Subcommittee on Chapter VIII. On July 24, the Subcommittee on Chapter VIII sought the comments of Commission A on the U.S. proposal for a new Article 94 with general exceptions to the charter.⁷⁰³ The essential security interests exception was

⁷⁰¹ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Captain W. B. Thorp to the Chairman of the Delegation, dated July 11, 1947, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

⁷⁰² Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

⁷⁰³ United Nations Conference on Trade and Development, Commission A, Summary Record of Thirty-Third Meeting, held on Thursday, 24 July 1947, NARA, Record Group 43, ITO Files, Box 123, Folder marked “E/PC/T/A/SR/1 to 43.”

discussed and no objection was raised, except for a minor clarification of the language on fissionable materials.

The U.S. understanding of the essential security interests exception following the Geneva conference continued to focus on the prevention of abuse of the exception. An analysis of the Geneva draft prepared by the U.S. Tariff Commission paraphrased the exception as providing that “[a]ny Member is permitted . . . to take any action to protect its security interests” relating to fissionable materials, relating to arms and other materials supplying military establishments, “relating to everything in time of war or other emergency in international relations,” or to carry out its obligations under the U.N. Charter for the maintenance of international peace and security.⁷⁰⁴ In other words, the Tariff Commission omitted the language specifying that the measures were those that a member considered necessary. In its further discussion of the language, the Tariff Commission report said that the provision left members with “complete freedom of action” to regulate imports and exports of fissionable materials, implements of war, and supplies for the military. In other words, the report noted, “with respect to such items exports or imports may be prohibited unqualifiedly or the Member may discriminate as to where it obtains its imports or sends its exports.” While the charter did not require a member to obtain advance approval by the organization of any action taken under these exceptions, it appeared “likely that charges that the exceptions were being abused for protective or other purposes would

⁷⁰⁴ United States Tariff Commission, Analysis Geneva Draft of Charter of International Trade Organization, November 1947, NARA, Record Group 43, ITO Files, Box 132, Folder marked “Analysis Geneva Draft of ITO Charter – November 1947.”

require consultation under Article 89 and decision by the Organization under Article 90 if the consultations should not result in satisfactory settlement.” The Tariff Commission’s analysis was not very sophisticated and completely missed the point of the debate over Neff’s proposed changes to the national security exception. The Commission’s analysis nevertheless reflected an understanding that invocation of the exception was subject to ITO review.

Neff’s concern that the charter would constrain U.S. freedom of action with respect to national security also led him to propose an amendment to the charter’s prohibition on “unreasonable impediments” to outward investment. Neff’s concern was that this language might preclude the United States from taking action necessary to protect its national security. Thus, Neff proposed that the language be amended to allow any impediment “required by national security or other national necessity.” Wilcox replied that “it was utterly inconceivable that any country would be willing to agree that national security considerations were ‘unreasonable.’”⁷⁰⁵ He argued that the requirement of reasonableness gave the United States even broader latitude than the national security exception, noting that the United States maintained export controls for protectionist reasons that could be justified as reasonable, but not necessary to U.S. national security. One member of the delegation observed that the United States had fought hard in London to obtain a prohibition on unreasonable action and, if the delegation now recommended that the language be changed, a

⁷⁰⁵ Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, May 22, 1947, NARA, Record Group 43, ITO Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1949) April – June 20, 1947.”

“Pandora’s box” of issues would be opened throughout the charter. Captain Thorp suggested that the phrase “contrary to the public interest” be substituted for “unreasonable.”⁷⁰⁶ Ultimately, no other member of the delegation shared the concerns about the inadequacy of the term “unreasonable” and the delegation voted to leave the existing language unchanged.

Neff’s proposal regarding the national security exception was nothing less than an assault on the charter as an instrument of the rule of law. In the name of national security, Neff sought to create an exception that would allow the United States to exempt itself from any obligation of the charter at any time in its sole discretion. The exception in effect would have negated the provisions of the charter as binding rules. Every member of the delegation understood what was at stake. An exception created for the United States would have been equally available to any other member. The charter would have lost its force as law.

The State Department in the years of the Truman administration was seeking to create an international economic order governed by notions of liberal legality. Neff’s proposal challenged that policy and, for that reason, no issue during the entire course of negotiation over the ITO charter was more controversial within the U.S. delegation than Neff’s proposal. Neff staged a challenge to the rule of law and, at least within the U.S. delegation, the rule of law won.

⁷⁰⁶ *Ibid.*

Chapter Four

Abandoning the International Trade Organization

The results of the Geneva conference were disastrous. The United States had proposed the inclusion of investment related provisions at the behest of the U.S. investor community, but U.S. investors were so dissatisfied with the language on nondiscrimination and expropriation in Article 12(2) that they threatened to oppose the entire charter if Article 12(2) remained in it.⁷⁰⁷

The NFTC believed that Article 12 allowed too many exceptions to the requirements of national and MFN treatment, its provisions on participation in foreign investment by host state nationals were objectionable in principle, and the obligation to pay just compensation for expropriation was not defined clearly enough.⁷⁰⁸ It argued that Article 12 would not promote investment, but would prejudice the United States in its attempt to conclude bilateral treaties for the protection of foreign investment.⁷⁰⁹ The NAM criticized the draft not only because it gave “undue emphasis” to the right of a country to expropriate, but because it permitted payment of compensation in local currency.⁷¹⁰ Orville Harden, the vice president of Standard Oil

⁷⁰⁷ Memorandum dated November 21, 1947, by Seymour Rubin and Harry Hawkins headed, “Investment Clauses in Geneva Draft Charter,” NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

⁷⁰⁸ Letter dated December 18, 1947, from NFTC President E. P. Thomas to Assistant Secretary of State Will Clayton, NARA, Record Group 43, ITO Files, Box 147, Folder marked “Trade – Correspondence, General – Havana.”

⁷⁰⁹ *Ibid.*

Company, sent Will Clayton a letter written by Standard Oil's counsel, George Koegler, expressing concern that Article 12(2) prohibited only treatment that was "appreciably more onerous"⁷¹¹ than national treatment and allowed payment of expropriation compensation in local currency.⁷¹²

Even some within the State Department were troubled by the compromises. John Parke Young later recalled that he was "shocked" when he learned that the U.S. delegation had agreed to language, not approved in Washington, agreeing to payment of compensation in local currency.⁷¹³

Devising a Strategy for the Havana Conference

After their return to the United States, the members of the Geneva delegation realized that the investment related provisions drafted in Geneva were unacceptable. In November, Sy Rubin and Harry Hawkins prepared a memorandum reviewing the alternatives available to the United States with respect to Article 12.⁷¹⁴ One alternative was to reopen the discussion of Article 12(2) at the final conference, to be held in Havana, with the goal of obtaining the inclusion of language on expropriation

⁷¹⁰ Department of State Briefing Memorandum dated May 1, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked "Chapter III."

⁷¹¹ Letter from George Koegler to Eugene Thomas dated October 24, 1947, NARA, Record Group 43, ITO Files, Box 14, Folder marked "Chapter III."

⁷¹² Letter from Orville Harden to Will Clayton dated November 21, 1947, NARA, Record Group 43, ITO Files, Box 14, Folder marked "Chapter III."

⁷¹³ John Parke Young Oral History, Harry S. Truman Library.

⁷¹⁴ Memorandum dated November 21, 1947, by Seymour Rubin and Harry Hawkins headed, "Investment Clauses in Geneva Draft Charter," NARA, Record Group 43, ITO Files, Box 14, Folder marked "Chapter III."

similar to that in the U.S.-China FCN treaty. The problem was that Article 12(2) was “the result of extensive and often heated discussions on a subject which excited as much controversy as anything else in the Charter, and on which the U.S. delegation had few allies.”⁷¹⁵ No countries other than Belgium and the Netherlands appeared likely to support an effort to strengthen Article 12(2).

A second alternative was to delete Article 12(2) in its entirety. This would eliminate much of the opposition of the U.S. investor community to the charter. Further, Article 12(2), Hawkins and Rubin conceded, did establish a bad precedent that would hinder efforts to obtain better language in bilateral negotiations. Deletion of that provision would eliminate the bad precedent.

Although the arguments for seeking deletion of Article 12(2) were strong, ultimately, Rubin and Hawkins recommended a third course, which was to seek to replace Article 12(2) with new language calling upon the parties to negotiate bilateral treaties for the protection of foreign investment. This would neutralize the opposition of the investor community and eliminate the bad precedent and might salvage something of value for the protection of foreign investment. They hoped that such language would enable the United States to use its bargaining power to achieve a better treaty bilaterally than it could obtain through the multilateral forum and would strengthen the ability of the United States to conclude more FCN treaties. The members of the U.S. delegation drawn from the business community, including

⁷¹⁵ Memorandum dated November 21, 1947, by Seymour Rubin and Harry Hawkins headed, “Investment Clauses in Geneva Draft Charter,” NARA, Record Group 43, Entry A1 698, ITO Files, Box 14, Folder marked “Chapter III.”

representatives of the NFTC, the NAM and the United States Chamber of Commerce, concurred with this approach.⁷¹⁶

Eight days after Rubin and Hawkins proposed their amendment, Will Clayton replied to Orville Harden's letter, informing him that the U.S. delegation was in agreement with Harden's position on Article 12(2) and would be submitting an amendment to the article.⁷¹⁷ On January 5, Clair Wilcox wrote to NFTC President Eugene Thomas, reported on the proposed amendment to Article 12(2) and assured him that the U.S. delegation had "given its complete, unanimous, and vigorous support" to the position taken by the NFTC and other business groups in the United States.⁷¹⁸ Wilcox told Thomas that the United States would "continue to fight for the sort of investment provisions which the Council seeks. . . ." ⁷¹⁹

The Havana Conference

Fifty-six nations participated in the Conference on International Trade and Employment, which convened in Havana on November 21. Most of these countries

⁷¹⁶ Susan Ariel Aaronson, *For the People, But Not by the People: A History of the International Trade Organization* (Unpublished Ph.D. dissertation, 1993), page 160.

⁷¹⁷ Letter from Will Clayton to Orville Harden dated November 29, 1947, NARA, Record Group 43, ITO Files, Box 14, Folder marked "Chapter III."

⁷¹⁸ Letter from Clair Wilcox to Eugene Thomas dated January 3, 1948, NARA, Record Group 43, Entry A1 698, ITO Files, Box 14, Folder marked "Chapter III."

⁷¹⁹ *Ibid.*

had not been invited to participate in the preparatory meetings and thus the Havana conference was their first opportunity to shape the document.⁷²⁰

Winthrop Brown, the chief of the Commercial Policy Division and the chief U.S. negotiator for tariff reductions in Geneva, recalled the “anguish” of the Havana conference.⁷²¹ It was “long and dreary” and by the time of the conference the U.S. delegation was “fed up” with rehashing a subject on which it already had worked for a very long time.⁷²² Further, the delegation sensed that the top officials in Washington had lost interest in the negotiations, to a large extent because the conclusion of the GATT had resulted in the tariff reductions that the United States hoped to achieve through the ITO. Although he continued to serve as the head of the U.S. delegation, Will Clayton had resigned as undersecretary prior to the commencement of the Havana Conference, symbolizing the extent to which the time of the ITO had passed.

Even some of the delegations from other countries questioned whether the conference would accomplish anything useful. At one point during the negotiation, the Afghan delegation invited Clair Wilcox to dinner. Wilcox was uncertain about the purpose of the meal, which was sumptuous. Finally, after the brandy had been served,

⁷²⁰ Some countries who were not members of the Preparatory Committee sent observers who were permitted to express their views. Colombia, Denmark, Mexico, Peru, Poland and Syria sent observers to the first session, while those same countries, as well as Afghanistan, Argentina, Ecuador, Egypt, Greece, Iran, Saudi Arabia, Siam, Sweden, Turkey, Uruguay, Venezuela, and Yugoslavia sent observers to the second session. Colombia and Mexico sent observers to the meeting of the drafting committee in New York. Department of State, *Draft Charter for the International Trade Organization of the United Nations*, Department of State Publication 2927, Commercial Policy Series 106 (Washington: Government Printing Office, 1947), page 6.

⁷²¹ Winthrop Brown Oral History, Harry S. Truman Library.

⁷²² *Ibid.*

the head of the delegation turned to Wilcox and said, “Mr. Wilcox, may I ask you a question?”

Wilcox replied, “Why, of course.”

The Afghan delegate then asked, “Why are we here?”⁷²³

The conference opened with a “chorus of denunciation” in which developing countries argued that the Geneva draft favored the interests of industrialized nations and would not promote economic development.⁷²⁴ The criticisms were not directed only at the investment provisions. Developing countries objected that the draft prepared in Geneva prohibited quantitative restrictions on trade, which they wished to maintain, and that the charter “should insure development as well as promote trade.”⁷²⁵ Participants proposed some 602 amendments to the charter, of which 432 were regarded as “antithetic to the essential purposes of the charter.”⁷²⁶ Even the countries that had participated in the Geneva conference offered 166 amendments to the charter.⁷²⁷ The organizers anticipated that the conference would last for seven weeks, but it continued for slightly more than four months.

⁷²³ *Ibid.*

⁷²⁴ Wilcox, *op. cit.*, page 47.

⁷²⁵ *Current Economic Development*, December 27, 1947, page 1, NARA, Record Group 59, Department of State Lot Files.

⁷²⁶ *The International Trade Organization: Key to Expanding World Trade and Employment*, Department of State Publication 3882, Commercial Policy Series 130 (Washington: Government Printing Office, 1950), page 7.

⁷²⁷ *Ibid.*

At Havana, the delegates expressed widespread agreement that the problem of economic development constituted “the key problem” the solution of which would facilitate the resolution of other issues before the conference.⁷²⁸ A number of delegates said that any provisions on investment must protect the interests of host states as well as foreign investors. Most delegates agreed that developing countries understood the value of foreign investment for economic development, although some noted that foreign investment sometimes impeded development. Guatemala, for example, argued that sudden inflows of foreign investment could be inflationary.⁷²⁹ Some expressed skepticism about too much reliance on foreign investment. Many delegates announced that they would be submitting proposed amendments to Chapter III, which in the Geneva draft of the charter was the chapter on economic development.

The Havana conference referred Chapter III to the “Second Committee.” In the committee, there was little support for an unqualified right of national treatment for foreign investment. Early in the discussion of Article 12, the Australian delegate argued that every state needed to reserve the right to deny national treatment in some cases and even Rubin, speaking on behalf of the United States, agreed.⁷³⁰

⁷²⁸ United Nations Conference on Trade and Employment, Press Release ITO/C.2/1, 1 December 1947, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

⁷²⁹ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷³⁰ United Nations Conference on Trade and Employment, Press Release ITO/C.2/7, 16 December 1947, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

Much of the discussion concerned the U.S. proposal to replace Article 12(2) with language calling for the negotiation of bilateral treaties. Delegates expressed a wide variety of reactions with little consensus.

Some countries supported the U.S. proposal to replace Article 12(2). For example, Costa Rica supported the U.S. position on the ground that the language of Article 12(2) might alarm prospective investors, defeating the purpose of Article 12.⁷³¹ The ICC representative agreed and argued that deletion of Article 12 would be preferable to its retention in its current form.⁷³² Liberia reached the same result, for somewhat different reasons. The Liberian delegate believed that, given the diversity of investment policies in different countries and the varied forms of investment, the adoption of detailed rules such as those set forth in Article 12(2) simply was not feasible. Rather, the charter should merely adopt general language calling for “equity and fair play” as in Article 11.⁷³³ Liberia also believed that the ITO was venturing too deeply into investment matters. It should not supervise investment matters or resolve disputes, but focus on promoting information exchange.

Other countries opposed the U.S. proposal for language on bilateral negotiations, although they did not always agree on the reasons for their opposition. Chile argued that bilateral negotiations would favor the interests of the more powerful

⁷³¹ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷³² United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Thirteenth Meeting, 23 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷³³ *Ibid.*

country.⁷³⁴ Argentina agreed.⁷³⁵ The Netherlands, by contrast, feared that bilateral negotiations would result in too many different approaches, thereby undermining the MFN treatment principle.⁷³⁶ Perhaps to avoid this result, the United Kingdom believed that the charter should set forth the principles on which any bilateral agreements would be based.⁷³⁷

Several countries, including Ceylon, Uruguay and Venezuela, argued that the conference should delete Article 12(2) in its entirety.⁷³⁸ Burma and India went even farther and proposed deleting all of Article 12 on the ground that the purpose of Chapter III was economic development and that investor protection was adequately addressed by Article 11, which prohibited unreasonable or unjustifiable action injurious to investment and authorized the ITO to recommend further international agreements to assure just and equitable treatment for capital.⁷³⁹

⁷³⁴ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

⁷³⁵ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Thirteenth Meeting, 23 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

⁷³⁶ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

⁷³⁷ *Ibid.*

⁷³⁸ United Nations Conference on Trade and Employment, Document Entitled "Second Committee: Economic Development," Doc. E/CONF.2/C.2/9, 8 December 1947, NARA, Record Group 43, ITO Files, Box 140, Folder marked "Second Committee."

⁷³⁹ *Ibid.*; United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

Other countries argued that Article 12 or at least Article 12(2) must be retained. Sweden contended that Article 12 was necessary to provide security to investors.⁷⁴⁰ The elimination of Article 12 would disserve the interests of capital importing countries. China argued that deletion of Article 12(2) would leave the matters covered by that paragraph uncertain.⁷⁴¹

Mexico proposed that Article 12(2) be replaced with new language embodying the Calvo Doctrine.⁷⁴² The Calvo Doctrine, named for nineteenth century Argentine jurist Carlos Calvo, held that foreign nationals or companies were not entitled under international law to treatment any more favorable than that accorded to local nationals and companies.⁷⁴³ In effect, the Calvo Doctrine would leave the protection of foreign investment entirely to the law of the host state. The United States immediately expressed opposition to the Mexican proposal.⁷⁴⁴

Some countries offered criticisms of Article 12 that were different from those offered by the United States. For example, Venezuela found the reference to “widest” opportunity to invest and “greatest” security for investment too vague.⁷⁴⁵ Pakistan

⁷⁴⁰ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Thirteenth Meeting, 23 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ The Calvo Doctrine has been explicated in Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

⁷⁴⁴ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Thirteenth Meeting, 23 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

proposed amending the sentence to remove the superlatives on the ground that they implied that foreign investment might receive treatment superior to that received by domestic investment.⁷⁴⁶ Mexico proposed simply deleting the sentence in its entirety.⁷⁴⁷

Indeed, the delegates proposed so many amendments to the chapter on economic development that the conference formed two different subcommittees to review them. On December 11, the conference created a joint subcommittee to consider Articles 9, 10 and 11.⁷⁴⁸ The joint subcommittee would have little impact on the evolution of the investment related provisions.

On December 23, the conference referred the highly controversial Article 12 to a separate subcommittee, known as Subcommittee B.⁷⁴⁹ This subcommittee consisted of Australia, Brazil, Canada, Ceylon, Czechoslovakia, Egypt, India, Mexico, Netherlands, New Zealand, Sweden, United Kingdom, United States and Venezuela.⁷⁵⁰

⁷⁴⁵ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Twelfth Meeting, 22 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

⁷⁴⁶ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Thirteenth Meeting, 23 December 1947, NARA, Record Group 43, ITO Files, Box 141, Folder marked "U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946."

⁷⁴⁷ *Ibid.*

⁷⁴⁸ United Nations Conference on Trade and Employment, Press Release ITO/C.2/4, 11 December 1947, NARA, Record Group 43, ITO Files, Box 139, Folder marked "ITO/C.2/."

⁷⁴⁹ United Nations Conference on Trade and Employment, Press Release ITO/C.2/11, 23 December 1947, NARA, Record Group 43, ITO Files, Box 139, Folder marked "ITO/C.2/."

⁷⁵⁰ "Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba," page 13, NARA, Record Group 43, ITO Files, Box 148, Folder marked

When Subcommittee B held its initial meeting, Rubin explained that the United States wished to replace Article 12(2) with new language. The United States justified its proposed amendment by asserting that the existing language of that provision was “cloudy and difficult.”⁷⁵¹ In particular, the exceptions to national and MFN treatment were such as to “obscure and overshadow” the rule.⁷⁵² Accordingly, the United States was proposing a simple statement under which members, if requested, would proceed with the negotiation of a bilateral agreement giving effect to the provisions of Article 12(1). The provisions of Article 12(1) had been those under which each party agreed to provide the “widest opportunity” to invest and the “greatest security” for existing and future investment. The new language proposed by the United States provided that “each member shall, upon the request of any other member, enter into and carry out with such other member negotiations directed to giving effect to the provisions of paragraph 1 of this article.”⁷⁵³ The United States argued that this new language would solve the interpretive difficulties of the existing language and would provide an unambiguous means of putting into effect the principles of Article 12(1).⁷⁵⁴

“Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba.”

⁷⁵¹ Amendment Proposed by Delegation of the United States of America, USD/12, dated November 27, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

⁷⁵² *Ibid.*

⁷⁵³ United Nations Conference on Trade and Employment, Press Release ITO/C.2/13, 29 December 1947, NARA, Record Group 43, ITO Files, Box 139, Folder marked “ITO/C.2/.”

Even with the proposed revision, the language of Article 12 remained controversial. The references in Article 12(1) to the “widest opportunity” for new investment and the reference to the “greatest security” for existing investment continued to be the subject of dispute, in part because their meaning was uncertain.⁷⁵⁵ The Indian delegate stressed the importance of protecting the interests of the capital importing country, prompting Rubin to remind the subcommittee that the host country has sovereignty over foreign investment in its territory, which provided the best means by which to protect its interests.⁷⁵⁶

Subcommittee B met a total of seven times.⁷⁵⁷ By January 22, the subcommittee had reached unanimous agreement on a new draft of that article.⁷⁵⁸ The chair of the subcommittee emphasized the diversity of views on the subcommittee and the fact that unanimity had been reached only as the result of a spirit of compromise.⁷⁵⁹

⁷⁵⁴ United Nations Conference on Trade and Employment, Document Entitled “Second Committee: Economic Development,” Doc. E/CONF.2/C.2/9, 8 December 1947, NARA, Record Group 43, ITO Files, Box 140, Folded marked “Second Committee.”

⁷⁵⁵ United Nations Conference on Trade and Employment, Press Release ITO/C.2/19, 15 January 1948, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

⁷⁵⁶ *Ibid.*

⁷⁵⁷ United Nations Conference on Trade and Employment, “Report of Sub-Committee B on Article 12 – International Investment for Economic Development,” Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1948.”

⁷⁵⁸ United Nations Conference on Trade and Employment, Press Release ITO/C.2/20, 22 January 1948, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

⁷⁵⁹ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Seventeenth Meeting, 26 January 1948, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

The United States achieved its goal in the subcommittee of replacing Article 12(2) with language in which the members undertook to enter into bilateral negotiations upon the request of another member “if mutually acceptable.”⁷⁶⁰ As the language explicitly acknowledged, the ITO charter could not compel the members to reach agreement and thus this provision did not guarantee that a bilateral treaty would be concluded. To further promote the negotiation of future agreements, the charter authorized the ITO to “make recommendations for and promote bilateral or multilateral agreements on measures designed . . . to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.”⁷⁶¹ This latter provision was based on language that had appeared in the suggested charter proposed by the United States in September 1946 and that had been retained in subsequent drafts.

The results of the subcommittee’s deliberations, however, were not an unalloyed victory for the United States. The subcommittee adopted other changes to Article 12 that weakened the language adopted in Geneva. For example, the subcommittee changed the language calling for the “widest opportunity” for investment to language calling for “reasonable opportunities for investments acceptable” to the host country. The subcommittee changed the language guaranteeing the “greatest security” to investment to language guaranteeing “adequate security” for investment. The U.S. proposal to delete Article 12(2) had eliminated any

⁷⁶⁰ Article 12(2)(b).

⁷⁶¹ Article 11(2)(a)(i).

explicit reference to compensation for expropriation, although new language specified that each party had the right “to prescribe and give effect on just terms to requirements as to the ownership of existing and future investment,” language that, Rubin believed, recognized implicitly an obligation of just compensation.⁷⁶² In addition, the requirement of “adequate security” presumably addressed that issue to some degree as well. The requirement of nondiscrimination that had appeared in the deleted version of Article 12(2) survived in the form of a much weaker obligation “to give due regard to the desirability of avoiding discrimination as between foreign investments.”⁷⁶³

Rubin told the committee that the new Article 12 was not all that the United States wanted, but it was a “workable and worthwhile addition” to the charter.⁷⁶⁴ At the same time, however, Rubin said that the United States would support an effort to strengthen the language.⁷⁶⁵ Belgium, the Netherlands and Switzerland all called for stronger language.

Belgium proposed an amendment, supported by the United States, to strengthen the nondiscrimination language.⁷⁶⁶ The Belgian amendment would have

⁷⁶² Department of State Briefing Memorandum dated May 1, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

⁷⁶³ Article 12(2)(a)(ii).

⁷⁶⁴ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Eighteenth Meeting, 29 January 1948, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷⁶⁵ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Summary Record of Seventeenth Meeting, 26 January 1948, NARA, Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1946.”

⁷⁶⁶ United Nations Conference on Trade and Employment, Press Release ITO/C.2/22, 28 January 1948, NARA, Record Group 43, ITO Files, Box 139, Folder marked “ITO/C.2/.”

replaced the language requiring the members to give “due regard to the desirability of avoiding discrimination as between foreign investments” with language prohibiting “all unjustifiable discrimination” between foreign and domestic investors. The amendment was defeated, however, with numerous delegates noting that the subcommittee language was a compromise and that the amendment would upset the balance reached through the compromise.

Before the subcommittee completed its discussion of Article 12, Wallace Phillips, a representative of the ICC, took the floor to say that the chamber opposed Article 12 as currently drafted because the chamber believed that it would discourage foreign investment. He said that the deletion of Article 12 in its entirety would be preferable to a version that would be prejudicial to the revival of international capital movements. He added that the chamber wished to make clear that foreign investment was entitled at least to national treatment. On January 30, the committee approved Article 12 without the nondiscrimination guarantees sought by Belgium, the United States and the ICC.⁷⁶⁷

On February 16, the recommendation of the joint subcommittee on Articles 9 through 11 came before the full committee. The subcommittee had held some 27 meetings on those three articles.⁷⁶⁸

⁷⁶⁷ United Nations Conference on Trade and Employment, Press Release ITO/C.2/23, 30 January 1948, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

⁷⁶⁸ United Nations Conference on Trade and Employment, “Report of Joint Sub-Committee of Committees II and VI on Articles 9, 10, and 11,” Record Group 43, ITO Files, Box 141, Folder marked “U.N. Conf. on Trade & Employment Havana Nov. 1947-Mar. 1948.”

The joint subcommittee had discussed the meaning of “unjustifiable” and “unreasonable.” It had agreed that the fact that the host state provided national treatment to covered investment was evidence that the treatment was not unreasonable or unjustifiable. It also agreed, however, that national treatment would not be sufficient to constitute justifiable or reasonable treatment. In other words, the subcommittee had acknowledged that the norms of reasonableness and nondiscrimination had independent content. Finally, it had agreed that the terms “unreasonable” and “unjustifiable” should be interpreted in light of other provisions of the charter, particularly Article 12.⁷⁶⁹

The committee approved Article 11, except paragraph 4, which provided that the term “nationals” as used in Articles 11 and 12 comprised natural and legal persons.⁷⁷⁰ A number of delegations had expressed concern that this language would create complications with respect to provisions of their constitutions or other domestic laws that referred to nationality. The committee decided to delete the language in order to avoid those difficulties, but the deletion was not intended to affect the interpretation of the term “nationals” as embracing corporate entities as well as individuals. Further, the issue of the nationality of legal entities was not implicated by the paragraph or by its deletion.⁷⁷¹

⁷⁶⁹ “Draft Report of Joint Sub-Committee of Committees II and VI on Articles 9, 10, and 11,” dated 3 February 1948, NARA, Record Group 43, ITO Files, Box 141, File marked “U.N. Conf. on Trade & Employment, Havana, Nov. 1947-Mar. 1948.”

⁷⁷⁰ United Nations Conference on Trade and Employment, Press Release ITO/C.2/24, 16 February 1948, NARA, Record Group 43, ITO Files, Box 139, Folded marked “ITO/C.2/.”

During the debate on Article 11, the Burmese delegation proposed an amendment that would have eliminated the prohibition on unreasonable or unjustifiable action injurious to investment and substituted a prohibition on discriminatory treatment, explaining that the existing language gave foreign investment more protection than national investment.⁷⁷² Burma understood that the norm of reasonableness was distinct from the norm of nondiscrimination and wanted to ensure that the charter embraced on the latter. The Burmese amendment, however, was not adopted.

The conference considered a number of proposals to impose affirmative obligations on developed countries to assist developing countries in acquiring various facilities for economic development. For example, Mexico proposed the creation of a permanent Economic Development Commission to address that issue.⁷⁷³ Chile proposed an amendment to Article 11 that would have required all members to notify other members of a shortage of consumer goods, to consult with members having a substantial interest in the importation of such goods in order to reserve an essential minimum supply for them, and to prevent speculation in consumer goods of vital

⁷⁷¹ United Nations Conference on Trade and Employment, Second Committee: Economic Development, Doc. E/CONF.2/C.2/39, 20 February 1948, NARA, Record Group 43, ITO Files, Box 140, Folded marked "Second Committee"; *Reports of Committees and Principal Sub-Committees*, page 25, NARA, Record Group 43, ITO Files, Box 148, Folder marked "Havana Conference" Reports of Committees and Principal Subcommittees."

⁷⁷² United Nations Conference on Trade and Employment, Second Committee: Economic Development, Doc. E/CONF.2/C.2/9, 8 December 1947, NARA, Record Group 43, ITO Files, Box 140, Folded marked "Second Committee."

⁷⁷³ *Ibid.*

importance to other members.⁷⁷⁴ Costa Rica proposed that profits and dividends be taxable only by the host state.⁷⁷⁵ Colombia proposed an entirely new article that would have authorized regional organizations to provide technical assistance to developing countries and to coordinate tax systems to ensure that income from investment could be taxed only in the host country.⁷⁷⁶ None of these proposals was adopted, however.

On March 24, 1948, 53 nations signed the Final Act, which constituted the Charter of the International Trade Organizations.⁷⁷⁷ Argentina and Poland declined to sign because they were dissatisfied with the charter. Turkey signed later.⁷⁷⁸

Meanwhile, as the process of negotiating the very controversial Article 12 had neared the end, Rubin prepared a memorandum seeking to evaluate the results of the Havana conference. He believed that the deletion of Article 12(2) as drafted in Geneva had been of “utmost importance.”⁷⁷⁹ That language had reserved too many rights for host countries with respect to investment. The right of nondiscriminatory treatment had been qualified by numerous exceptions. The requirement of “just”

⁷⁷⁴ *Ibid.*

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.*

⁷⁷⁷ “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba,” page 23, NARA, Record Group 43, ITO Files, Box 148, Folder marked “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba.”

⁷⁷⁸ *Ibid.*

⁷⁷⁹ Memorandum by Seymour J. Rubin dated January 23, 1948, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

compensation was to have been evaluated from the point of view of the payer, suggesting that poor countries owed a lesser standard of compensation than rich countries. Payment could have been made in local currency. The deletion of Article 12(2) even provided an argument that the interpretation of “just compensation” allowing payment in local currency was incorrect.⁷⁸⁰

With regard to lessons for the future, Rubin believed that any treaty must leave countries with “almost unlimited discretion” with respect to the right to establish investment because of policies that the United States and other countries had adopted that limited such right and that these countries were unlikely to abandon.⁷⁸¹ Further, the U.S. delegation had found that highly specific language with respect to expropriation, such as might be found in a bilateral treaty, was “impossible” to negotiate in a 60 nation, multilateral conference that was principally concerned with other matters.⁷⁸²

The new language adopted in Havana, although an improvement over the Geneva language, still would likely raise concerns. The U.S. delegation was especially troubled by references to taking ownership of property “on just terms.” The problem was partly psychological because even the U.S. Constitution recognized the sovereign’s power to expropriate and thus the U.S. delegation could hardly object to the charter’s recognition of such a power. Nevertheless, the footnote on local currency

⁷⁸⁰ *Ibid.*

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*

in the Geneva draft had raised sensitivity about the issue of expropriation and thus business groups would be particularly alert to the treatment of expropriation in the Havana charter, which seemed to emphasize the host state's power.⁷⁸³

At the same time, however, Rubin noted that the Havana charter did represent an improvement in the international investment regime insofar as it permitted issues relating to the security of investment to be submitted to the dispute resolution mechanism of the charter, including ultimately to the International Court of Justice, rather than merely to diplomatic representation, which in the past had been the only remedy for "unfair" treatment. For this reason, Article 12 provided American investors with an "improved status" with respect to the security of their investments.⁷⁸⁴ Further, the provision authorizing each member to call upon other members to negotiate bilateral treaties might well prove to be a "substantial help" to the United States in its efforts to negotiate FCN treaties. Rubin believed, on balance, that Article 12 was a "useful addition" to the charter and that it gave an "important additional measure of security" to foreign investment.⁷⁸⁵

Rubin thus regarded the availability of binding dispute resolution as the most important accomplishment of the ITO negotiation process with respect to investment. Rubin's memorandum also reflected the increasing use of the concept of "fairness" as a way of characterizing the appropriate climate for foreign investment. Interestingly,

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*

Rubin did not draw particular attention to the principle of reasonableness that had been introduced in London and that had survived Geneva and Havana, although that may have been because he was evaluating the Havana conference and the establishment of the reasonableness principle had occurred well before Havana.

In later discussions, Rubin would continue to refer to fairness and would occasionally advert to the reasonableness principle. For example, in a talk that he delivered in October 1948, Rubin contended that a capital exporting country “looks chiefly for guarantees of fair treatment” and then moments later noted that the “best guarantee of continued foreign investment . . . is a reasonable and justifiable measure of security for the foreign private investor.”⁷⁸⁶ In his October talk, Rubin saw fairness as the overarching concept in a favorable investment climate and linked this to norms of reasonableness and security.

In a speech that he delivered the following month, Rubin conceded that Article 12 was not “a ringing declaration of the rights of and security to be afforded to private foreign investors.”⁷⁸⁷ Much of Article 12 was phrased in terms of the powers of the capital importing country. Yet, Article 12 did have certain “compelling virtues.”⁷⁸⁸ The language on “just terms” was “not too far” from that of the Fifth Amendment to the U.S. Constitution.⁷⁸⁹ The charter recognized the importance of security to private

⁷⁸⁶ Seymour J. Rubin, “Private Foreign Investment – The ITO Charter and the Bogota Economic Agreement,” American Foreign Law Association, Proceedings No. 31, November 1948.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Ibid.*

investment. It contemplated further bilateral negotiations. The prohibition on “unjustifiable and unreasonable action” injurious to investment was “also a substantial guarantee of fair treatment.”⁷⁹⁰ Once again, Rubin treated “fairness” as a general term for the character of a favorable investment climate and suggested that fairness embraced the norm of reasonableness. Throughout his talk, he continued to refer to the treatment desired as “fair” treatment. He turned to the dispute resolution procedures of the charter and argued that the charter coupled “an agreement to give fair treatment” with an “agreed procedure” for failure to comply with that agreement.

The official report of the U.S. delegation concluded that the investment provision gave “the United States a basis for obtaining new commercial treaties and to safeguard investors against unfair treatment by complaining to ITO that benefits of the Charter are being nullified or impaired.”⁷⁹¹ Overall, the delegation claimed, the accomplishments at the Havana conference were “truly remarkable.”⁷⁹²

Other State Department officials similarly came to treat the concept of fairness as a reference to the overall investment climate desired. Writing about FCN treaties in 1951, Harry Hawkins would observe that “[f]oreign capital will not enter a country unless it has some assurance that it will receive fair treatment. . . .”⁷⁹³ He continued,

⁷⁹⁰ *Ibid.*

⁷⁹¹ “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba,” page 27, NARA, Record Group 43, ITO Files, Box 148, Folder marked “Official Report of the United States Delegation to the United Nations Conference on Trade and Employment, Havana, Cuba.”

⁷⁹² *Ibid.*, page 29.

“If the underdeveloped countries are desirous of developing their resources and raising their living standards with the help of foreign capital, they must be willing to give basic guarantees of fair treatment to an investor. . . .”⁷⁹⁴

The Aftermath of Havana

Despite the modifications to the Geneva language adopted in Havana, the business community remained hostile to the investment provisions of the ITO charter.⁷⁹⁵ In November 1949, at a meeting of the President’s Committee on Financing Foreign Trade, an advisory group that included representatives of companies such as Chase National Bank, Bank of America, Westinghouse, U.S. Steel, and John Deere, several members of the committee expressed the view that “ratification of the ITO Charter would render foreign investment impossible because of the investment provisions it contains.”⁷⁹⁶

Despite the fact that the NFTC, the NAM and the Chamber of Commerce had representatives on the U.S. delegation at Havana, all three organizations opposed the charter. The NFTC attacked the Havana charter as worse than no charter at all. It argued that Article 12 “not only affords no protection for foreign investments of the

⁷⁹³ Harry C. Hawkins, *Commercial Treaties & Agreements: Principles and Practice* (New York: Rinehart & Company, Inc. 1951), page 16.

⁷⁹⁴ *Ibid.*, page 29.

⁷⁹⁵ Susan Ariel Aaronson, *For the People, But Not by the People: A History of the International Trade Organization* (Unpublished Ph.D. dissertation, 1993), page 164.

⁷⁹⁶ Memorandum, “Meeting of the President’s Committee on Financing Held at Mr. Aldrich’s Office,” November 28, 1949, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

United States but it would leave them with less protection than they now enjoy.”⁷⁹⁷ The prohibition on unreasonable treatment was not specific enough,⁷⁹⁸ the provision calling for the negotiation of agreements ensuring fair and equitable treatment for investment imposed no real obligation,⁷⁹⁹ the requirement of “due regard” for avoiding discriminatory treatment offered too little reassurance,⁸⁰⁰ and the dispute resolution provision did not commit the host country to binding arbitration of disputes concerning an investment.⁸⁰¹ Further, the NFTC believed that Article 12 would undermine U.S. efforts to negotiate stronger bilateral treaties for investment protection.⁸⁰²

The NAM also opposed the charter, with the investment article providing one of the principal justifications for its opposition.⁸⁰³ Acceptance of the modest protections in the charter, according to the NAM, would impede efforts to strengthen the investment climate abroad and impede efforts by the United States to protect investors against injurious conduct that passed the test of reasonableness.⁸⁰⁴ That is,

⁷⁹⁷ *International Trade Organization*, Hearings before the Committee on Finance, United States Senate, 80th Cong. 1st Session, Parts 1 and 2, (Washington: Government Printing Office, 1947), page 200.

⁷⁹⁸ Robert F. Loree, *Position of the National Foreign Trade Council with respect to the Havana Charter for an International Trade Organization* (New York: National Foreign Trade Council, 1950), page 53.

⁷⁹⁹ *Ibid.*, pages 53-54.

⁸⁰⁰ *Ibid.*, page 59.

⁸⁰¹ *Ibid.*, page 56.

⁸⁰² *Ibid.*, page 60.

⁸⁰³ William Diebold, Jr., *The End of the I.T.O.* (Princeton: Princeton University Press, 1952), page 19.

⁸⁰⁴ *Ibid.*, page 18.

while the NFTC believed that the norm of reasonableness was too vague, the NAM went further and argued that the norm of reasonableness was intrinsically insufficient.

Although it conceded that the Havana charter was an improvement over the Geneva draft, the ICC argued that the charter did not provide foreign investors with “the kind of assurance they need in order to venture into foreign countries without fear of arbitrary governmental action.”⁸⁰⁵ It failed to require just compensation for expropriation or to prohibit discrimination against foreign investment.

Critics even argued that the dispute resolution procedures, which Rubin saw as the single most important accomplishment with respect to investment in the charter, disadvantaged U.S. investors because, without them, the United States could “throw [its] full weight against a country that expropriates.”⁸⁰⁶ The State Department noted in response that, in fact, it had tried to protect U.S. investors through diplomatic means “for a long time.”⁸⁰⁷ Despite U.S. efforts, however, “a long history of cases” existed where U.S. investors had received no compensation or inadequate compensation for expropriation.⁸⁰⁸ In short, the State Department believed that investors failed to understand that the charter provided them with more protection than could the Department through the exercise of diplomacy.

⁸⁰⁵ International Chamber of Commerce, “Basic Criticisms of the Havana Charter,” NARA, Record Group 43, ITO Files, Box 147, Folder marked “Havana Conference – Basic Criticisms of the Havana Charter.”

⁸⁰⁶ Department of State Briefing Memorandum dated May 1, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.*

More generally, business groups saw the ITO charter as a retreat from the original U.S. proposal and worried that the processes to be established by the charter would result in further retreats.⁸⁰⁹ This was particularly the case because each member would have a single vote within the ITO and thus the United States, it was argued, would be outvoted by developing countries or those that favored objectionable policies. In the view of the investor community, concessions made by the United States would bind it, but other countries would invoke various exceptions or escape clauses to avoid their own obligations so that the ITO charter would represent a one-sided deal.

Woodbury Willoughby scheduled a meeting with the NFTC in November 1948 as part of an effort to build support for the charter. An internal briefing memorandum written to assist him in his preparation for the meeting stressed two principal advantages of the ITO charter. First, the charter for the first time had subjected host state treatment of foreign investment to the “rule of reason.” The memorandum identified three places where the rule of reason appeared: the provision in Article 12(1)(c)(iii) to the effect that requirements with respect to ownership be on “just terms”; the provision in Article 12(1)(c)(iv) that other requirements be reasonable; and the prohibition in Article 11(1)(b) on unreasonable or unjustified conduct. The memorandum further noted that these provisions created a basis on which to obtain payment of just compensation for expropriation. As the memorandum indicates, the U.S. delegation understood that the language of Articles 11 and 12 introduced into the

⁸⁰⁹ Diebold, *op. cit.*,, page 19.

ITO charter a requirement of reasonableness and they regard that norm as part of the requirement of “just” treatment.

Second, the charter had introduced binding, third-party dispute resolution.⁸¹⁰ The memorandum rejected the claim by opponents of the charter that the charter would preclude diplomatic protection with respect to a claim. Articles 41 and 93(1), for example, provided for consultations between the parties. The charter facilitated negotiations by providing an agreed set of rights and obligations to which appeal could be made during diplomatic representations. In the event that consultations were unsuccessful, the dispute could be submitted to the dispute resolution provisions of the ITO, where again the charter included rights and obligations that would form the basis for the complaint and where the United States could argue its case “without incurring, at least to the same degree, the charge of using its political and economic power to gain the decision it wants irrespective of the merits of the case.”⁸¹¹ The memorandum acknowledged that the ITO procedures could be slow, but that would depend upon how they were implemented in the future. The United States could use its influence to encourage expeditious procedures. In any event, the procedures should be shaped in order to ensure both speed and justice

The State Department believed that Articles 11 and 12 “require fair treatment for foreign investments and facilities and are in conformity with the practice and the

⁸¹⁰ Memorandum dated November 8, 1948, from Weiss to Willoughby, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III.”

⁸¹¹ *Ibid.*

constitutional requirements of the U.S.”⁸¹² The United States had had begun to see the concept of fair treatment as a shorthand for the entire corpus of investment related obligations under the charter. It also recognized the consistency of these obligations with U.S. constitutional requirements. The Department noted the parallel between “just terms” and the Fifth Amendment’s requirement of “just compensation.” Article 99’s exception for security measures eliminated any conflict between U.S. measures under the Trading with the Enemy Act and ITO charter obligations.

The State Department understood that the investment provisions of Article 12 had placed the entire charter in jeopardy and sought to deemphasize them. When Secretary of State Dean Acheson testified on behalf of the ITO charter before the House Foreign Affairs Committee in 1950, his prepared statement, which was some 400 lines long, devoted only about 5 lines to the provisions on investment protection.⁸¹³ Public relations materials published by the State Department to build support for approval of the ITO generally omitted any reference to the promotion or protection of U.S. foreign investment.⁸¹⁴

⁸¹² Department of State Briefing Memorandum dated May 1, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III”.

⁸¹³ Address by the Honorable Dean Acheson, Secretary of State, Before the House Committee on Foreign Affairs, In Support of United States Acceptance of Membership in the International Trade Organization, NARA, Record Group 43, ITO Files, Box 55, Folder marked “International Trade Organization (5).”

⁸¹⁴ Examples include *World Trade and the United States*, Department of State Publication 3492, Commercial Policy Series 119 (Washington: Government Printing Office, 1949) and *The International Trade Organization: Key to Expanding World Trade and Employment*, Department of State Publication 3882, Commercial Policy Series 130 (Washington: Government Printing Office, 1950).

The investment provisions were not the only cause for criticism by business groups. Some business interests opposed the charter because they believed that, in light of its many exceptions and escape clauses, it would contribute too little to the liberalization of trade.⁸¹⁵ For example, they feared that exceptions for balance of payments difficulties would tend to perpetuate exchange controls and import quotas.⁸¹⁶ They believed that the United States would make tariff concessions and receive too little in return.⁸¹⁷ Other business interests opposed the charter because it could result in the reduction or elimination of U.S. trade restrictions that benefited them.⁸¹⁸ In short, free traders and protectionists alike joined in opposition to the charter, the former because the charter was said to be too weak and the latter because it was said to be too strong.

The ITO charter did enjoy support from some interest groups. Labor and farm groups generally supported the charter, as did many professional economists and civic organizations. Because of various compromises in the charter, however, this support often lacked enthusiasm.⁸¹⁹

Opposition to the charter was sometimes ideological. Some businesses objected in principle to the idea, reflected in the charter, that governments are responsible for maintaining full employment, an idea that they rightly associated with

⁸¹⁵ Diebold, *op. cit.*, pages 14-16; Zeiler, *op. cit.*, pages 148-149.

⁸¹⁶ Diebold, *op. cit.*, page 16.

⁸¹⁷ Zeiler, *op. cit.* page 148.

⁸¹⁸ Diebold, *op. cit.*, page 23.

⁸¹⁹ *Ibid.*, page 10.

the New Deal.⁸²⁰ The charter, in their view, was another step toward statism and socialism. Some opposed the charter because they believed that it infringed upon U.S. sovereignty or required an unconstitutional delegation of federal power to an international body, a position supported to some extent by the American Bar Association.⁸²¹ Others criticized it on separation of powers grounds, believing that it institutionalized executive control over trade.⁸²²

Some even raised the question whether the ITO charter coincided with communist doctrine, insofar as it called for future agreements giving “due regard” to the needs of each member.⁸²³ As early as 1947, opponents of the ITO charter had tried to link the ITO with communist subversion, a tactic that dissuaded some from publicly supporting the charter.⁸²⁴ The allegations were ironic, given that the Soviet Union refused to attend the Havana conference and opposed the ITO charter. Charter supporters attempted to use Soviet opposition to their advantage, arguing that by promoting trade the charter would strengthen the free world in its struggle against communism.⁸²⁵ In language reflecting the symbolic warfare between proponents and opponents and the need to identify the charter with traditional American values, the

⁸²⁰ *Ibid.*, page 17; Zeiler, *op. cit.*, page 150.

⁸²¹ Diebold, *op. cit.*, page 23; Zeiler, *op. cit.*, page 148.

⁸²² *Ibid.*, page 148.

⁸²³ Department of State Briefing Memorandum dated May 1, 1949, NARA, Record Group 43, ITO Files, Box 14, Folder marked “Chapter III”.

⁸²⁴ Aaronson, *op. cit.*, page 140.

⁸²⁵ Zeiler, *op. cit.*, page 158.

State Department argued that the charter called for “a ‘Yankee swap’ (a far cry from Communist doctrine).”⁸²⁶

In any event, the Soviet Union’s refusal to participate in the ITO negotiations undermined the argument that trade would promote peace.⁸²⁷ By 1948, Americans regarded the Soviet Union as the chief threat to peace and the Soviet Union’s abstention from the ITO negotiations meant that the ITO likely would not be a means for linking the two potential belligerents with bonds of mutually beneficial trade. If anything, the ITO merely provided other countries with a platform from which to denounce the United States.

In addition to bolstering ideological objections to the ITO charter, the Cold War changed U.S. foreign policy priorities in ways adverse to the charter. The U.S. delegation to the Havana conference returned just as Congress was approving the European Recovery Plan, often described as the Marshall Plan.⁸²⁸ Secretary Marshall and Under Secretary Robert Lovett did not wish to devote attention to long term initiatives like the ITO charter that might dilute public support for immediate financial assistance to Europe.⁸²⁹ The Marshall Plan also diminished business support for the charter because many business groups had begun to believe that the stimulus to

⁸²⁶ *Ibid.*

⁸²⁷ John M. Rothgeb, Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington: Congressional Quarterly Press, 2001), page 77.

⁸²⁸ The debate regarding the Marshall Plan is described in Charles L. Mee, Jr., *The Marshall Plan: The Launching of Pax Americana* (New York: Simon and Schuster, 1984), pages 225-245 and Diane B. Kunz, *Butter and Guns: America’s Cold War Economic Diplomacy* (New York: The Free Press 1997), pages 29-56.

⁸²⁹ Aaronson, *op. cit.*, page 156.

European reconstruction promised by that plan had eliminated the need for the ITO.⁸³⁰ Following approval of the Marshall Plan, Congress turned its attention to other Cold War related measures, such as approval of the North Atlantic Treaty Organization and the Mutual Defense Assistance Program.⁸³¹

Congressional inattention to the charter also stemmed from the State Department's inept Congressional relations. Prior to the Havana conference, the State Department had declined to include Congressional representatives in its delegation to the ITO conferences, thereby missing an opportunity to build support for the charter within Congress.⁸³² When two senators and two congressmen were invited to Havana, the two senators declined, an indication of Congressional indifference.⁸³³

Critical personnel changes undermined support for the charter within the executive branch. Will Clayton, the head of the U.S. delegation and a highly visible and charismatic figure, had resigned as undersecretary of state in October 1947, a month before the Havana conference began, in order to spend more time with his ailing wife, although he had agreed to participate in the Havana conference.⁸³⁴ Clair Wilcox, the deputy head of the U.S. delegation, resigned after the conference from

⁸³⁰ Telegram dated July 25, 1947, from the Secretary of State to the U.S. delegation in Geneva, NARA, Record Group 43, ITO Files, Box 134, Folder marked "ITO Geneva Conference (chron) from July 1, 1947"; Zeiler, *op. cit.*, page 153.

⁸³¹ Diebold, *op. cit.*, page 6.

⁸³² Aaronson, *op. cit.*, page 119.

⁸³³ *Ibid.*, page 158; Rothgeb, *op. cit.*, page 75.

⁸³⁴ William L. Garwood, Jr., *Will Clayton: Economic Statesman* (Washington: The American Studies Center, 1979), page 74.

sheer exhaustion⁸³⁵ and returned to the economics department at Swarthmore, where he immediately started work on a book explaining the charter and urging its ratification, a book that he would publish in 1949.⁸³⁶ With Clayton and Wilcox both gone, the ITO charter had lost its most influential and knowledgeable advocates. At the same time, Dean Acheson, who would become Truman's secretary of state in January 1949, unlike Cordell Hull and Will Clayton, was not a strong proponent of free trade. In his mind, foreign economic policy should serve national security and thus the ITO charter simply was of less importance than NATO and foreign aid for defense.⁸³⁷ Without Clayton or Wilcox, Acheson lacked an influential advisor to keep the ITO charter on his agenda.

To the extent that trade liberalization remained an administration priority, the ITO charter was eclipsed by other instruments of trade policy. In the period immediately after the end of the Havana conference, State Department officials wrestled with whether to give priority to approval of the ITO charter or renewal of Cordell Hull's Reciprocal Trade Agreements Act, finally deciding to seek renewal of the trade act and to defer consideration of the ITO charter until the next year.

Even more devastating was the parallel negotiation of the General Agreement on Tariffs and Trade (GATT)⁸³⁸ during the Geneva conference. The participants in

⁸³⁵ John M. Leddy Oral History, Harry S. Truman Library.

⁸³⁶ Wilcox, *op.cit.*

⁸³⁷ Zeiler, *op. cit.*, page 154.

⁸³⁸ General Agreement on Tariffs and Trade, signed October 30, 1947, TIAS No. 1700.

the Geneva conference, as of 1947, were responsible for 70 percent of world trade.⁸³⁹ The GATT, which entered into force on January 1, 1948, during the Havana conference, covered about half of all world trade.⁸⁴⁰ Thus, increasingly, it appeared that much of the desired trade liberalization could be achieved through the GATT, which weakened the argument for the necessity of an ITO. Indeed, by July 1948, the State Department had decided that those countries that participated in the Havana conference but that were not parties to the GATT should be invited to accede to the GATT and that a second round of tariff negotiations should be scheduled “at an early date with as large a number of countries as possible.”⁸⁴¹ In April 1949, just as Truman was transmitting the ITO charter to Congress, the GATT parties held a second round of negotiations in Annecy, a round in which 34 nations participated and that continued until August.⁸⁴² The resulting agreements covered 80 percent of world trade.⁸⁴³

Finally, ratification of the charter was subject to election year politics. Delaying submission of the charter to Congress until 1949 would remove it as an issue

⁸³⁹ *Draft Charter for the International Trade Organization of the United Nations*, Department of State Publication 2927, Commercial Policy Series 106 (Washington: Government Printing Office, 1947), page 6.

⁸⁴⁰ *World Trade and the United States*, Department of State Publication 3492, Commercial Policy Series 119 (Washington: Government Printing Office, 1949).

⁸⁴¹ *Current Economic Developments*, July 6, 1948, page 5, NARA, Record Group 59, Department of State Lot Files.

⁸⁴² Zeiler, *op. cit.*, page 170.

⁸⁴³ *Ibid.*, page 176.

in Truman's reelection campaign and, if the Democrats regained control of Congress, allow its consideration by a more sympathetic legislative body.⁸⁴⁴

Truman at last submitted the ITO charter to Congress on April, 18, 1949.⁸⁴⁵ Congress delayed action, however, while it debated another renewal of the Reciprocal Trade Agreements Act, which had been renewed for only one year in 1948. The House had approved the renewal in February, but the Senate did not do so until September.⁸⁴⁶ Truman continued to give priority to renewal of the Marshall Plan and approval of military assistance.⁸⁴⁷

The House Foreign Affairs Committee did not hold hearings on the ITO charter until April 19, 1950, two years after the Havana conference ended. The committee chair, Democrat John Kee of West Virginia, believed that the charter could not pass the House.⁸⁴⁸ Thus, the committee never issued a report and the charter was never brought to the House for debate.⁸⁴⁹ Rather, members of the President's own party kept the charter in the committee. The Senate never even held hearings, in part because Senator Tom Connally, the chairman of the Senate Foreign Relations

⁸⁴⁴ Zeiler, *op. cit.*, page 153.

⁸⁴⁵ Aaronson, *op. cit.*, page 186; Zeiler, *op. cit.*, page 156.

⁸⁴⁶ Aaronson, *op. cit.*, page 205.

⁸⁴⁷ Zeiler, *op. cit.*, page 157.

⁸⁴⁸ *Ibid.*, page 160.

⁸⁴⁹ Diebold, *op. cit.*, page 6.

Committee, believed that Truman would be “embarrassed” by the “indifference” of members of his party toward the ITO.⁸⁵⁰

Senator Joseph McCarthy’s allegations, beginning in February 1950, that communists had infiltrated the State Department created additional problems for two reasons.⁸⁵¹ First, it increased the political cost of being associated with any program linked to socialism or even statism.⁸⁵² Second, McCarthy’s theatrics distracted the Senate. For example, Senator Connally, in noting the failure of his committee to hold hearings on the charter, explained that “five of our members are on the sub-committee handling the charges made by Senator McCarthy.”⁸⁵³

The outbreak of the Korean War in June 1950 struck the death blow. First, it further focused Congressional attention on defense related matters.⁸⁵⁴ Second, it only heightened opposition to anything associated with socialism or statism.⁸⁵⁵

During the November 1950 midterm elections, Republicans gained 56 seats in the House and 13 seats in the Senate, diminishing the support that Truman could expect for his legislative agenda in 1951.⁸⁵⁶ Accordingly, at a Cabinet meeting on November 21, as Chinese forces were driving into South Korea, Secretary of State

⁸⁵⁰ Zeiler, *op. cit.*, page 160.

⁸⁵¹ McCarthy’s accusations are described in David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: The Free Press, 1983).

⁸⁵² Zeiler, *op. cit.*, page 159.

⁸⁵³ Aaronson, *op. cit.*, page 223.

⁸⁵⁴ Zeiler, *op. cit.*, page 161.

⁸⁵⁵ *Ibid.*, page 159.

⁸⁵⁶ Aaronson, *op. cit.*, page 123.

Dean Acheson recommended that the administration abandon the ITO proposal⁸⁵⁷ and pursue its trade agenda through the GATT,⁸⁵⁸ which at that moment was holding its third round of trade negotiations in Torquay, England.

In December 1950, the State Department issued a press release announcing that Truman had decided that the proposed ITO charter would not be resubmitted to Congress during the current session.⁸⁵⁹ The following year, Secretary Acheson finally acknowledged publicly that the charter would never be resubmitted to Congress.⁸⁶⁰ That same year, several other governments also withdrew the charter from their own parliaments, explaining that the ITO would serve no purpose if the United States refused to join.⁸⁶¹ The decade long effort to create the ITO had ended in failure.

Meanwhile, so controversial had the ITO charter become that the Department decided in February 1951 to remove references to the ITO charter from those FCN treaties still under negotiation. The Department believed that eliminating references to the charter would eliminate the possibility that Senate advice and consent to the ratification of the FCN treaties would become enmeshed in the controversy regarding the ITO charter.⁸⁶²

⁸⁵⁷ *Ibid.*, page 224.

⁸⁵⁸ Zeiler, *op. cit.*, page 161.

⁸⁵⁹ *Department of State Bulletin*, Vol. XXIII, No. 598, December 18, 1950, page 977.

⁸⁶⁰ Diebold, *op. cit.*, page 24.

⁸⁶¹ *Ibid.*, page 25.

⁸⁶² Airgram dated February 8, 1951, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/1-251.

The GATT originally was limited to a term of three years, after which, the parties assumed, it would be displaced by the ITO charter.⁸⁶³ When the GATT parties realized that ITO charter would not come into force as anticipated, they extended the GATT indefinitely.⁸⁶⁴

Although the effort to create an international trade organization ended in failure, it had major consequences for the evolution of U.S. foreign investment policy. First, the hearings on the charter provided a forum in which the U.S. business community could pressure the U.S. government to seek treaty provisions to strengthen the protection of international investment. Second, that pressure prompted the U.S. government to consider at length the kinds of provisions that should appear in an investment treaty. Third, the ITO negotiations demonstrated the impossibility of negotiating investment related provisions acceptable to the U.S. business community in a multilateral forum and thus the need to incorporate any such provisions in bilateral treaties, whether FCN treaties or new bilateral treaties dedicated solely to investment protection. Fourth, the negotiations led to efforts, described in Chapter 5, to incorporate at least some of the investment related provisions developed for the ITO charter into the U.S. FCN treaties, thus permanently transforming those treaties. Fifth, the negotiations introduced a new norm of reasonableness into the regime of international investment law and, in particular, into the U.S. FCN treaties. Sixth, it led to the formulation of a general prohibition on discriminatory treatment, apart from

⁸⁶³ Diebold, *op. cit.*, page 28.

⁸⁶⁴ *Ibid.*

more specific requirements of national and MFN treatment. Seventh, although the concept of fair and equitable treatment had appeared in U.S. investment policy statements previously, the ITO negotiations incorporated the concept for the first time in a proposed treaty as a descriptor of the general investment climate that the United States sought to create.

Chapter Five

The FCN Treaties Become Investment Treaties

As his 1949 inauguration approached, President Harry Truman, an avid reader of U.S. history, wanted to deliver a memorable speech, like Washington's farewell, that would enhance his stature.⁸⁶⁵ The problem was that his speech lacked a memorable idea or theme.

The solution to Truman's problem would come from a midlevel State Department official named Benjamin H. Hardy. Hardy had served in Latin America as a naval officer during the war, when he had concluded that U.S. foreign policy should place greater emphasis on improving living conditions around the world rather than cultivating the support of elites.⁸⁶⁶ After the war, he worked as a speech writer in the State Department's Office of Public Affairs. In August 1948, he told the office director, Francis Russell, that the United States should develop a program of technical assistance for developing countries, an idea that he formalized in a memorandum in November. A native of Georgia, where he had seen how new technology could transform an economy, Hardy saw his proposal as an application of the New Deal to less developed countries.⁸⁶⁷

⁸⁶⁵ Thomas G. Paterson, "Foreign Aid Under Wraps: the Point Four Program," *The Wisconsin Magazine of History* 56 (1972), 119-121.

⁸⁶⁶ Ken Hechler, *Working with Truman: A Personal Memoir of the White House Years* (New York: G. P. Putnam's Sons, 1982), pages 115-116.

⁸⁶⁷ Clark Clifford, *Counsel to the President* (New York: Random House, 1991), page 149.

The idea of U.S. technical assistance to developing countries was not entirely new. In 1940, Nelson Rockefeller had expressed a concern to Franklin Roosevelt that the Nazis were gaining influence in Latin America, after which Roosevelt appointed Rockefeller to a new position as coordinator of inter-American affairs. The Rockefeller Foundation already was involved in programs of technical assistance in Latin America⁸⁶⁸ and, in 1942, the Roosevelt administration established the Institute of Inter-American Affairs, headed by Rockefeller, to provide government funded assistance.

Russell forwarded Hardy's suggestion to other officials in the Department, but these officials believed that it would never be funded. With Secretary of State George Marshall hospitalized for kidney surgery (and on the verge of resigning), Acting Secretary of State Robert Lovett requested that Russell assist him in developing ideas for Truman's inaugural address. Russell suggested to Hardy that he prepare a draft incorporating his technical assistance proposal. Russell forwarded Hardy's draft to Lovett, who rejected it with a notation that read, "Francis, I am not sure this is a good idea, but I am quite sure that it's not appropriate for an inaugural address."⁸⁶⁹

Undeterred, Hardy boldly telephoned Truman's speechwriter, George Elsey, whom he knew only from some telephone conversations, to request a meeting.⁸⁷⁰ Believing that Hardy was calling on behalf of the State Department, Elsey agreed to

⁸⁶⁸ Sergei Y. Shenin, *The United States and the Third World: The Origins of Postwar Relations and the Point Four Program* (Huntington: Nova Publishers, 1999), page 162.

⁸⁶⁹ Ken Hechler, *op. cit.*, page 116.

⁸⁷⁰ Clifford, *op. cit.*, page 249.

the meeting. After Hardy explained his proposal, Elsey realized “instantly” that Hardy’s proposal was the idea for which he had been searching.⁸⁷¹ Clark Clifford, Truman’s special assistant, later explained the reason that Hardy’s proposal found its way into Truman’s inaugural address: “While we had a speech in search of an idea, Hardy had an idea in search of a speech.”⁸⁷²

To avoid any retribution against Hardy for communicating with the White House outside of the normal channels, Elsey asked the State Department to include a technical assistance program in its recommendations for the inaugural address. No reply came from the department. After several days, Hardy brought another draft to Elsey, saying that Lovett had refused to send it to the White House. Lovett believed that the proposal had “insufficient preparation and analysis.”⁸⁷³

When Truman read the first draft of his address, which included Hardy’s proposal, he saw the proposal as a New Deal program. More particularly, he analogized the proposal to the Tennessee Valley Authority, which had brought prosperity to the southeast, and to the educational programs of the Department of Agriculture.⁸⁷⁴ Truman also was aware, as a student of history, that economic development in the United States had been financed during the nineteenth century by

⁸⁷¹ Paterson, *op. cit.*, page 121.

⁸⁷² *Ibid.*, page 250.

⁸⁷³ Hechler, *op. cit.*, page 117.

⁸⁷⁴ *Ibid.* page 118. Jason Scott Smith argues that Point Four was also a legacy of the public works programs of the New Deal. Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933-1956* (New York: Cambridge University Press, 2006), pages 248-249.

foreign investment.⁸⁷⁵ Truman later explained, “It seemed to me that if we could encourage stabilized governments in underdeveloped countries in Africa, South America, and Asia, we could encourage the use for the development of those areas some of the capital which had accumulated in the United States.”⁸⁷⁶ Truman recognized, however, that promoting international capital movements would require, as State Department policymakers repeatedly had recognized, both extending legal protection to foreign investment and ensuring that foreign investment contributed to economic development. As he wrote, “If the investment of capital from the United States could be protected and not confiscated, and if we could persuade the capitalists that they were not working in foreign countries to exploit them but to develop them, it would be to the mutual benefit of everybody concerned.”⁸⁷⁷

The benefit to the United States, in Truman’s mind, was that prosperity would enable developing countries to purchase American exports.⁸⁷⁸ This, of course, was the very benefit of foreign investment that U.S. policymakers had been citing at least since the early 1940s, when they were planning the postwar economic order. At the same time, Truman believed, such a program would demonstrate the tangible benefits of the American way of life and thereby thwart the expansion of communism,⁸⁷⁹ particularly

⁸⁷⁵ Harry S. Truman, *Memoirs by Harry S. Truman, Volume II, Years of Trial and Hope* (Garden City: Doubleday and Company, 1956), page 231.

⁸⁷⁶ *Ibid.*, page 231.

⁸⁷⁷ *Ibid.*, page 231.

⁸⁷⁸ *Ibid.*, pages 232-233.

⁸⁷⁹ *Ibid.*

in developing countries. The Cold War thus had added a further justification for promoting outward U.S. investment. The notion, prevalent at the beginning of the decade, that foreign investment would foster prosperity and peace had evolved, by the end of the decade, into the notion that foreign investment would foster prosperity and victory in the Cold War.

Thus, as the process of drafting Truman's address progressed, Hardy's proposal of technical assistance became coupled with the idea of promoting private investment. The White House sent the final draft of the speech to the State Department two days before the inauguration and, again, Lovett objected to the Hardy proposal. Dean Acheson, who would serve as secretary of state in Truman's second administration, liked the speech, however, and the proposal remained despite Lovett's objections.⁸⁸⁰

Truman Proposes the Point Four Program

January 20, 1949, was a cold, but almost cloudless, day. A little after noon, under a brilliant sun, Truman ascended "the most monumental and costly inaugural stand ever seen up to that time,"⁸⁸¹ constructed with funds generously appropriated by the Republican Eightieth Congress with the expectation that the man standing atop the platform would be named Thomas E. Dewey, not Harry S. Truman. At 1:29, having taken the oath of office and kissed the Bible, Truman turned to the crowd of more than

⁸⁸⁰ Clifford, *op. cit.*, pages 250-251.

⁸⁸¹ Robert J. Donovan, *Tumultuous Years: The Presidency of Harry S. Truman, 1949-1953* (New York: W. W. Norton & Company, 1982), pages 20-21.

a million people and delivered the first inaugural address ever televised, an address devoted entirely to the foreign policy of the United States.

He explained that his foreign policy would “emphasize four major courses of action.” The first was to support the United Nations, the second was to continue the program for “world economic recovery,” and the third was to “strengthen freedom-loving nations against the dangers of aggression.” American foreign policy, in other words, would continue to be the promotion of economic prosperity and victory in the Cold War. None of that was new and that part of his address would soon be forgotten.

Truman next turned to the innovative idea for which his inaugural long would be remembered: a new way of achieving prosperity and victory in the Cold War. He announced his adoption of Ben Hardy’s proposal, a proposal that soon was known universally as “Point Four.” In Truman’s words, “Fourth, we must embark on a bold new program for making the benefits of our scientific advancement and industrial progress available for the improvement and growth of underdeveloped areas.”⁸⁸²

Truman began his discussion of Point Four with an explanation of the circumstances that necessitated the program: “More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas. . . .”⁸⁸³

⁸⁸² Harry S. Truman, “The Faith of the American People: The Inaugural Address,” January 20, 1949, reprinted in Department of State, *A New Era in World Affairs: Selected Speeches and Statements of President Truman, January 20 to August 29, 1949*, Department of State Publication 3653 (Washington: Government Printing Office, 1949), page 6.

⁸⁸³ *Ibid.*

Next, he explained the reason that the burden of addressing world poverty fell to the United States: “The United States is pre-eminent among nations in the development of industrial and scientific techniques. The material resources which we can afford to use for the assistance of other peoples are limited. But our imponderable resources in technical knowledge are constantly growing and are inexhaustible.”⁸⁸⁴

Truman then restated this proposal, but this time he added a second component. Technical assistance must be accompanied by increased private investment: “I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing development. 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.”⁸⁸⁵

The State Department long had acknowledged in its foreign investment policy statements that foreign investment did not always serve the interests of capital importing countries, a fact that Truman understood as well.⁸⁸⁶ He was aware that much foreign investment in developing countries was a product of colonialism and he envisioned a form of development that would yield self-sufficiency, not a new kind of

⁸⁸⁴ *Ibid.*, page 7.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ Truman, *op. cit.*, page 232.

foreign domination.⁸⁸⁷ Thus, he explained, the United States must promote the interests of the host countries as well as those of the foreign investors: “Such new economic developments must be devised and controlled to benefit the peoples of the areas in which they are established. Guarantees to the investors must be balanced by guarantees in the interest of the people whose resources and whose labor go into these developments. The old imperialism – exploitation for foreign profit – has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair-dealing.”⁸⁸⁸

Truman had announced his “Fair Deal” legislative proposals in his annual State of the Union address, delivered to Congress only fifteen days before. Through his reference to “development based on the concepts of democratic fair-dealing,” Truman explicitly linked the principles of his foreign policy with those underlying his domestic policy.

Perhaps anticipating Republican objections to an extension of the Fair Deal abroad, Truman emphasized that his Point Four proposal served the economic interests of the United States as well as those of the developing countries: “All countries, including our own, will greatly benefit from a constructive program for the better use of the world's human and natural resources. Experience shows that our commerce with other countries expands as they progress industrially and economically.”⁸⁸⁹

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*, pages 7-8.

⁸⁸⁹ *Ibid.*, page 8.

Truman hoped as well to sound an idealistic note, to link Point Four to aspirations greater than merely the economic self-interests of the United States: “Only by helping the least fortunate of its members to help themselves can the human family achieve the decent, satisfying life that is the right of all people. Democracy alone can supply the vitalizing force to stir the peoples of the world into triumphant action, not only against their human oppressors, but also against their ancient enemies—hunger, misery, and despair.”⁸⁹⁰

Truman’s announcement of the Point Four program was received with “immense and sustained” applause.⁸⁹¹ The *Washington Post* reported on the speech under the headline “Truman Proposes ‘Fair Deal’ Plan for the World.”⁸⁹²

Clark Clifford later explained that the proposal for assistance to developing countries had been included as the final of four points precisely so that it would provide a climax following the recitation of familiar policies. “You go through the dog acts and acrobats on up to the headline, and that’s the last act of the evening. That’s why it was made Point 4.”⁸⁹³

Point Four represented a significant departure in U.S. foreign economic policy. It was the first substantial U.S. bilateral program directed at economic development in

⁸⁹⁰ *Ibid.*

⁸⁹¹ David McCullough, *Truman* (New York: Simon & Schuster 1992), page 731.

⁸⁹² *The Washington Post*, January 21, 1949, page 1.

⁸⁹³ Clark Clifford Oral History, Harry S. Truman Library; Thomas G. Paterson, *Meeting the Communist Threat: Truman to Reagan* (New York: Oxford University Press, 1988), page 147.

other countries.⁸⁹⁴ The United States had provided aid to Europe under the Marshall Plan for purposes of reconstruction, that is, for rebuilding economies devastated by the war. Point Four, however, was aimed not at European countries on the front lines of the Cold War, but at developing countries many of which were newly freed from colonialism. Walt W. Rostow has argued that Truman's inaugural address "constituted a turning point in Western policy."⁸⁹⁵

Secretary of State Acheson claimed that Point Four was more than just another instrument of the Cold War policy of containment, explaining that "the program has a much more enduring and fundamental purpose than [containment], and we should be carrying it forward even if there were no Soviet threat."⁸⁹⁶ Truman too had linked Point Four to goals beyond winning the Cold War. He sought through technical assistance and private investment to bring economic development to the entire world. It would project the New Deal onto the international plane and contribute to higher standards of living worldwide.

Soviet commentators took a different view. They regarded Point Four as a means of expanding capitalist penetration of developing countries, focusing less on the technical assistance aspects than on its stimulation of private investment, which they regarded as a form of neocolonialism.⁸⁹⁷

⁸⁹⁴ W. W. Rostow, *Theories of Economic Growth from David Hume to the Present* (New York: Oxford University Press, 1990), page 376.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ Department of State, *What is Point Four? Address by the Secretary of State*, Department of State Publication 4487 (Washington: Government Printing Office, 1952), page 6.

Truman's assertion that Point Four would not constitute a new form of colonial domination apparently represented a sincere belief. The day after his inauguration, Truman told the Cabinet that the work of Point Four would be done principally through private enterprise. He explained, however, that "[t]he private concerns would be required to give assurances that they would not exploit the foreign country into which they went, but would operate to the benefit of that country."⁸⁹⁸ The State Department's Foreign Investment Policy Committee, as shown in Chapter One, had been working for years on a policy that embraced precisely that idea.

Because the Point Four program had originated as the inspiration of a midlevel speech writer and did not enjoy the support of the State Department bureaucracy, the Department prior to Truman's inauguration had not developed any plans for implementing the Point Four proposal. After the address, Acheson insisted that the State Department have responsibility for the administration of the program,⁸⁹⁹ but then largely ignored it. Willard Thorp, who served as the assistant secretary of state for economic affairs following Will Clayton's elevation to undersecretary, recalled that "nobody upstairs paid much attention" to Point Four.⁹⁰⁰

⁸⁹⁷ Shenin, *op. cit.*, page 172.

⁸⁹⁸ Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945-1960* (New York: Columbia University Press, 1985), page 206.

⁸⁹⁹ Clifford, *op. cit.*, page 252.

⁹⁰⁰ Willard Thorp Oral History, Harry S. Truman Library.

Creating a Point Four Program

Developing a policy to implement Point Four would fall to midlevel officials within the federal government, who searched desperately for programs that would add content to Truman's new policy. In February, the State Department convened an interagency group called the Advisory Committee on Technical Assistance (ACTA) to develop a more specific proposal to implement Point Four. By March, ACTA had prepared a document entitled "Objectives and Nature of the Point IV Program,"⁹⁰¹ which the ECEFP adopted on March 1.⁹⁰² The President approved the policy on April 21.⁹⁰³

The ACTA policy on Point Four recapitulated the goals of U.S. foreign economic policy, particularly foreign investment policy. The first goal was "contributing to domestic economic stability and productivity."⁹⁰⁴ The document noted that exports were necessary to prevent a contraction in the U.S. economy, but that the United States was not importing enough to allow other countries to pay for U.S. exports. Outward capital investment would provide other countries with the dollars that they needed to pay for U.S. exports. More generally, outward investment would "achiev[e] a better balance in the world economy" by increasing productivity

⁹⁰¹ Department of State, *Foreign Relations of the United States, 1949*, Vol 1 (Washington: Government Printing Office, 1976), page 763.

⁹⁰² Memorandum headed, "Objectives and Nature of the Point IV Program," approved March 1, 1949, NARA, Record Group 59, Department of State File No. 800.50T.A./5-349.

⁹⁰³ Department of State Circular Telegram, "Planning the 'Point Four' Program," NARA, Record Group 59, Department of State File No. 800.50T.A./5-349.

⁹⁰⁴ Memorandum headed, "Objectives and Nature of the Point IV Program," approved March 1, 1949, NARA, Record Group 59, Department of State File No. 800.50T.A./5-349.

everywhere.⁹⁰⁵ Increased productivity in “underdeveloped areas” would benefit those areas as well as the rest of the world.⁹⁰⁶ It would enable them to buy manufactured goods from Europe and the United States, thereby increasing employment in those areas, while also giving those areas access to lower cost goods.

Point Four would also contribute to U.S. victory in the Cold War. It would strengthen U.S. national security by creating good will among developing countries and strengthening “freedom loving” nations.⁹⁰⁷ In this way, the appeal of communist subversion would be reduced, while U.S. allies in the Cold War would become more effective.⁹⁰⁸ Increasing prosperity everywhere would promote peace, as the energies of peoples were channeled toward constructive activity.

These goals were little different from those articulated at the end of the war: using foreign investment to promote prosperity and peace, except that the promotion of peace now included defeating communism in addition to eliminating the economic hardship that had led to war.

The ACTA document observed that it was “particularly important” that countries conclude bilateral or multilateral agreements to encourage international investment flows.⁹⁰⁹ The document did not specifically refer to FCN treaties, but very

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *Ibid.*

⁹⁰⁸ As several historians have argued, Point Four was a way of extending containment to the developing world. See, e.g., David A. Baldwin, *Economic Development and American Foreign Policy, 1943-62* (Chicago: The University of Chicago Press, 1966), page 74.

quickly State Department officials would decide that FCN treaties could fulfill the need identified by the policy statement.

Business groups strongly supported the negotiation of FCN treaties as an element of the Point Four program.⁹¹⁰ In a pamphlet published in December 1949 concerning the Point Four program, the New York Chamber of Commerce called for the negotiation of bilateral treaties to protect U.S. investment abroad.⁹¹¹ Writing to the chair of the Senate Committee on Foreign Relations about FCN treaties in 1950, the president of the NFTC observed that “[c]onsideration of measures to implement President Truman’s Point IV Program has given greater emphasis to the need for this type of diplomatic arrangement. We need scarcely add that we are greatly in favor of the accelerated program of negotiating treaties of friendship, commerce and navigation initiated by the State Department.”⁹¹² The U.S. Chamber of Commerce went farther and argued that the provision of assistance to foreign countries should be conditioned upon their concluding agreements guaranteeing “fair treatment” for U.S. investment.⁹¹³ Once again, elements of the business community sought to use economic leverage to coerce other countries to conclude FCN treaties.

⁹⁰⁹ Memorandum headed, “Objectives and Nature of the Point IV Program,” approved March 1, 1949, NARA, Record Group 59, Department of State File No. 800.50T.A./5-349.

⁹¹⁰ Baldwin, *op. cit.*, page 104.

⁹¹¹ Chamber of Commerce of the State of New York, *The Point 4 Program* (December 1949), reprinted in Walter M. Daniels, *The Point Four Program* (New York: The H. W. Wilson Company, 1951), pages 125-128.

⁹¹² Letter dated March 6, 1950, from Eugene P. Thomas to Senator Tom Connally, NARA, Record Group 59, Department of State File No. 611.334/2-2350.

The State Department almost immediately began to refer to FCN treaties as treaties intended to promote foreign investment. For example, during a press conference held on July 13, 1949, Secretary Acheson explained that the FCN treaty between Italy and the United States was “designed to stimulate a mutually advantageous flow of capital and technology which is in line with basic objectives of Point Four program.”⁹¹⁴

The change in the way that FCN treaties were perceived following Truman’s inaugural address is illustrated by a conversation between Woodbury Willoughby and Charles R. Carroll on March 3, 1949, only weeks after the inaugural address. Carroll was the chair of the NFTC’s Law Committee, the business group that the State Department most frequently consulted regarding the FCN treaty program. Carroll was also the general counsel to General Motors for overseas operations. Carroll initially telephoned Willoughby to express concern that the State Department was shifting emphasis from FCN treaty negotiations to trade agreement negotiations.⁹¹⁵ Carroll regarded FCN treaties as more important than trade agreements. Carroll also “wished to know what was the significance of the new phrase ‘investment treaty’ that he had recently heard.”⁹¹⁶ Willoughby reassured Carroll that the Department was not losing

⁹¹³ Chamber of Commerce of the United States, *What the Chamber Stands for in World Affairs*, reprinted in Walter M. Daniels, *The Point Four Program* (New York: The H. W. Wilson Company 1951), pages 63-66.

⁹¹⁴ Telegram dated July 13, 1949, from the Secretary of State to the U.S. mission in Rome, NARA, Record Group 59, Department of State File No. 711.652/7-1349.

⁹¹⁵ Memorandum of Conversation between Charles R. Carroll and Woodbury Willoughby, dated March 3, 1949, NARA, Record Group 59, Department of State File No. 711.002/3-349.

interest in the FCN treaty program and that, in fact, the program fit very well into President Truman's Point Four program because "these treaties are the traditional instruments designed to create a favorable environment for foreign investment."⁹¹⁷ Woodbury explained that the term "investment treaty" referred to "an attempt to develop what is essentially an establishment treaty."⁹¹⁸ Willoughby said that the Department hoped to prepare a treaty that might be easier to negotiate than an FCN treaty, while containing stronger investment related provisions.⁹¹⁹ Carroll replied that the FCN treaty should be retained as is, rather than placing the investment provisions into a separate treaty.⁹²⁰ The Department of Commerce also endorsed the continued negotiation of FCN treaties to protect foreign investment, rather than the development of a separate investment treaty.⁹²¹

The Department ultimately abandoned the idea of developing a separate investment treaty and decided that the FCN treaties would function as bilateral investment treaties. In late 1949, an internal State Department memorandum drafted by a member of the Division of Commercial Policy noted that "[t]his Government is now actively promoting the investment of private American capital in foreign

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*

⁹²⁰ *Ibid.*

⁹²¹ Letter dated August 12, 1949, from Clarence I. Blau to Winthrop Brown, NARA, Record Group 59, Department of State File No. 711.002/8-1249.

countries through the projected Point Four program, treaties of friendship, commerce and navigation and other measures.”⁹²²

Indeed, the Department of State soon regarded the protection of foreign investment as the primary function of the FCN treaties. By February 1950, Winthrop Brown, who had succeeded Clair Wilcox as the director of the Office of International Trade Policy, could say that “the predominant (but not the only) interest of this Government in seeking to negotiate [FCN treaties] lies in the contribution which they can make in promoting economic development by the creation of a climate favorable to the flow of private capital into foreign investments, and thus increasing standards of living everywhere. The treaty program is being developed with a view to its forming an integral and important part of the Point IV program.”⁹²³

An internal State Department report, “Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation,” written in March 1950, explained, “During the past several months there has been evidence of a broader general understanding of the functions of treaties of friendship, commerce and navigation. Clarifications of policy with respect to the Point Four program and the signing of the treaties with Ireland and Uruguay have tended to focus attention upon the role of these treaties in promoting the investment of private capital in foreign

⁹²² Memorandum by Charles H. Sullivan headed, “Entry of foreign investors into the United States under treaties of friendship, commerce and navigation,” dated November 23, 1949, NARA, Record Group 59, Department of State File No. 711.004/5-350.

⁹²³ Memorandum dated February 13, 1950, from Mr. Brown to Mr. Mills, NARA, Record Group 59, Department of State File No. 611.004/3-850.

countries and thus in furthering one of the major objectives of Point Four.”⁹²⁴ Similarly, when transmitting a proposed FCN treaty to the U.S. ambassador in Ethiopia in July 1950, the State Department explained that “The enclosed draft, as the Uruguay treaty and others of the sort, is quite relevant to the Point IV program and constitutes an important element in the realization of Point IV objectives, inasmuch as such treaties are calculated to establish a ‘climate’ of conditions conducive to the flow of investment capital.”⁹²⁵ A September 1950 State Department press release described the FCN treaty between Ireland and the United States as “an example of the type of treaty the United States is seeking to negotiate with many countries with the object of encouraging the flow of investment capital, expanding world trade and stimulating productive economic intercourse generally.”⁹²⁶ In October, the Department described the promotion of private investment as “currently the major emphasis of the [FCN] treaty program.”⁹²⁷

Even provisions of the FCN treaties guaranteeing noneconomic rights were reconceived as investment related. As the March 1950 internal State Department report explained, “Concurrently, there has been growing appreciation of the value of those provisions in commercial treaties which provide assurances respecting

⁹²⁴ Memorandum headed “Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

⁹²⁵ Letter dated July 18, 1950, from Willard Thorp to Ambassador George Merrill, NARA, Record Group 59, Department of State File No. 611.654/6-1550.

⁹²⁶ Department of State Press Release No. 959, September 15, 1950, reprinted in *Department of State Bulletin*, Vol. XIII, No. 587, October 2, 1950, pages 550-551.

⁹²⁷ *Current Economic Developments*, October 23, 1950, NARA, Record Group 59, Department of State Lot Files.

fundamental personal rights and of the way in which such provisions contribute to the development of a favorable climate for investment. . . . [P]rivate business interests are particularly aware of the importance of assurances of this kind and of their direct relation to actual business operations abroad.”⁹²⁸

Two years after Truman’s inaugural address, the State Department’s new understanding of the FCN treaties had not changed. A December 29, 1951, memorandum from Assistant Secretary for Economic Affairs Willard Thorp regarding six FCN treaties negotiated during 1951 referred to these treaties as part of a “program of extending and modernizing the treaty protection of American citizens, corporations, capital, trade and shipping abroad, with special emphasis on establishing conditions favorable to private investment.”⁹²⁹

Congress saw the FCN treaties similarly. When it enacted the Mutual Security Act of 1952,⁹³⁰ Congress included section 516(d), which directed the State Department to “accelerate a program of negotiating treaties of commerce and trade” but noted specifically that the treaties “shall include provisions to encourage and facilitate the flow of private investment to countries participating in programs under this act.”⁹³¹

⁹²⁸ Memorandum headed, “Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

⁹²⁹ Memorandum dated December 29, 1951, from Willard Thorp to the Office of Congressional Relations, NARA, Record Group 59, Department of State File No. 611.004/12-2951.

⁹³⁰ 66 Stat. 141.

The State Department's reconceptualization of the FCN treaties as investment treaties continued even after the end of the Truman administration and the election of a president of a different political party. In a memorandum dated November 5, 1954, sent to the American embassies in Brussels, The Hague and Luxembourg, the State Department explained that the trade provisions of the FCNs were of "quite secondary importance."⁹³² Rather, it explained, "The major present emphasis and purpose of the FCN treaty lies in its establishment and investment provisions."⁹³³ Further, "[t]he main current incentive to negotiate such a treaty, aside from the political and traditionalist incentive, is to lay the foundation for increased foreign investment."⁹³⁴ The following month, the U.S. embassy in Belgium informed Belgian diplomats that the United States "considered the most important feature of the Treaty to be its provisions for improving the investment climate with respect to relations between the two countries."⁹³⁵

Other countries conceptualized the FCN treaties the same way and came to regard the chief reason for concluding an FCN treaty to be not the creation of trade or navigation rights, but the promotion of foreign investment. For example, in 1950, officials of the Bank of Mexico asked for a copy of the standard U.S. FCN treaty and

⁹³¹ Department of State Circular Airgram dated August 6, 1953, NARA, Record Group 59, Department of State File No. 611.004/8-653.

⁹³² Department of State Instruction on Possible Negotiation of FCN treaty with Belgium, dated November 5, 1954, NARA, Record Group 59, Department of State File No. 611.554/11-554.

⁹³³ *Ibid.*

⁹³⁴ *Ibid.*

⁹³⁵ Memorandum of Conversation, November 30, 1954, NARA, Record Group 59, Department of State File No. 511.554/12-454.

explained that they were particularly interested in the provisions for the protection of foreign investment and the Point IV program.⁹³⁶

Similarly, the State Department reported to its embassy in Brussels that, during a visit to Washington by a Belgian official, the Department had cited the value of an FCN treaty for creating a “‘climate’ conducive to investment.”⁹³⁷ This prompted the Belgian embassy in Washington to express interest in concluding such a treaty.⁹³⁸ Less than a month later, a Belgian official in the Ministry of Trade told a U.S. embassy official that he agreed with the U.S. government that the promotion of foreign investment was the main purpose of an FCN treaty and that Belgium was “‘favourably disposed” to negotiate such a treaty in the near future.⁹³⁹

Discussions between the State Department and business groups also reflected their mutual understanding of FCN treaties as investment treaties. For example, a March 1950 State Department memorandum describing the business community’s reaction to the FCN treaty with Uruguay remarked that “[a] number of private business groups have indicated their approval of the treaty with Uruguay, particularly as an aid to investment...”⁹⁴⁰ Three months later, LeRoy D. Stinebower, a special

⁹³⁶ Memorandum dated March 8, 1950, from Harvey R. Wellman, NARA, Record Group 59, Department of State File No. 611.004-3-850.

⁹³⁷ Department of State Instruction on Possible Negotiation of FCN treaty with Belgium, dated November 5, 1954, NARA, Record Group 59, Department of State File No. 611.554/11-554.

⁹³⁸ *Ibid.*

⁹³⁹ Memorandum of Conversation, November 30, 1954, NARA, Record Group 59, Department of State File No. 511.554/12-454.

assistant to Assistant Secretary Willard Thorp, wrote to Noel Sargent, secretary to the NAM, that “inasmuch as one of the main purposes of these treaties is to facilitate private foreign investment we wish to obtain views on their content from those who may be foreign investors.”⁹⁴¹

Contemplating a New Investment Treaty

Although by late 1949 the State Department had decided that the FCN treaty would serve as the bilateral investment treaty contemplated by the Point Four program, in the days following Truman’s inaugural, as has been noted, the Department seriously contemplated the development of an entirely new treaty for that purpose. The task of developing such a treaty fell to John Parke Young’s Committee on Foreign Investment Policy.⁹⁴²

In drafting a new bilateral investment treaty, the committee sought commitments that would be strong enough to encourage investment, that would have a reasonable prospect of acceptance by other countries, that would be consistent with U.S. law and acceptable to Congress, and that would be considered “fair and reasonable” by both parties. In June, 1949, the committee recommended the drafting of a treaty under five main headings: equitable treatment, reasonable freedom to

⁹⁴⁰ Memorandum headed, “Status of Present Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004.3-2250.

⁹⁴¹ Letter dated June 9, 1950, from LeRoy D. Stinebower to Noel Sargent, NARA, Record Group 59, Department of State File No. 611.004/6-250.

⁹⁴² Report of the NAC-ECEFP Joint Committee on Foreign Investment Policy, June 7, 1949, NARA, Record Group 43, ITO Files, Box 38, Folder marked “Foreign Investment Policy – General”.

operate and manage an enterprise, compensation for expropriation, withdrawal of funds and taxation.

Meanwhile, as Young's committee on investment policy worked on the proposed treaty, the question of how to stimulate outward foreign investment became the subject of interagency discussions among officials responsible for monetary policy. The Bretton Woods Agreement Act, which Congress enacted in 1945, had established a National Advisory Committee on International Monetary and Financial Problems (NAC) to coordinate U.S. policy on international monetary and financial affairs.⁹⁴³ The NAC included representatives of the Departments of Treasury, State and Commerce as well as the Board of Governors of the Federal Reserve Bank, the Export-Import Bank, the Economic Cooperation Administration, the Securities Exchange Commission, and the IBRD. Only weeks after the president's announcement of Point Four, Undersecretary of State James E. Webb asked the NAC to make recommendations concerning measures that the federal government might take to encourage international investment flows.⁹⁴⁴

On June 8, the NAC recommended three sets of measures to promote foreign investment: the creation of an experimental investment guarantee program, the conclusion of "appropriate investment treaties" and the enactment of tax incentives for

⁹⁴³ 59 Stat. 512.

⁹⁴⁴ Memorandum from the Under Secretary of State to the Chairman of the National Advisory Council, March 1, 1949, NARA, Record Group 59, NAC Subject Files, Lot File 60D137, reprinted in *Foreign Relations of the United States, 1949*, Vol. 1 (Washington: Government Printing Office, 1976), page 773.

outward foreign investment.⁹⁴⁵ Less than a week later, on June 14, the NAC recommended to the State Department a proposed outline for the negotiation of treaties to provide protection for foreign investment, an outline that essentially adopted the recommendations of Young's committee. Like the investment committee recommendations, the NAC outline called for treaty provisions under five headings: equitable treatment, reasonable freedom to operate and manage an enterprise, compensation for expropriation, withdrawal of funds and taxation.⁹⁴⁶

The NAC report appeared more than a year after the conclusion of the Havana conference and its embrace of the concept of "equitable treatment" clearly reflected the evolution in U.S. investment policy that had occurred during the ITO charter negotiations. Under the heading of "equitable treatment," the NAC outline of treaty provisions stated that "United States investors shall at all times be accorded non-discriminatory, reasonable, fair and equitable treatment." As the language indicates, the United States was using the concept of "fair and equitable treatment" to embrace a set of principles that included nondiscrimination and reasonableness. Other discussions of the role of investment treaties in Point Four also used "fair treatment" as a description of the general level of treatment sought.⁹⁴⁷ In amplification of the requirement of nondiscrimination, the outline called for national treatment with

⁹⁴⁵ National Advisory Council, Action No. 333, June 8, 1949, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

⁹⁴⁶ National Advisory Council, Action No. 334, June 14, 1949, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

⁹⁴⁷ See, *e.g.*, Executive Committee on Economic Foreign Policy, "Objectives and Nature of the Point IV Program," page 4, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

respect to the right to engage in economic activities, except in certain reserved sectors of the economy, where MFN treatment would be required.⁹⁴⁸ Under the heading relating to the freedom to operate and control an enterprise, the outline called for a right of investors to engage employees of their choice, regardless of nationality. Under the heading relating to expropriation, the outline provided that property shall not be taken for a public purpose except upon prompt payment of just compensation. Adequate provision for payment of compensation shall have been taken prior to the expropriation. Payment shall be made in the currency of the investor or in a convertible currency.⁹⁴⁹

As would be expected given the mandate of the NAC, the largest section of the outline dealt with the withdrawal of funds. The NAC believed that, as a result of postwar conditions, the inconvertibility of currencies had become the chief obstacle to the flow of international capital and thus took a special interest in the problem of exchange controls.

At the same time, however, State Department officials recognized that some countries needed to restrict currency transfers. As John Parke Young later wrote, “The end of the war in 1945 found production and trade seriously dislocated, and widespread imbalance in international payments and receipts. . . . Under such conditions exchange control was essential to prevent severe exchange depreciation,

⁹⁴⁸ National Advisory Council, Action No. 334, June 14, 1949, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

⁹⁴⁹ *Ibid.*

speculation, and additional hardship for large masses of people dependent upon imports.”⁹⁵⁰

Yet, State Department officials also believed that exchange controls should be temporary. As Young later explained, the fact that they were needed demonstrated that a country’s exports were too low, a problem that exchange controls would not solve. Exchange controls, moreover, tended to promote inefficient industries, redistribute income, create windfall gains and discourage investment. Exchange controls could be useful while a state undertook “remedial measures” to address its underlying problem, such as the disruption of production during the war, and to prevent capital flight during a crisis, but they should be avoided when possible and should be permitted eventually to disappear.⁹⁵¹

Young’s Foreign Investment Policy Committee had given much attention to the problem of withdrawals and had already drafted a new provision on withdrawal of funds for inclusion in U.S. FCN treaties.⁹⁵² The committee wished to provide investors with a right to withdraw from the host country their earnings, any compensation for expropriation, and the amount of their capital invested. It also wished to ensure that the withdrawal was not compromised by an unfavorable exchange rate. The committee recognized, however, that shortages of foreign

⁹⁵⁰ John Parke Young, *The International Economy* (New York: The Ronald Press Company, 4th ed. 1963), page 408.

⁹⁵¹ *Ibid.*, page 414.

⁹⁵² Memorandum headed, “Report of the Joint NAC-ECEFP Committee on FCN Financial Clauses,” dated March 22, 1949, NARA, Record Group 43, ITO Files, Box 38, Folder marked “Foreign Investment Policy – General”.

exchange in many countries precluded an absolute commitment in that regard and that some kind of escape clause would be necessary. The committee sought an escape clause that would “retain a reasonable degree of protection for the investor while being sufficiently flexible to meet changing economic circumstances and to be acceptable to the foreign country.”⁹⁵³

The NAC’s outline again adopted the recommendation of the Foreign Investment Policy Committee. The outline called for a right of national and MFN treatment with respect to the international transfer of payments.⁹⁵⁴ Further, nationals and companies of one party were to be guaranteed the right to transfer freely in the currency of that party both capital and earnings from the territory of the other party. The rate of exchange was to be that approved by the IMF for such transactions or, in the absence of an approved rate, a rate that was just and reasonable.

The outline of provisions included an escape clause applicable to periods of “exchange stringency.”⁹⁵⁵ It permitted exchange restrictions necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the people of the host country or those approved by the IMF. In the event that a party applied exchange restrictions, that party must within a period of three months in consultation with the other party make reasonable provisions for such withdrawals “as may be feasible,” giving consideration to special needs for other

⁹⁵³ *Ibid.*

⁹⁵⁴ National Advisory Council, Action No. 334, June 14, 1949, NARA, Record Group 56, Subject Files of the Assistant Secretary of the NAC, Box 1.

⁹⁵⁵ *Ibid.*

transactions. Such provisions must be reviewed at intervals of not more than twelve months. In general, any restrictions could not be administered so as to disadvantage the competitive position of capital covered by the treaty relative to capital of any third country.

Finally, under the heading of taxation, the NAC outline called for national and MFN treatment with respect to matters of taxation. It also provided that, where income was earned in two or more countries, income taxes shall be apportioned among the countries.⁹⁵⁶

The NAC's proposed investment treaty would exclude from treaty obligations any measures necessary to protect a party's essential security interests. Notably absent was the language of the ITO charter authorizing each country to determine for itself the necessity of a measure.⁹⁵⁷ Including the self-judging language in the FCN treaties or in any other bilateral investment treaties, as was noted in Geneva, could have undermined the treaties as instruments of the rule of law by allowing a party to be the judge of its own cause.⁹⁵⁸

The State Department never adopted for use the model treaty envisioned by John Parke Young's committee and the NAC. As will be seen below, after the Havana

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Ibid.*

⁹⁵⁸ Robert Wilson, one of those responsible for negotiating FCN treaties during the Truman administration, noted in 1949 that the compromissory clauses (*i.e.*, the clauses authorizing submission of disputes under the treaties to the International Court of Justice) "assure that, in the last analysis, not each interested party for itself . . . but the principal judicial agency of the United Nations will have the role of final, authoritative interpreter of the treaty provisions." Robert R. Wilson, "Postwar Commercial Treaties of the United States," *American Journal of International Law* 43 (1949), 262, 287.

Conference the State Department had begun to strengthen the investment provisions of the FCN treaties. By June 1949, when Young's committee completed its work on the proposed model bilateral investment treaty, much of what was in the model bilateral investment treaty already appeared in the model FCN treaty. Young's committee and the NAC devoted considerable attention in 1949 and 1950 to modifying the existing provision on exchange controls and, as will be seen below, the Department would immediately propose the incorporation of those modifications into the FCN treaties under negotiation. These modifications of the exchange control provisions would be the chief legacy of the work of Young's committee.

Point Four Assistance and FCN Treaties

While the Executive Branch deliberated over the content of a possible bilateral investment treaty, Democratic Congressman John Kee of West Virginia, who was then serving as Chair of the House Committee on Foreign Affairs, introduced on July 12, 1949, the International Technical Cooperation Act of 1949⁹⁵⁹ to implement the Point Four program. Many Republicans, led by Senator Robert Taft, opposed Point Four because they regarded it as an extension abroad of New Deal programs like the Works Progress Administration.⁹⁶⁰

As Republican opposition to a Point Four program mounted, Republican Congressman Christian Herter of Massachusetts introduced, on August 17, an

⁹⁵⁹ H.R. 5615.

⁹⁶⁰ Thomas G. Paterson, *Meeting the Communist Threat: Truman to Reagan* (New York: Oxford University Press, 1988), page 152; Shenin *op. cit.*, page 50.

alternative bill, the Foreign Economic Development Act of 1949.⁹⁶¹ Herter was sympathetic with the Point Four program, but believed that Congress would approve it only with certain compromises. Among the provisions in Herter's legislation was language conditioning the receipt of technical assistance upon the conclusion of a treaty guaranteeing that U.S. investment would receive fair and equitable treatment, just compensation in the event of expropriation, the convertibility of profits, and protection against discriminatory taxes and double taxation.⁹⁶² Herter acknowledged during floor debate that his legislation "was a hastily drafted composite" of views expressed by the NFTC and the U.S. Chamber of Commerce.⁹⁶³ Herter's bill offered in essence an alternative vision of Point Four, one in which the program consisted of limited technical assistance and the negotiation of FCN treaties as a condition of receiving that assistance.

One notable feature of Kee's legislation was a proposed investment guarantee program, under which new U.S. private investment would be guaranteed against certain risks, such as expropriation, exchange controls, and physical destruction during hostilities.⁹⁶⁴ Truman believed that insurance was necessary because developing countries might simply be unable to prevent certain losses for foreign investors, particularly those arising out of internal or international hostilities.⁹⁶⁵

⁹⁶¹ H.R. 6026.

⁹⁶² Willard Thorp Oral History, Harry S. Truman Library.

⁹⁶³ 96 *Congressional Record* 4111 (March 24, 1950).

⁹⁶⁴ *Ibid.*, pages 47-48.

The NFTC denounced investment guarantees as “wrong in principle.”⁹⁶⁶ Such guarantees would shift the responsibility for protecting investment from the host country to the United States and would tend to involve the U.S. government in approving and disapproving investments.⁹⁶⁷ The NAM believed that investment guarantee programs removed the incentive for developing countries “to correct errors of financial and economic policy.”⁹⁶⁸ The business community argued that the best form of guarantee for an investment was not an insurance program, but the negotiation of FCN treaties.⁹⁶⁹ The problem from the business community’s perspective, however, was that the United States had encountered considerable resistance from other countries with which it sought to conclude FCN treaties.⁹⁷⁰ Conditioning Point Four assistance on the conclusion of an FCN treaty, as required by the Herter bill, would provide a means for overcoming that resistance.

The Truman administration opposed the use of foreign assistance as a means of coercing other countries to sign FCN treaties⁹⁷¹ and received support even from some

⁹⁶⁵ *New York Times*, June 25, 1949; Shenin, *op. cit.*, page 42

⁹⁶⁶ *Ibid.*, page 50.

⁹⁶⁷ *Ibid.*, pages 50-51.

⁹⁶⁸ David A. Baldwin, *Economic Development and American Foreign Policy, 1943-62* (Chicago: The University of Chicago Press, 1966), page 104.

⁹⁶⁹ Shenin, *op. cit.*, page 28

⁹⁷⁰ *Ibid.*

⁹⁷¹ In opposing Herter’s compromise version, Truman received a great deal of support from Christian groups, who regarded Point Four as a humanitarian program consistent with their own values. They saw Point Four as “a twentieth-century missionary vehicle for both democracy and Christianity.” Shenin, *op. cit.*, page 165.

Republicans. For example, Republican Congressman Jacob Javits of New York argued that “making treaties a condition of giving aid would be tying a string to technical know-how which the Communists would make big propaganda about, charging that we are trying to do something for American capital before we do anything for anybody in the world.”⁹⁷²

To gain Congressional support for Point Four, Truman emphasized the benefits to the U.S. economy. Increased development in Africa, Asia and Latin America, he argued, would create a market for U.S. exports.⁹⁷³ Truman also began to characterize Point Four as a containment measure.⁹⁷⁴

The bill that finally emerged from Congress and that Truman signed into law on June 5, 1950, the Act for International Development,⁹⁷⁵ omitted the language conditioning aid upon the conclusion of such a treaty. The bill did include a finding that “capital investment can make the maximum contribution to economic development only . . . where there is confidence of fair and reasonable treatment and due respect for the legitimate interests of the peoples of the countries to which the assistance is given and in which the investment is made”⁹⁷⁶

⁹⁷² House Committee on Foreign Affairs, Hearings on Act for International Development, H.R. 5615, page 202, quoted in Shenin, *op. cit.*, page 47.

⁹⁷³ Robert Packenham, *Liberal America and the Third World: Political Development Ideas in Foreign Aid and Social Science* (Princeton: Princeton University Press, 1973), pages 44-45; Shenin, *op. cit.*, page 50.

⁹⁷⁴ Truman Message Asks \$45,000,000 for Point 4 Fund,” *New York Times*, June 25, 1949; Shenin, *op. cit.*, page 41.

⁹⁷⁵ Public Law 81-535, Title IV, 64 Stat. 204.

⁹⁷⁶ Section 402(c).

The legislation reflected the State Department's longstanding view that foreign investment must benefit both the investor and the host state. Regarding the interests of the host state, the legislation said that "this involves confidence on the part of the people of the underdeveloped areas that investors will conserve as well as develop local resources, will bear a fair share of local taxes and observe local laws, and will provide adequate wages and working conditions for local labor."⁹⁷⁷ Regarding the interests of the investor, the legislation noted that this "involves confidence on the part of investors, through intergovernmental agreements or otherwise, that they will not be deprived of their property without prompt, adequate and effective compensation; that they will be given reasonable opportunity to remit their earnings and withdraw their capital; that they will have reasonable freedom to manage, operate, and control their enterprises; that they will enjoy security in the protection of their persons and property, including industrial and intellectual property, and nondiscriminatory treatment in taxation and in the conduct of their business affairs."⁹⁷⁸

Negotiating an FCN Treaty with Colombia

In the months following the conclusion of the Havana conference, the State Department, not yet knowing that the ITO charter would never enter into force, had begun to consider including in its FCN treaties investment related provisions that would harmonize the treaties with the charter.⁹⁷⁹ Although the Department had sought

⁹⁷⁷ Section 402(c).

⁹⁷⁸ Section 402(c).

in Havana to eliminate the exception riddled nondiscrimination and security provisions adopted in Geneva, the provisions that introduced into the charter the concept of fair and equitable treatment and the principle of reasonableness had represented a genuine accomplishment and these had survived the Geneva and Havana conferences.

By mid 1948, the Department was in search of opportunities to insert into an FCN treaty provisions reflecting the progress made during the ITO negotiation process. Thus, even before Truman's announcement of Point Four and the reconceptualization of FCN treaties as investment treaties, the State Department was bolstering the investment protection provisions of those treaties. In the early months of 1949, when the State Department went in search of instruments to advance Point Four through the promotion of private investment, the FCN treaties would already include much of what they needed to serve that function.

The first opportunity to harmonize an FCN treaty with the results of the ITO negotiation process came during negotiations with Colombia. The U.S. business community in Colombia long had sought an FCN treaty between the United States and Colombia to replace an existing 1846 treaty between the two countries. In fact, the State Department had prepared a proposed draft treaty for negotiation with Colombia

⁹⁷⁹ Robert Wilson, one of the FCN treaty negotiators, wrote in 1949 about the efforts of the State Department to reconcile the FCN treaty provisions with the ITO charter provisions, although he was referring specifically to the trade provisions rather than the investment provisions. Robert W. Wilson. "Postwar Commercial Treaties of the United States," *American Journal of International Law* 43 (1949) 281-282.

in 1940.⁹⁸⁰ As has been noted, however, the United States had suspended FCN treaty negotiations during the war.

U.S. investors sought an FCN treaty with Colombia in particular because the Colombian constitution allowed expropriation without compensation⁹⁸¹ and thus these investors felt especially vulnerable.⁹⁸² In addition, following the war, Colombia held limited reserves of foreign exchange. Accordingly, the U.S. business community was also concerned about its ability to transfer funds out of Colombia.⁹⁸³

As the war drew to a close and the United States inaugurated its postwar FCN treaty program, the State Department began to contemplate once more the negotiation of a new FCN treaty with Colombia. When the U.S. ambassador to Colombia visited Washington in November 1945, State Department officials inquired about the possibility of negotiating a treaty.⁹⁸⁴ The ambassador informed the Department that the time for negotiating a treaty was not propitious. First, anti-American sentiment in

⁹⁸⁰ Despatch dated December 19, 1940, from the Secretary of State to the U.S. Ambassador in Bogota, NARA, Record Group 59, Department of State Lot Files, Folder marked "Walter Hollis Files."

⁹⁸¹ Article 30 of the Colombia Constitution, after stating that in general expropriation required payment of indemnification, further provided, "Nevertheless, the Legislature, for reasons of justice, may determine the cases in which there is not ground for indemnification, by a favorable vote of an absolute majority of the members of each Chamber." Seymour J. Rubin, *Private Foreign Investment: Legal and Economic Realities* (Baltimore: The Johns Hopkins Press, 1956), page 14.

⁹⁸² Letter dated July 30, 1948, from Mitchell Carroll to Secretary of State George C. Marshall, NARA, Record Group 59, Department of State File No. 711.212/7-3048.

⁹⁸³ Memorandum of Conversation dated March 2, 1949, NARA, Record Group 59, Department of State File No. 711.212/3-249.

⁹⁸⁴ Memorandum of Conversation dated November 30, 1945, NARA, Record Group 59, Department of State File No. 611.2131/11-3045.

Colombia was high, as a result of wartime price controls on coffee. Second, the Colombia political situation was unstable.

The U.S. business community continued to pressure the Department for a new treaty. Only a couple of months after the ambassador's visit, the Colombian-American Chamber of Commerce adopted a resolution urging the Department to initiate the negotiation of a new FCN treaty with Colombia.⁹⁸⁵

The prospects for a treaty only deteriorated, however. The proposal for the creation of the ITO aroused protectionist sentiment in Colombia, with many Colombians fearing that free trade would allow stronger countries to dominate Colombia. The Colombian government began to consider not only opposing the creation of the ITO, but terminating the existing FCN treaty with the United States because it contained provisions on trade that were suggestive of the controversial ITO charter.⁹⁸⁶

By the summer of 1948, the Havana conference had ended, removing a major impediment to the negotiation of an FCN treaty between Colombia and the United States. The State Department again proposed the negotiation of a modern FCN treaty with Colombia, a proposal that met a favorable reaction from the Colombian foreign minister.⁹⁸⁷ In August, the Department transmitted a proposed treaty to the U.S.

⁹⁸⁵ Letter dated January 23, 1946, from the Colombia-American Chamber of Commerce to the Secretary of State, NARA. Record Group 59, Department of State File No. 611.2131/1-2346.

⁹⁸⁶ Letter dated September 26, 1947, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.2131/9-2647; Letter dated October 17, 1947, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.2131/10-1747.

ambassador in Bogota for his review, but noted that additional investment related provisions likely would be included.⁹⁸⁸ Meanwhile, American businesses in Colombia, particularly Pan America Airways and companies in the petroleum industry, were showing “considerable interest” in the proposed negotiation.⁹⁸⁹

The United States presented a draft treaty to the Colombian embassy on October 14, 1948, but alerted the Colombian government that the United States still was reviewing the text and might make further changes to its own proposal.⁹⁹⁰ The proposed draft, dated October 11, 1948, included the investment related provisions that had appeared in the FCN treaty with Italy and that were discussed in Chapter Two. It also included, however, a new Article V, headed “Promotion of Investment” as well as a new Article VIII on currency transfers.⁹⁹¹ The text proposed to Colombia was similar to drafts already presented to the Netherlands and Belgium earlier that year, although neither of those two countries had been prepared to commence negotiations.

⁹⁸⁷ Telegram dated July 29, 1948, from the Secretary of State to the U.S. embassy in Bogota, NARA, Record Group 59, Department of State File No. 711.212.7-2948.

⁹⁸⁸ Despatch dated August 5, 1948, from the Secretary of State to the U.S. embassy in Bogota, NARA, Record Group 59, Department of State File No. 711.212/7-1648.

⁹⁸⁹ Letter dated September 28, 1948, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.212/9-2848.

⁹⁹⁰ Despatch dated October 15, 1948, from the Secretary of State to the U.S. embassy in Bogota, NARA, Record Group 59, Department of State File No. 711.212/9-248.

⁹⁹¹ Draft Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Colombia, October 11, 1948, NARA, Record Group 59, Department of State File No. 711.212/9-248.

These new articles signaled the beginning of a transformation in the investment protection provisions of the FCN treaties. They also reflected the influence of the ITO charter negotiations and the work of John Parke Young's Foreign Investment Policy Committee on the content of the FCN treaties.

First, the new article on investment promotion required each party to accord "equitable treatment" to the "capital" of nationals and companies of the other party.⁹⁹² FCN treaties had sometimes required "fair and equitable" treatment with respect to some specific activity, such as with respect to the imposition of exchange controls or purchases by state trading enterprises,⁹⁹³ but for the first time the United States sought to use in an FCN treaty the phrase "equitable treatment" as way of describing the general investment climate that should exist. Notably, the article referred to the treatment of capital, as opposed to "property," the term previously used in FCN treaties to refer to investment. This too reflected the influence of the ITO negotiations, where the term "capital" was used.

Second, the new article prohibited "unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests" of investors of the other party in the enterprises that they had established or in the capital, skills, arts of technology which they have supplied.⁹⁹⁴ For the first time, the United States was

⁹⁹² *Ibid.*

⁹⁹³ Illustrative of these provisions are Articles XIX (exchange controls) and XX (state trading companies) of the U.S.-China FCN Treaty.

⁹⁹⁴ Draft Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Colombia, October 11, 1948, Article V, NARA, Record Group 59, Department of State File No. 711.212/9-248.

seeking to incorporate the norm of reasonableness explicitly into the investment protection provisions of an FCN treaty. Host state action could violate the treaty if it was arbitrary, much in the way that arbitrary regulations could violate the due process of the U.S. Constitution.

The article also introduced a general prohibition on discriminatory treatment, analogous to the equal protection clause of the U.S. Constitution. FCN treaties in the past had required national or MFN treatment with respect to particular activities, but had never prohibited all forms of unjustified discrimination injurious to investment. The United States during the ITO negotiations in Geneva had supported a Belgian proposal to include a general prohibition on discriminatory treatment in the ITO charter, but the proposal had failed. The language of the new investment promotion article resurrected the idea.

The article introduced as well a general prohibition on unjustified treatment, but this language soon vanished from the U.S. model treaty language. It essentially was redundant of the requirements of reasonableness and nondiscrimination.

Like the ITO charter, the new article addressed state imposed impediments to the free flow of capital. It provided that neither party shall deny “appropriate opportunities and facilities” for the investment of capital by nationals or companies of the other party.⁹⁹⁵ Additionally, it prohibited either party from “unreasonably or unjustifiably imped[ing]” nationals or companies of the other party from obtaining on

⁹⁹⁵ *Ibid.*

equitable terms the capital, skills and technology it needs for economic development.⁹⁹⁶

The new article on currency transfers supplemented the article on exchange controls that had appeared in earlier treaties. The new article guaranteed to nationals and companies of either party the right to withdraw freely from the territory of the other party earnings and reasonable amounts of capital.⁹⁹⁷ An escape clause allowed either party, in periods of exchange stringency, to depart from this obligation to the extent necessary to give preference to transfers related to the imports essential to the health and welfare of its people and to service its external debt and other international contractual obligations.⁹⁹⁸ In the event that a party departed from its obligation of free transfer, it was required to provide the other party an opportunity for consultation with respect to a schedule or other arrangements for the withdrawals that had not been freely permitted.⁹⁹⁹ The general provision on exchange controls used in earlier treaties remained and it required national and MFN treatment with respect to any such controls.¹⁰⁰⁰

The U.S. business community watched the negotiations closely. In early March 1949, for example, a representative of the NFTC, Mitchell B. Carroll, met with

⁹⁹⁶ *Ibid.*

⁹⁹⁷ Article VIII(1).

⁹⁹⁸ Article VIII(2).

⁹⁹⁹ Article VIII(2).

¹⁰⁰⁰ Article XVIII.

several State Department officials to discuss the status of the treaty.¹⁰⁰¹ Although four months had passed since it had provided its proposed draft to the Colombian government, the Department was still studying and revising the investment related provisions of the treaty.

At the meeting, Carroll stressed the importance of being able to repatriate compensation for expropriation and sought strong treaty protection in that regard. He argued that countries with insufficient foreign exchange to allow transfer of expropriation compensation should not expropriate. One of the State Department officials, Sheldon Mills, doubted, however, that Colombia would agree not to expropriate unless it had sufficient foreign exchange reserves to allow transfer of compensation. John Parke Young noted that there was “little point in tying a country down to transfer requirements which we know in advance cannot be fulfilled if economic conditions take an adverse turn.”¹⁰⁰² Accordingly, the United States must be prepared to agree to “a certain amount of flexibility.”¹⁰⁰³ For example, transfer of expropriation compensation within two or three years should be regarded in general as satisfactory.

Carroll concluded the discussion by asking for a report on the progress of the FCN treaty program worldwide. Young said that the Department was “pushing them

¹⁰⁰¹ Memorandum of Conversation dated March 2, 1949, NARA, Record Group 59, Department of State File No. 711.212/3-249.

¹⁰⁰² *Ibid.*

¹⁰⁰³ *Ibid.*

actively” but that officials of other countries could not “get too far ahead of public opinion.”¹⁰⁰⁴

The State Department also sought the views of the Business Advisory Council, affiliated with the Department of Commerce, on the investment related provisions of the FCN treaties.¹⁰⁰⁵ The council recommended strengthening the provisions in various respects, but the State Department Office of the Legal Advisor responded by noting the inconsistency of the proposals with U.S. constitutional principles.¹⁰⁰⁶ Department officials observed that treaty provisions were mutual, meaning that the United States would be required to honor any commitments imposed by the treaty, and that the United States must avoid the appearance of exerting undue pressure on other countries.¹⁰⁰⁷ None of the proposed revisions was adopted.

Even as State Department officials were discussing treaty protections with U.S. business representatives, however, Colombia was focusing on a different aspect of international capital movements, the problem of double taxation. On March 9, 1949, a week after State Department officials met with Carroll, the U.S. ambassador met with the Colombian foreign minister to discuss the treaty. The foreign minister said that Colombia would have “no important objections” to the treaty, but wished to add a

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵Memorandum by Herman Walker, Jr., headed, “Further possible provisions in standard draft of Treaty of Friendship, Commerce and Navigation (or Economic Development),” dated October 12, 1949, NARA, Record Group 59, Department of State Lot Files, Folder marked “Commercial Treaties.”

¹⁰⁰⁶Memorandum dated November 15, 1949, from Stanley Metzger to Michael Cardozo, NARA, Record Group 59, Department of State Lot Files, Folder marked “Commercial Treaties.”

¹⁰⁰⁷Memorandum by Herman Walker, Jr., headed, “Further possible provisions in standard draft of Treaty of Friendship, Commerce and Navigation (or Economic Development),” dated October 12, 1949, NARA, Record Group 59, Department of State Lot Files, Folder marked “Commercial Treaties.”

provision to prevent double taxation of investment.¹⁰⁰⁸ The ambassador replied that the United States preferred to address problems of double taxation in a separate treaty.¹⁰⁰⁹

By April, the Colombian government had decided that the conclusion of an FCN treaty with the United States must be conditioned upon the conclusion of a double taxation treaty, perhaps at the same time.¹⁰¹⁰ The United States was still considering its tax policy with respect to foreign investment and was not yet prepared to negotiate a tax treaty with Colombia.¹⁰¹¹ By October, the Colombian government had decided that it would not negotiate an FCN treaty until after a double taxation treaty was concluded.¹⁰¹² At the end of that month, a team traveled from Washington to Bogota and successfully negotiated two treaties for the prevention of double taxation.¹⁰¹³ As the year came to a close, however, FCN treaty negotiations had yet to resume.

¹⁰⁰⁸ Telegram dated March 9, 1949, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.212/3-949.

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ Telegram dated April 27, 1949, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.212/4-2749.

¹⁰¹¹ Despatch dated May 17, 1949, from the Department of State to the U.S. embassy in Bogota, NARA, Record Group 59, Department of State File No. 711.212/4-2749.

¹⁰¹² Memorandum of Conversation dated October 7, 1949, NARA, Record Group 59, Department of State File No. 711.212/10-749,

¹⁰¹³ Airgram dated October 21, 1949, from the Secretary of State to the U.S. embassy in Bogota, NARA, Record Group 59, Department of State File No. 711.212/10-2149; Despatch dated December 5, 1949, from the U.S. embassy in Bogota to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.212/12-549.

Negotiating an FCN treaty with Uruguay

Meanwhile, with the Colombian negotiations stalled over the problem of double taxation, the State Department's attention shifted to negotiations with Uruguay. In July 1948, U.S. embassy personnel in Montevideo had suggested to officials of the Uruguayan foreign affairs and finance ministries the possibility of negotiating an FCN treaty between the United States and Uruguay. These officials responded with "eager interest."¹⁰¹⁴

The Department was "pleased" at the response, but wanted to be certain that Uruguay's conception of the treaty was in accord with the U.S. conception.¹⁰¹⁵ The Department transmitted copies of the recently signed FCN treaty with Italy to illustrate the type of treaty that the United States wanted to conclude. At the same time, however, the Department alerted the embassy to the fact that it had revised the treaty since the completion of the negotiations with Italy. The Department would forward the Colombian draft as soon as it was completed and anticipated that this draft would likely form the basis for negotiations with Uruguay.¹⁰¹⁶

When the text of the treaty with Italy arrived, the embassy complained that it was too technical and legalistic and suggested that a simpler draft would be more likely to lead to a successful negotiation.¹⁰¹⁷ The Department responded that the

¹⁰¹⁴ Telegram dated July 30, 1948, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/7-3048.

¹⁰¹⁵ Telegram dated August 6, 1948, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/7-3048.

¹⁰¹⁶ *Ibid.*

technical legal issues of the treaty must eventually be addressed and, if Uruguay was not prepared to address them, the Department would prefer to know that before it invested time in a futile negotiation.¹⁰¹⁸

The embassy's fears proved unfounded, however. When the embassy presented the sample draft to the Uruguayan finance minister on September 23, he indicated that the treaty would be approved because it did not require anything that was not already part of Uruguayan law and practice.¹⁰¹⁹ In October, the director of economic and commercial affairs at the foreign affairs ministry told the embassy that Uruguay could sign the proposed treaty with only "minor" changes, primarily for domestic political reasons.¹⁰²⁰ Uruguayan officials would need to insist upon some changes to demonstrate to the political opposition that the government had not simply capitulated to the American request.¹⁰²¹ Such changes might include changes to the language on expropriation compensation, the language on access to mining rights, and the language granting the right to practice law.

On October 28, the Department forwarded to the U.S. embassy in Montevideo the draft that it had proposed to Colombia. The Department noted that the draft

¹⁰¹⁷ Telegram dated August 18, 1948, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/8-1848.

¹⁰¹⁸ Telegram dated August 30, 1948, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/8-1848.

¹⁰¹⁹ Letter dated October 5, 1948, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/10-548.

¹⁰²⁰ Letter dated October 22, 1948, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/10-2248.

¹⁰²¹ *Ibid.*

contained new language on the subject of “encouragement and protection of investments” that had not appeared in any prior draft sent to the embassy.¹⁰²² This language included the new investment provision, which appeared at Article V, as well as the new provision on currency transfers.

On November 9, the Department reported to the embassy that it was preparing a draft tailored to Uruguay. The draft for Uruguay would be similar to the draft for Colombia, except for changes to the provision on currency transfers, which the Department was still in the process of revising.¹⁰²³ Consistent with its pragmatic approach, the Department informed the embassy that the draft was “intended merely to serve as a basis for negotiations, and counter-proposals by the Uruguayans [would] be welcomed, and [would] receive the sympathetic consideration of the Department.”¹⁰²⁴ At the same time, however, each proposed change by Uruguay would require interagency consultation within the U.S. government and could delay the negotiation. Thus, the Department urged the embassy to encourage the Uruguayan government to limit proposed changes to those provisions that presented “important policy problems.”¹⁰²⁵

¹⁰²² Airgram dated October 28, 1948, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/10-2248.

¹⁰²³ Airgram dated November 9, 1948, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/10-2248.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ *Ibid.*

On January 6, 1949, the Department transmitted its proposed draft for negotiations with Uruguay.¹⁰²⁶ The Department alerted the embassy that the draft was still subject to revision and that the Department might suggest changes to its own draft, particularly to the provision on currency transfers.¹⁰²⁷

The investment provisions of the draft for Uruguay differed from those of the draft for Colombia in a few respects. The general prohibitions on unreasonable or discriminatory treatment remained, but the prohibition on “unjustified” treatment disappeared, presumably because it was redundant of the other two. Similarly, the language in the draft for Colombia prohibiting either party from unreasonably or unjustifiably impeding either party from obtaining on equitable terms the capital, skills and technology it needs for its economic development omitted the reference to unjustifiable impediments and prohibited only unreasonable ones.

Although Uruguay raised a number of concerns, none of them presented a serious difficulty. For example, Uruguay objected to language that had appeared in the draft for Colombia that prohibited local participation requirements that would interfere with the right of foreign investors to control their investments, but the United States agreed to delete the provision.¹⁰²⁸ By early March, negotiations had come to a standstill over a single issue, currency transfers.¹⁰²⁹ The problem was that the United

¹⁰²⁶ Airgram dated January 6, 1949, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/1-649.

¹⁰²⁷ *Ibid.*

¹⁰²⁸ Telegram dated March 4, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.3321/3-449.

States government itself was not satisfied with the transfers provision in the proposed treaty that it had given to Uruguay and was still attempting to draft a provision acceptable to all U.S. agencies.¹⁰³⁰ Recall that the NAC would not approve treaty language on currency transfers until some three months later. The Department finally decided to propose language that would be used only in the treaty with Uruguay and to consult further with the business community before selecting language for inclusion in the model treaty.¹⁰³¹

On March 9, the Department forwarded its proposed language.¹⁰³² The new language was similar to, but stronger than, that which had appeared in the draft proposed to Colombia. It provided that, in the event that exchange controls were imposed during periods of exchange rate stringency, the host state was required within three months to make reasonable provision for withdrawals of returns on the investment as well as withdrawals of such capital as may be feasible, “giving consideration to special needs for other transactions.”¹⁰³³

¹⁰²⁹ Telegram dated March 9, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.3321/3-949.

¹⁰³⁰ Memorandum to the File dated February 24, 1949, NARA, Record Group 59, Department of State File No. 711.332/2-1049.

¹⁰³¹ Memorandum of Conversation, headed, “FCN Treaties – Special Provision on Withdrawal of Earnings,” dated March 8, 1949, NARA, Record Group 59, Department of State File No. 711.332/3-849.

¹⁰³² Telegram dated March 9, 1949, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/3-949.

¹⁰³³ *Ibid.*

The Uruguayan government immediately accepted the new provision on currency transfers. Two days after the State Department proposed the new provision, on March 11, the two countries reached agreement on the final text of the treaty.¹⁰³⁴

That same day, the Uruguayan government notified the State Department that it wished to announce publicly that negotiations had begun so as to avoid claims that Uruguay had agreed to a treaty dictated by Washington without negotiations.¹⁰³⁵ The State Department agreed to the announcement.¹⁰³⁶ The U.S. embassy urged the Department to approve the text quickly because the political circumstances in Uruguay were favorable for ratification at that moment and because the chief Uruguayan negotiator was leaving the country by the end of the month and his absence could delay ratification for several months.¹⁰³⁷ Over the next few weeks, the two governments worked out various technical details, such as stylistic corrections and reconciliations of the original English text and the Spanish translation.

The treaty with Uruguay had been completed only a few weeks following Truman's announcement of the Point Four program. Although the link between Point Four and the FCN treaties would favor the negotiation of the treaties in some instances, in the case of Uruguay the link provided ammunition for the treaty's

¹⁰³⁴ Telegram dated March 11, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/3-1149.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ Telegram dated March 14, 1949, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 711.332/3-1149.

¹⁰³⁷ Despatch dated March 11, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/3-1149.

enemies. On May 6, 1949, the *Wall Street Journal* published an article referring to the FCN treaty with Uruguay as a “pilot” for the Point Four program.¹⁰³⁸ Until the *Wall Street Journal* article appeared, the Brazilian press, apart from one communist newspaper, had been content merely to report the existence of the negotiations and to withhold comment until the actual text of the treaty was made public.¹⁰³⁹

The *Wall Street Journal* article triggered an immediate adverse reaction from several Uruguayan newspapers, which denounced efforts by the United States to treat Uruguay as a “guinea pig” for the program and warned that the treaty would open the door to “Yankee trusts” that would crush local industry.¹⁰⁴⁰ The principal Uruguayan negotiator expressed apprehension to U.S. embassy personnel about the potential effect of the adverse commentary on Uruguay’s ability to conclude the negotiations successfully. Uruguayan officials feared that the treaty would be portrayed as another “imperialist tentacle.”¹⁰⁴¹

Ultimately, however, the criticism subsided, at least for a time. The treaty was signed on November 23, after which coverage of the treaty in the Uruguayan press was “slight,” except for two newspapers, one leftist and the other communist, both of

¹⁰³⁸ Telegram dated May 19, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.332/5-1949.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ Memorandum dated June 9, 1949, from R. K. Oakley to Mr. Daniels, NARA, Record Group 59, Department of State File No. 711.332/6-949.

which opposed the treaty.¹⁰⁴² By early March of the following year, several newspapers had published editorials in support of the treaty.¹⁰⁴³

The State Department, in submitting the FCN treaty with Uruguay to the President, observed that it was “in line” with Point Four and one of the types of agreements contemplated by Article 12 of the ITO charter.¹⁰⁴⁴ The treaty was also in accordance with “liberal principles.”¹⁰⁴⁵ The Senate gave advice and consent to ratification of the treaty on August 9, 1950.¹⁰⁴⁶

Meanwhile, as the treaty lay before the U.S. Senate, opposition to the treaty in Uruguay resurfaced. By April of 1950, the tone of press coverage had changed and newspapers that formerly were supportive had begun to question the desirability of the treaty.¹⁰⁴⁷ This time the opposition proved fatal. The Uruguayan government never ratified the treaty and it never entered into force.

¹⁰⁴² Despatch dated December 30, 1949, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.334/2-350.

¹⁰⁴³ Despatch dated March 10, 1950, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.334/3-1050.

¹⁰⁴⁴ Letter dated January 12, 1950, from Secretary of State Dean Acheson to President Harry S. Truman, NARA, Record Group 59, Department of State File No. 611.334/1-1250.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ Telegram dated August 9, 1950, from the Secretary of State to the U.S. embassy in Montevideo, NARA, Record Group 59, Department of State File No. 611.334/8-950.

¹⁰⁴⁷ Despatch dated April 5, 1950, from the U.S. embassy in Montevideo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.334/4-550.

Negotiating an FCN Treaty with Ireland

The first FCN treaty with the new investment provisions that would enter into force was that concluded with Ireland. The foundation for the successful negotiation was laid in March 1948, when the State Department transmitted a proposed FCN treaty to the U.S. legation in Dublin and authorized legation officials to approach the Irish government to ascertain its interest in negotiating a treaty.¹⁰⁴⁸ The Department alerted the legation to the fact that the treaty still was under review and that the United States might wish to modify the proposed treaty in the future.¹⁰⁴⁹

After studying the proposed treaty, Irish officials met with U.S. negotiators at the U.S. legation over a period of several days in May. Those meetings revealed that the principal issue was likely to be the conflict between the national treatment provision of the treaty and the Irish Control of Manufactures Act, which required that 51 percent of any industrial enterprise in Ireland be owned by Irish nationals and thus was inconsistent with the national treatment provisions of the treaty.¹⁰⁵⁰ The Irish government did not wish to grant U.S. investors national treatment with respect to the right to establish investment because Ireland would have difficulty refusing to grant a similar right to British investors, which the Irish were unwilling to do because they feared British domination of their economy.¹⁰⁵¹ If the Irish government had some

¹⁰⁴⁸ Letter dated March 5, 1948, from the Secretary of State to the U.S. legation in Dublin, NARA, Record Group 59, Department of State File No. 711.41D2/1-1248.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ Memorandum of Conversation dated March 20, 1948, NARA, Record Group 59, Department of State File No. 711.41D2/5-2448.

assurance that U.S. investors would invest in Ireland, granting U.S. investors rights of entry would be less difficult. History, however, suggested that U.S. investors were unlikely to show sufficient interest.¹⁰⁵² The Irish similarly feared British purchase of residential real estate, which would drive up prices in the residential real estate market.¹⁰⁵³ The Irish also faced difficulty accepting commitments regarding exchange controls, given that Ireland was a member of the Sterling bloc and thus not in control of its own currency reserves.¹⁰⁵⁴

The issue of national treatment proved so difficult in the Irish negotiations, as well as in discussions with France and the Netherlands, that by November Herman Walker, one of the Department's treaty negotiators, questioned whether the Department should abandon the principle entirely.¹⁰⁵⁵ Ultimately, he recommended instead that the Department agree to transitional exceptions tailored to each country.

Following these informal discussions, the two parties commenced formal negotiations on October 6 and continued them until October 24.¹⁰⁵⁶ By December

¹⁰⁵¹ Airgram dated October 21, 1948, from the U.S. legation in Dublin to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.41D/10-21-48.

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ The sterling bloc was an arrangement under which Britain purchased food from other members of the empire, which then used the receipts to purchase manufactured goods from Britain. This trade was financed through pound sterling accounts that could not be converted to dollars. Thomas W. Zeiler, *Free Trade Free World: The Advent of GATT* (Chapel Hill: The University of North Carolina Press 1999), page 22; Harold James, *International Monetary Cooperation Since Bretton Woods* (Washington: International Monetary Fund, 1996), page 90.

¹⁰⁵⁵ Telegram dated November 23, 1948, from the U.S. embassy in Paris to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.41D2/11-2348.

only three important issues remained, one of which related to the Control of Manufactures Act.¹⁰⁵⁷ The others related to exchange controls and the acquisition of real property. All three remaining issues thus related primarily to the problem of capital movements across borders, rather than to the protection of investment.

By late January 1949, the Irish foreign minister had suggested that negotiations relating to the Control of Manufactures Act be suspended but that negotiations on the remaining issues continue.¹⁰⁵⁸ The State Department broke the impasse, however, on March 22, when it notified its legation in Dublin that the United States had decided to compromise. The United States would agree to an exception for the Control of Manufactures Act for a period of four years, in exchange for Ireland's agreement to a new investment protection provision.¹⁰⁵⁹

The new investment protection provision was based on the language that appeared in the Uruguay treaty then under negotiation. It included a requirement that property receive "equitable treatment" and prohibited unreasonable or discriminatory measures that would impair property rights.

The same date, the United States proposed new language to address the problem of exchange controls. The language was broadly similar to that which had

¹⁰⁵⁶ Airgram dated December 23, 1948, from the Secretary of State to the U.S. embassy in London, NARA, Record Group 59, State Department File No. 711.41D2/12-2348.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ Airgram dated January 20, 1949, from the U.S. legation in Dublin to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.41D2/1-2049.

¹⁰⁵⁹ Airgram dated March 22, 1949, from the Secretary of State to the U.S. legation in Dublin, NARA, Record Group 59, Department of State File No. 711.41D2/1-2049.

been proposed in the negotiations with Colombia and Uruguay, but was structured differently to take account of Ireland's circumstances as a member of the Sterling bloc. It allowed either party to depart from the obligation of national and MFN treatment during times of foreign exchange stringency, while also requiring that any exchange controls imposed make "reasonable provision" for withdrawal of expropriation compensation, of earnings and of capital and that the party imposing them provide an opportunity for consultations with the other party. The Department explained that the term "reasonable" took account of "all points of view including [the] realities [of the] Irish exchange situation, and allow[ed] priorities for such things as needful imports and maintaining financial solvency."¹⁰⁶⁰ The Irish government nevertheless sought language in the minutes of interpretation that would clarify the meaning of "reasonable provision"¹⁰⁶¹ Ultimately, the parties agreed upon language that specified that "reasonable provision" allowed either party during periods of exchange stringency to apply exchange restrictions necessary to assure the availability of foreign exchange for purchases "essential to the health and welfare of its people, and also allowed consideration to be given to special needs for other exchange transactions,"¹⁰⁶² essentially the language that had been used in the texts of the treaties with Colombia and Uruguay.

¹⁰⁶⁰ Telegram dated October 18, 1949, from the Secretary of State to the U.S. legation in Dublin, NARA, Record Group 59, Department of State File No. 711.41D2/10-1849.

¹⁰⁶¹ Telegram dated December 9, 1949, from the U.S. legation in Dublin to the Secretary of State, NARA, Record Group 59, Department of State File No. 711.41D2/12-949.

¹⁰⁶² Minutes of Interpretation, Ad Article VII, paragraph 5.

The bargain proposed by the United States proved acceptable to Ireland. The United States agreed to an exception to national treatment for Ireland's existing legislation and¹⁰⁶³ the two countries signed the treaty on January 21, 1950.¹⁰⁶⁴

¹⁰⁶³ Article VI(4).

¹⁰⁶⁴ Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland, signed January 21, 1950, 1 UST 785, TIAS 2155, 206 UNTS 269.

Chapter Six

Negotiating the First Investment Treaties

The State Department intended, following World War II, to negotiate a network of FCN treaties that would spread principles of American liberal legality everywhere. By the end of 1946, the United States had signed an FCN treaty with China, was in the final stages of negotiations with Lebanon, and was preparing to negotiate with 15 other countries: Afghanistan, Australia, Austria, Brazil, Canada, Chile, Cuba, Egypt, France, Greece, Iran, Italy, the Philippines, the United Kingdom, and the U.S.S.R.¹⁰⁶⁵ Thus, by 1946, the modern FCN treaty program was active in every region of the world, except Sub-Saharan Africa.

Progress was slow, however. The State Department did not conclude a single FCN treaty in 1947, a year dominated by the ITO charter negotiations. During the first several months of 1948, with the ITO charter negotiations completed, the State Department returned to the FCN treaty program with renewed vigor.¹⁰⁶⁶ It signed a treaty with Italy in February and began negotiations with Australia, France and Ireland. It sent draft treaties to another seven countries: Belgium, Iran, India, Netherlands, New Zealand, Pakistan and South Africa, the first country in Sub-Saharan Africa to begin FCN treaty discussions with the United States. The Department also began to plan negotiations with Colombia and Uruguay.

¹⁰⁶⁵ *Current Economic Developments*, January 20, 1947, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁶⁶ *Current Economic Developments*, August 23, 1948, NARA, Record Group 59 Department of State Lot Files.

Despite the renewed vigor, however, progress remained slow.¹⁰⁶⁷ By May 1949, the Department had sent draft treaties to three more countries, Costa Rica, Ecuador and Luxembourg, but was in negotiations with only one, Uruguay. Four years after the end of the war in Europe, the United States still had concluded only two FCN treaties, with China and with Italy.

By March 1950, the State Department had sent draft treaties to eight more countries, Denmark, Israel, Paraguay, Peru, Portugal, Spain, Sweden and Syria, and was preparing to send a treaty to a ninth country, Argentina. These additional discussions meant that the United States had inaugurated inconclusive treaty discussions with 31 countries in Europe, Asia, Africa and South America.¹⁰⁶⁸ By this time, the State Department had held discussions with Afghanistan, Argentina, Australia, Belgium, Brazil, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Egypt, France, Greece, India, Iran, Israel, Lebanon, Luxembourg, Netherlands, New Zealand, Pakistan, Paraguay, Peru, the Philippines, Portugal, Spain, Sweden, Syria, South Africa and the United Kingdom. As of March 1950, however, treaties still had been signed only with China and Italy and active negotiations were taking place with only one of the 31 countries, Colombia.

¹⁰⁶⁷ *Current Economic Developments*, May 2, 1949, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁶⁸ Memorandum headed "Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation," dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

U.S. Bargaining Power

As early as 1947, State Department officials were concerned that the United States lacked sufficient bargaining power to conclude a large number of FCN treaties. For example, Woodbury Willoughby, the associate chief of the Commercial Policy Division, observed in March of that year, “The extent to which an FCN treaty is a vehicle through which significant modifications of established policy usually can be effected is quite limited. Our bargaining power is principally good will, as the United States does not actually ‘give’ very much in one of these documents. In the main, these treaties serve to prevent a future worsening of a present status quo.”¹⁰⁶⁹

By mid 1949, years of experience had demonstrated that the Department’s bargaining power was indeed quite limited.¹⁰⁷⁰ First, because the United States under its own laws treated foreign investors very well, other countries recognized that the treaty would grant them little protection beyond that which they already enjoyed under U.S. law.¹⁰⁷¹ For example, in discussing the proposed FCN treaty with the Soviet Union, officials in the Division of Commercial Policy had noted that one important benefit that such a treaty could provide for U.S. corporations was that it would grant

¹⁰⁶⁹ Memorandum dated March 17, 1949, from Mr. Willoughby to Mr. Tate, NARA, Record Group 59, Department of State File No. 611.41D2/3-1749.

¹⁰⁷⁰ *Current Economic Developments*, May 2, 1949, page 2, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁷¹ *Ibid.*; Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 8.

them the right to sue in Soviet courts, although Soviet corporations already possessed that right with respect to U.S. courts.¹⁰⁷²

Second, in any event, most other countries were not in a position to export capital to the United States and thus had little need to gain additional access to, or protection in, the U.S. economy.¹⁰⁷³ John King Fairbank observed in 1948 that, when the United States and China signed their FCN treaty, “its egalitarian provisions were viewed by cynics as an open door for American commercial exploitation of China, with no bar to similar exploitation of the United States – providing China had the wherewithal.”¹⁰⁷⁴

Particularly after the reconceptualization of the FCN treaties as investment treaties in 1949, the United States had hoped that other countries would be induced to sign FCN treaties by the expectation of attracting U.S. investment.¹⁰⁷⁵ Those hopes were not to be realized, however.

In the years following the war, many countries were fearful of U.S. economic domination and wanted to retain the discretion to restrict the entry of U.S. capital.¹⁰⁷⁶

¹⁰⁷² Memorandum headed, “The Third Meeting to Consider a Tentative Draft Treaty of Friendship, Commerce and Navigation between the United States and the U.S.S.R. Held May 24, 1945,” NARA, Record Group 59, Department of State File No.611.6131/Undated.

¹⁰⁷³ Memorandum headed, “Entry of foreign investors in the United States under treaties of friendship, commerce and navigation,” dated November 23, 1949, NARA, Record Group 59, Department of State File No. 611.004/5-350.

¹⁰⁷⁴ John King Fairbank, *The United States and China* (Cambridge: Harvard University Press, 1948), page 328.

¹⁰⁷⁵ *Current Economic Developments*, May 2, 1949, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁷⁶ *Ibid.*

Thus, the investment related provisions of the FCN treaties often impeded, rather than promoted, the successful negotiation of an FCN treaty. By the early 1950s, the State Department had found that the investment provisions were the most difficult provisions in the FCN treaties on which to reach agreement with other countries.¹⁰⁷⁷

Particularly troublesome was the provision on national treatment.¹⁰⁷⁸ Many countries refused to grant U.S. investors the right to establish investments in their territory on the same basis as their own investors because of “fear of undue American influence in their economies.”¹⁰⁷⁹ The concern in particular was that U.S. investors either would colonize important sectors of the economy or would drain the economy of foreign exchange through large withdrawals of earnings and capital.¹⁰⁸⁰

In some cases, potential treaty partners feared not U.S. investors, but third country investors.¹⁰⁸¹ Granting national treatment to U.S. investors would require U.S. treaty partners, in accordance with the MFN treatment provisions in their treaties with other countries, to grant national treatment to investors of those other

¹⁰⁷⁷ Robert Renbert Wilson, *United States Commercial Treaties and International Law* (New Orleans: The Hauser Press, 1960), page 21; Herman Walker, Jr., “Treaties for the Advancement and Protection of Foreign Investment: Present United States Practice,” *American Journal of Comparative Law*, Vol. V, (1956), 229-247.

¹⁰⁷⁸ Memorandum headed, “Status of Present Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

¹⁰⁷⁹ *Current Economic Developments*, May 2, 1949, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁸⁰ *Ibid.*

¹⁰⁸¹ Memorandum headed, “Status of Present Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

countries.¹⁰⁸² Thus, for example, the French feared Spanish and Italian penetration of their economies. The Filipinos feared the Chinese, the Irish feared the British, the Greeks feared the Italians, the Danes feared the Germans, and the Uruguayans feared the Argentines.¹⁰⁸³

The United States recognized that other countries had a legitimate right to refuse guarantees of entry of investment. As Woodbury Willoughby noted in his 1947 memorandum, “There is a tenable opinion to the effect that we have no more right to insist upon unlimited and unregulated entry of capital than the other country has to insist upon unlimited entry of persons”¹⁰⁸⁴

The provisions on expropriation and exchange controls also presented “a substantial degree of negotiating difficulty.”¹⁰⁸⁵ These difficulties were related to the concern about national treatment. U.S. investors, if entitled by the national treatment provision to invest in another country, could rely upon the currency transfer rights granted by the treaty to drain the other country of foreign exchange reserves. At the same time, provisions requiring compensation for expropriation would prevent a country from regaining local control over assets acquired by U.S. investors, unless that

¹⁰⁸² *Current Economic Developments*, May 2, 1949, NARA, Record Group 59, Department of State Lot Files.

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ Memorandum by Woodbury Willoughby, dated March 17, 1949, NARA, Record Group 59, Department of State File No. 611.41D2/3- 1749.

¹⁰⁸⁵ Memorandum headed, “Status of Present Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

country paid compensation to the foreign investor. Payment of compensation, once again, could drain the country of needed foreign exchange.

Despite the lack of progress, State Department officials steadfastly refused to apply pressure to other countries to conclude an FCN treaty. In a memorandum to Assistant Secretary Willard Thorp, written on April 24, 1951, John M. Leddy, the deputy director of the Office of International Trade Policy and a member of the Commercial Policy Division from 1945 to 1949, who would later serve as assistant secretary of state and assistant secretary of the treasury, argued that “the promotion of the treaty program should not be ‘aggressive’ in the sense of indiscriminate pressure upon foreign governments to accept or consider our proposals. Such a method promotes antagonistic reactions abroad which are difficult to overcome.”¹⁰⁸⁶

Leddy believed that even striking rhetorical poses for U.S. domestic audiences could impede negotiations. He argued that “[a]ggressive propaganda in support of the treaty program either abroad or at home is not desirable. The sort of statements of purposes and aims that would appeal to practical businessmen would sound the wrong note abroad where nationalistic and communistic elements misrepresent our treaties as instruments of imperialism.”¹⁰⁸⁷

Thus, Leddy contended, the best approach was to await or to create opportunities when other countries would be amenable to accepting FCN treaty

¹⁰⁸⁶ Memorandum dated April 24, 1951, from John M. Leddy to Willard Thorp, headed “Means for the more effective promotion of the F.C.N. Treaty Program,” NARA, Record Group 59, Department of State File No. 611.004/4-2451.

¹⁰⁸⁷ *Ibid.*

obligations rather than attempting to force them to accept those obligations. “Our experience,” he explained, “indicates that the most promising policy is to pursue a selective program, always prepared to exploit favorable opportunities to the utmost Perhaps our objectives could best be promoted if we should think of the treaty program not as a campaign for pressing treaties upon all countries, but as a program for seeking out or creating and exploiting favorable opportunities for the negotiation of treaties.”¹⁰⁸⁸

Like Woodbury Willoughby four years before, Leddy believed that the United States should take advantage of any goodwill that it enjoyed with other countries to create conditions favorable to negotiations. He observed that “[i]t would be desirable to study the possibility of a more systematic exploitation for treaty purposes of the situations that result from the action taken by the United States that is advantageous to foreign countries, *e.g.*, the making of loans, grants, technical aid arrangements, etc.”¹⁰⁸⁹ Leddy made clear that he was not arguing that the financial assistance be used in a coercive way, adding, “It is not suggested, of course, that an effort be made to purchase treaties by means of loans, etc. However, the making of such concessions to foreign governments creates psychological or moral situations favorable for the initiation of treaty negotiations or their prompt conclusion.”¹⁰⁹⁰

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ *Ibid.*

Although the State Department regarded FCN treaties as a means of promoting foreign investment, Leddy did not believe that the Department should stress that claim in its negotiations. “Overemphasis upon treaties as sure means for stimulating foreign investment,” he contended, “is not good salesmanship.”¹⁰⁹¹ Part of the problem was the impossibility of proving that the conclusion of an FCN treaty actually would promote investment flows. “It is not feasible,” he said, “to attempt to prepare statistical or other factual data to demonstrate the effectiveness of an FCN treaty in encouraging investment. Two of the three new treaties that have been ratified since World War II are with countries poor in natural resources, and for that and other reasons not particularly attractive to foreign investors. The treaty with China is not attractive for obvious reasons.”¹⁰⁹²

Rather, an attempt to correlate investment with the “legal and institutional climates favorable to investment, such as the treaties are intended to promote, would probably be a more practical exercise.”¹⁰⁹³ As Leddy’s comment suggests an FCN treaty was principally an instrument to promote the rule of law.

Negotiating an FCN Treaty with Greece

By 1950, the Department’s years of persistence began to yield tangible results. A series of successful negotiations that began in 1950 gave the Department the

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*

opportunity to incorporate its new investment related provisions into additional treaties and to refine the language of the provisions in the process.

These negotiations also illustrate U.S. foreign investment policy in action. They show the State Department promoting core principles of liberal legality, while acknowledging the need of other countries to regulate their economies. These treaties demonstrate as well the extent to which, by 1950, the investment related provisions had become of primary importance in the negotiations.

As it happened, those investment related provisions that addressed core rule of law principles, such as reasonableness, nondiscrimination, security and due process, rarely were at issue during the negotiations. Other countries readily accepted U.S. notions of legality as reflected in the FCN treaties. To the extent that opposition arose to rule of law principles in the treaties, that opposition came from the U.S. business community, which believed that the treaty provisions imposed insufficient restraints on foreign governments.

The provisions that were controversial in the negotiations with other countries were those related to access – the movement of capital across borders. In particular, the two great concerns that arose repeatedly, even in the successful negotiations, were fears related to the national treatment provision, which granted entry for U.S. capital, and fears related to the transfers provision, which allowed the withdrawal of U.S. capital and earnings.

The first of these 1950 negotiations to produce a treaty was that with Greece. The United States provided a copy of a proposed FCN treaty to the Greek government

in early 1950.¹⁰⁹⁴ That draft reflected the FCN treaty as an investment treaty in its mature form, although its investment provisions differed little in substance from those in the FCN treaty with Ireland.

The most visible change was that the Department had placed the guarantee of equitable treatment in the very first article, which required each party “at all times” to accord “equitable treatment” to the persons, property, enterprises and other interests of nationals and companies of the other party. The placement of the guarantee at the beginning of the treaty indicated that the phrase “equitable treatment” referred to the general climate that the parties intended the treaty to create for investment.

The most important substantive change appeared in the provision on currency transfers. The FCN treaty with Ireland had permitted exchange controls at any time and for any reason as long as certain provisions for withdrawals were allowed. The draft provided to the Greek government permitted exchange controls only “to the extent necessary to prevent [a party’s] monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves.” The proposed treaty with Greece, in other words, narrowed the scope of the exception for balance of payments difficulties.

Greece initially assured the United States that the draft presented “no serious questions.”¹⁰⁹⁵ Nevertheless, in May, the Greek government transmitted to the U.S.

¹⁰⁹⁴ Airgram dated February 1, 1950, from the Secretary of State to the U.S. embassy in Greece, NARA, Record Group 59, Department of State File No. 611.814/2-150.

¹⁰⁹⁵ *Ibid.*

embassy a counterproposal.¹⁰⁹⁶ The counterproposal indicated that Greece objected to extensive commitments regarding national treatment, to the requirement that compensation be paid for expropriation, and to the obligation to allow the withdrawal of capital and earnings. The State Department feared that the disagreements on these issues of “basic treaty philosophy” might be so great that the negotiation of a treaty would not be feasible.

The Greek negotiators explained that Greece was reluctant to guarantee national treatment not because it feared U.S. investment, but because it had MFN commitments to other countries in the region, notably Italy, and that these commitments would have required that any national treatment obligation given to U.S. investors be extended to investors of those countries,¹⁰⁹⁷ which Greece was reluctant to do.¹⁰⁹⁸ Greece thus sought to base national and MFN treatment on reciprocity. The State Department was willing to accept a reciprocal national treatment obligation, but wanted MFN treatment to remain unconditional.¹⁰⁹⁹

By July, the Greek government still had not offered a counterproposal with respect to the withdrawal of funds. Greece was concerned that the United Kingdom might demand a similar right of withdrawal for British bondholders and it simply did

¹⁰⁹⁶ Airgram dated May 11, 1950, from the U.S. embassy in Greece to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.814/5-1150.

¹⁰⁹⁷ Airgram dated June 16, 1950, from the Department of State to the U.S. embassy in Greece, NARA, Record Group 59, Department of State File No. 611.814/6-250.

¹⁰⁹⁸ Memorandum headed “Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation,” dated March 10, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-2250.

¹⁰⁹⁹ Memorandum headed “Memorandum on the Provisions of the Greek Counterdraft,” dated July 31, 1950, NARA, Record Group 59, Department of State File No. 611.814/6-250.

not have sufficient foreign exchange reserves to allow British bondholders to withdraw their capital and earnings.¹¹⁰⁰ The Greek government proposed addressing this problem by excluding from coverage of the provision those investments that were made prior to October 16, 1944, the date of the liberation of Greece. This would allow U.S. postwar investments to be covered, while excluding the British bondholders who had invested prior to the war. The United States, however, resisted inclusion of an “arbitrary discrimination” with respect to the coverage of investment.¹¹⁰¹ Although the arbitrary discrimination would have favored U.S. investors over British investors, it was unacceptable to the United States because it was inconsistent with the nondiscrimination principle at the core of the treaty’s investment provisions.

The Greek government also was concerned that the escape clause in the transfers provision for “goods and services essential to the health and welfare of the people” was not broad enough.¹¹⁰² It feared that the clause would be read to apply only to foreign exchange needed to prevent disease or hunger, not to keep factories operating and people employed.¹¹⁰³ Greece was prepared to give priority to the needs of U.S. investors, but not at the expense of the stability of the economy. It wanted an exception for exchange controls necessary for economic stability.

¹¹⁰⁰ Telegram dated July 11, 1950, from the U.S. embassy in Athens to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.814/7-1150.

¹¹⁰¹ Airgram dated September 22, 1950, from the Secretary of State to the U.S. embassy in Athens, NARA, Record Group 59, Department of State File No. 611.814/8-2450.

¹¹⁰² Telegram dated July 11, 1950, from the U.S. embassy in Athens to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.814/7-1150.

¹¹⁰³ Memorandum of Conversation headed “Exchange control provisions of treaty of friendship, commerce and navigation now under negotiation at Athens,” dated November 17, 1950, NARA, Record Group 59, Department of State File No. 611.814/11-1750.

The disagreement on this point was not one of principle, but of semantics. The U.S. negotiators acknowledged that Greece needed to ensure that it had adequate reserves to promote full employment, but believed that the phrase “health and welfare” was broad enough to accommodate that need. The Greeks replied that the term “welfare” when translated into Greek meant only “succor to the needy” and did not have the breadth that it did in English.¹¹⁰⁴ The U.S. negotiators feared, however, that “economic stability” was a vague term susceptible of a broad interpretation that would undermine the treaty commitment.

The Greek government candidly admitted that it would not have sufficient foreign exchange reserves to allow the withdrawal of large blocks of capital for many years. Again, the U.S. negotiators were sympathetic. They explained that the treaty language required only “feasible” withdrawals of capital and that this would require such withdrawals only when Greece’s external financial position reasonably permitted.¹¹⁰⁵ The Greek negotiators replied that other countries would demand the same treatment that U.S. investors received and that other countries might not interpret the treaty language in the same way that the Americans did.

Ultimately, the two parties resolved their semantic disagreement. The U.S. negotiators agreed to include a reference to economic stability in the escape clause and, with that concession, Greece accepted the remaining treaty commitments. The two countries signed the treaty on August 3, 1951.

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ *Ibid.*

Negotiating an FCN Treaty with Denmark

The United States and Denmark in the 1950s already had an FCN treaty in force, although the treaty was old, having been negotiated by Secretary of State Henry Clay in 1826.¹¹⁰⁶ Denmark initiated the discussions regarding a new treaty in April 1949, when the economic counselor at the Danish embassy in Washington, Gunnar Seidenfaden, inquired about the FCN treaty negotiations with Uruguay. In response to that inquiry, the Department of State provided Seidenfaden with a copy of the substantive articles of a proposed treaty.¹¹⁰⁷

The Danish government studied the proposed treaty for several months. In November 1949, Seidenfaden informed the State Department that the Danish government was prepared to commence the negotiation of a new FCN treaty to replace the 1826 treaty.¹¹⁰⁸ At the same time, however, Seidenfaden indicated that certain provisions of the treaty might require adjustment, including provisions guaranteeing national treatment for accountants, granting foreigners the right to acquire real property, and limiting the imposition of exchange controls. By December, the Department of State had prepared a proposed treaty draft, which included the latest “improvements” and resembled closely the draft provided to Greece the previous

¹¹⁰⁶ Convention of Friendship, Commerce and Navigation, United States-Denmark, 1826, 8 Stat. 340, TS 65, 7 Bevans 1.

¹¹⁰⁷ Airgram dated April 5, 1948, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 711.5992/4-549.

¹¹⁰⁸ Memorandum of Conversation dated November 3, 1949, NARA, Record Group 59, Department of State File No. 711.5992/11-349.

August.¹¹⁰⁹ The draft was transmitted to the embassy at the end of the month¹¹¹⁰ and delivered to the Danish government in January.¹¹¹¹

The transfers provision quickly emerged as the chief issue. The Danish government wished to control the import of capital and sought to ensure that the transfers provision would not preclude this.¹¹¹² In particular, the Danish government wished to ensure that exchange controls authorized by the IMF would be exempt from treaty restrictions.

The State Department objected to the Danish proposal. As the Department explained, the purpose of the transfers provision was “to provide assurances that investors will receive reasonable consideration in the allocation of exchange during periods of exchange stringency when exchange restrictions are in force.”¹¹¹³ When it authorized a member to impose exchange controls, the IMF did not ordinarily set priorities for that member’s allocation of available exchange. Thus, for example, a member acting under IMF-approved exchange restrictions could allow the use of foreign exchange to import luxuries, but not to withdraw earnings. The treaty

¹¹⁰⁹ Memorandum dated December 21, 1949, from Winthrop Brown to Willard Thorp, NARA, Record Group 59, Department of State File No. 711.5992/12-2149.

¹¹¹⁰ Letter dated December 30, 1949, from the Acting Assistant Secretary for Economic Affairs to the U.S. Ambassador to Denmark, NARA, Record Group 59, Department of State File No. 711.5992/12-3049.

¹¹¹¹ Despatch dated January 25, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/1-2550.

¹¹¹² Airgram dated May 3, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/5-350.

¹¹¹³ Airgram dated June 13, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594-5350.

language was intended to ensure that reasonable provision was made for the withdrawal of earnings. In the event that the IMF authorized specific restrictions, such as on earnings, then the IMF authorization would prevail. Accordingly, the treaty did not weaken the IMF, but did impose restrictions in certain cases where the IMF left members with discretion.¹¹¹⁴

The Danish government also wanted to retain other protections against American dominance of the Danish economy. As it had done in agreeing to the reservation for economic stability with Greece, the United States sought to accommodate Danish concerns while preserving the basic treaty objective of gaining access to the Danish economy.

First, Denmark wished to reserve the right to require that managers and directors of companies incorporated in Denmark have resided in Denmark for two years.¹¹¹⁵ The State Department responded that the “essential treaty objective” was that U.S. investors have the power to exercise “final control” over Danish companies that they owned.¹¹¹⁶ After examination of the Danish law, the State Department concluded that the law did not “appear . . . to frustrate the facile realization of genuine

¹¹¹⁴ *Ibid.*

¹¹¹⁵ Airgram dated May 3, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/5-350.

¹¹¹⁶ Airgram dated June 1, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350; Airgram dated May 27, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350.

control by majority American stockholding interests.”¹¹¹⁷ The Department noted that several U.S. states had citizenship requirements with respect to corporate directors.

A Danish law requiring that incorporators be Danish citizens or residents similarly did not appear to violate the treaty. The treaty did not require national treatment with respect to the right to organize corporations, but only a “practical and efficacious right,” which would be present as long as it was “conveniently open” for U.S. investors to utilize the services of Danish citizens or residents to establish corporations.¹¹¹⁸ Again, some U.S. states had similar laws. The Department noted with satisfaction that Danish law did not require that a majority of the stockholders have Danish nationality, which could have raised “a serious treaty problem.”¹¹¹⁹ The United States agreed to include in the minutes of interpretation language that authorized each party to adopt “special requirements with respect to the residence or nationality of the founders, members of the boards of directors, and managing directors of companies constituted under its laws.”¹¹²⁰

Second, the Danish government wished to reserve the right to prohibit foreign ownership of real property.¹¹²¹ Such a reservation was necessary because the Danish Parliament was considering legislation to that effect in order to prohibit Germans from

¹¹¹⁷ Airgram dated August 9, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.954/7-1250.

¹¹¹⁸ *Ibid.*

¹¹¹⁹ *Ibid.*

¹¹²⁰ Minutes of Interpretation, *ad* Article VIII, paragraph 1.

¹¹²¹ Airgram dated May 3, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/5-350.

owning land on the Danish side of the border between Denmark and Germany. Denmark suggested that the treaty grant only MFN treatment with respect to this right. The Department could not grant MFN treatment with regard to ownership of land because it had granted national treatment to Argentina in an 1853 FCN treaty.¹¹²² Thus, MFN treatment would mean national treatment, but without reciprocity. Many state laws restricted alien land ownership and the Department was unwilling to use the treaty to override those laws in the absence of reciprocity. The Department suggested that Denmark's concern regarding German ownership of land near the border could be addressed through an exception for national defense. The Danish government, however, was reluctant to adopt a rationale for the legislation linked in an obvious way to its relations with Germany because such an approach would have invited German retaliation. Ultimately, the United States agreed to language that essentially subordinated the right to own real property to local law.

Third, Denmark wanted to preserve certain privileges for state owned enterprises.¹¹²³ The State Department noted that the treaty was intended to ensure that private businesses were not ruined by competition with state subsidized enterprises. If the government wished to exclude private businesses from certain sectors of the economy, the Department explained, "the appropriate measure is expropriation with

¹¹²² Airgram dated June 1, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350; Airgram dated May 27, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350.

¹¹²³ Airgram dated May 3, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/5-350.

just compensation rather than the harassment of unfair government competition.”¹¹²⁴

If Denmark already had state owned monopolies, then they were by definition not in competition with private enterprise and no problem would arise. The Department also noted that the relevant treaty provision was limited only to commercial, manufacturing and processing activities and did not apply in sectors such as banking, mining, communications and transportation.

The greatest obstacles to the conclusion of the treaty involved Danish reluctance to grant national treatment with respect to the establishment of investment and to agree to the provision on transfers.¹¹²⁵ The national treatment provision was inconsistent with a set of longstanding Danish laws discriminating against aliens with respect to various business activities. The Danish concern regarding the transfers provision was that U.S. investors would withdraw funds that would deplete Danish foreign exchange reserves.

The Department hoped to resolve these issues “without upsetting long-established Danish legislative policy” or “damaging the integrity of the Department’s treaty objectives.”¹¹²⁶ The Department recognized that it simply could not ask Denmark to repeal well established legislation that had never hurt U.S. businesses in

¹¹²⁴ Airgram dated June 1, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350; Airgram dated May 27, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/5-350.

¹¹²⁵ Airgram dated July 12, 1950, from the U.S. embassy in Copenhagen to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.594/7-1250.

¹¹²⁶ Airgram dated August 9, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.954/7-1250.

practice, even if its literal language seemed inconsistent with the treaty.¹¹²⁷ Reassured that the United States would not make an issue of the existing laws, Denmark agreed to the national treatment obligation.

The Department believed that the treaty language with respect to withdrawals adequately protected the Danes “against the danger of dollar drains beyond what they can afford at any given point in time.”¹¹²⁸ The Department met the Danish concern about the transfers provision by completely redrafting it in a way that maintained its substance but gave greater prominence to each party’s right to impose exchange controls to assure the availability of foreign exchange for purchases essential to the health and welfare of the people.¹¹²⁹ With this final change, the two countries signed the treaty on October 1, 1951.

Negotiations with Italy -- Again

By January 1950, nearly two years after conclusion of the FCN treaty between the United States and Italy, the Italian government was disappointed by the lack of U.S. investment in Italy. After consulting with the international business community, Italian officials concluded that the major impediment was the Italian government’s

¹¹²⁷ Airgram dated January 30, 1951, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.954/1-251.

¹¹²⁸ Airgram dated August 9, 1950, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.954/7-1250.

¹¹²⁹ Airgram dated January 27, 1951, from the Secretary of State to the U.S. embassy in Copenhagen, NARA, Record Group 59, Department of State File No. 611.594/1-251.

restrictions on the withdrawal of dollars from Italy.¹¹³⁰ Accordingly, the Italian embassy proposed that the United States and Italy conclude a new agreement supplementing the 1948 FCN treaty that would include investment provisions similar to those that appeared in the FCN treaty between the United States and Uruguay.

In March, the State Department provided the embassy with a draft agreement that was based on the language of the FCN treaties with Uruguay, Ireland and Colombia.¹¹³¹ The new agreement prohibited unreasonable and discriminatory measures and included a right to hire accountants and technical experts and a guarantee of free transfer of both earnings and capital, subject to an exception for periods of exchange stringency. The Italian government had invited the new agreement, the negotiations do not appear to have presented any great difficulties, and the two countries signed the agreement in September 1951.

Negotiating an FCN Treaty with Israel

FCN treaty negotiations with Israel began in April 1950, when the Israeli ambassador to the United States delivered a note to the State Department expressing an interest in concluding such a treaty.¹¹³² The ambassador explained that Israel wished to conclude the treaty in order to encourage American investment in Israel.¹¹³³

¹¹³⁰ Memorandum of Conversation headed "Liberalization of investment provisions of US-Italian FCN treaty," dated January 27, 1950, NARA, Record Group 59, Department of State File No. 611.654/1-2750.

¹¹³¹ Memorandum of Conversation headed "Negotiations for an Investment Agreement between the U.S. and Italy," dated March 10, 1950, NARA, Record Group 59. Department of State File No. 611.654/3-1050.

Assistant Secretary of State George McGhee told the ambassador that the FCN treaty contained the kinds of provisions that American businesses considered necessary to warrant investing abroad. While there was “room for considerable revision and adjustment” in the treaty language, the treaty contained “a hard core of principle” that the State Department regarded as indispensable.¹¹³⁴

Informal discussions began almost immediately. On April 28, the State Department sent copies of its standard model treaty to the Israeli embassy.¹¹³⁵ The U.S. model proposed to Israel included a reformulated national treatment provision.¹¹³⁶ In the past, the treaty required national treatment with respect to certain activities. The list of covered activities, however, had led to interpretive difficulties about the exact scope of the terms.¹¹³⁷ Accordingly, the Department decided instead to formulate a general rule requiring national treatment in all circumstances, followed by exceptions under which the host country could deny national treatment in certain sectors of the economy.¹¹³⁸ The effect was to reverse the presumption underlying the

¹¹³² Despatch dated May 5, 1950, from the Secretary of State to the U.S. mission in Tel Aviv, NARA, Record Group 59, Department of State File No. 611.84A4/4-2450.

¹¹³³ Memorandum of Conversation headed “Israeli Readiness to Negotiate a Treaty of Friendship, Commerce and Navigation,” dated April 25, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/4-2550.

¹¹³⁴ *Ibid.*

¹¹³⁵ Memorandum of Conversation headed, “Negotiation of Treaty of Friendship, Commerce and Navigation with Israel,” dated May 3, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-350.

¹¹³⁶ Airgram dated January 7, 1952, from the Secretary of State to the U.S. political advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/12-1751.

¹¹³⁷ *Ibid.*

provision. Rather than requiring national treatment only where the treaty language so specified, the treaty would require national treatment unless language to the contrary appeared.

The two countries held a first round of informal discussions on May 3.¹¹³⁹ Three more sessions were held in May, at which point the two countries suspended further discussions while the Israeli embassy awaited instructions from Tel Aviv.¹¹⁴⁰

By October, Israel was ready to begin formal negotiations.¹¹⁴¹ The Israelis were hoping to attract U.S. investment¹¹⁴² and wished to conclude a treaty as expeditiously as possible, by the end of the year if possible.¹¹⁴³ The United States was concerned about the political implications of signing its first FCN treaty in the Near East with Israel¹¹⁴⁴ and, although it did not so inform the Israeli delegation, planned to prolong the negotiations at least until the end of the year in order to provide an

¹¹³⁸ *Ibid.* The new language appeared at Article VII.

¹¹³⁹ Memorandum of Conversation headed, "Negotiation of Treaty of Friendship, Commerce and Navigation with Israel," dated May 3, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-350.

¹¹⁴⁰ Memorandum headed, "Records of Preliminary Discussions of Treaty of Friendship, Commerce and Navigation with Israel," dated November 20, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-1050; Memorandum of Conversation headed, "FCN Treaty Negotiations with Israel," dated October 17, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/10-1750.

¹¹⁴¹ Memorandum of Conversation headed, "FCN Treaty Negotiations with Israel," dated October 17, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/10-1750.

¹¹⁴² Memorandum of Conversation headed, "FCN Negotiations with Israel – 4th Meeting," dated May 11, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-1050.

¹¹⁴³ Memorandum of Conversation headed, "Israeli FCN Negotiations," dated October 20, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/10-2050.

¹¹⁴⁴ Memorandum of Conversation headed, "FCN Negotiations with Israel – 4th Meeting," dated May 11, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-1050.

opportunity to complete the negotiation of an FCN treaty with Lebanon.¹¹⁴⁵ The negotiations with Lebanon, however, eventually would end in failure.

From the first discussions, the Israeli negotiators expressed concern about the provision on transfers, fearing that Israeli exchange controls might be inconsistent with the treaty. They noted that Israel already had made a special effort to address the needs of investors¹¹⁴⁶ and was allowing withdrawals by investors at the expense of other needs, including foodstuffs.¹¹⁴⁷ The Israeli government was concerned that a guarantee of free movement of capital would be disastrous for a country with limited foreign exchange reserves.

The treaty guaranteed to investors the right to make feasible withdrawals of capital. U.S. negotiators explained in response to Israeli concerns that the United States considered withdrawal of capital to be “feasible only if sufficient monetary reserves were available.”¹¹⁴⁸ For this reason, the treaty incorporated reservations “designed to afford adequate protection to a country’s exchange position.”¹¹⁴⁹

¹¹⁴⁵ Memorandum of Conversation headed, “FCN Treaty Negotiations with Israel,” dated October 17, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/10-1750.

¹¹⁴⁶ Memorandum of Conversation headed, “Treaty of Friendship, Commerce and Navigation with Israel – Third Preliminary Discussion,” dated May 10, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-1050.

¹¹⁴⁷ Memorandum of Conversation headed, “Israeli FCN Negotiations – 2nd Meeting,” dated May 8, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/5-850.

¹¹⁴⁸ Memorandum of Conversation headed, “Negotiation of Treaty of Friendship, Commerce and Navigation with Israel,” dated December 13, 1950, NARA, Record Group 59, Department of State File No. 611.84A4/12-1350.

¹¹⁴⁹ *Ibid.*

Ultimately, Israel concluded that the treaty left it sufficient discretion and the two countries signed the treaty on August 23, 1951.

Negotiating an FCN Treaty with Ethiopia

The State Department had begun to consider the negotiation of an FCN treaty with Ethiopia as early as 1946.¹¹⁵⁰ The U.S. business community in Ethiopia was small, however, and so the State Department was not subject to the same pressure to conclude a treaty that existed in the case of many other countries.

Ethiopia, along with Iran and Afghanistan, was one of several “relatively small and undeveloped countries” with which the Department wished to conclude FCN treaties, but that presented a special problem.¹¹⁵¹ In the Department’s view, these countries were not “sufficiently advanced in governmental and economic organization to be ready” to conclude a standard FCN treaty.¹¹⁵² Thus, the Department commenced the preparation of a “short draft” for use with these less developed countries.¹¹⁵³

The Department took the first steps toward negotiation of a treaty with Ethiopia in April 1950, when Assistant Secretary George McGhee traveled to Addis Ababa. During the visit, McGhee “expressed to the Emperor the hope that the climate

¹¹⁵⁰ Letter dated June 21, 1946, from Felix Cole to the Secretary of State, NARA, Record Group 59, Office of the Legal Adviser Lot Files.

¹¹⁵¹ Letter dated May 6, 1947, from Assistant Secretary of State Willard Thorp to Attorney General Tom Clark, NARA, Record Group 59, Department of State File No. 711.002/5-647.

¹¹⁵² *Current Economic Developments*, October 23, 1950, NARA, Record Group 59, Department of State Lot Files.

¹¹⁵³ Letter dated May 6, 1947, from Assistant Secretary of State Willard Thorp to Attorney General Tom Clark, NARA, Record Group 59, Department of State File No. 711.002/5-647.

for foreign investment in Ethiopia would continue to be favorable and suggested that it might be desirable, in the interest of promoting Ethiopia's economic development and of furthering economic intercourse between the two countries, to consider the negotiation of a modern treaty of friendship and commerce."¹¹⁵⁴

Even as McGhee was proposing a treaty, the State Department still was mulling the question of what should be in the short draft. In a letter dated April 19, 1950, the Department asked the embassy in Addis Ababa "what a new treaty between the United States and Ethiopia might suitably provide."¹¹⁵⁵ The Department "suppose[d] that [the] standard draft [treaty] might need considerable abridgment and revision to adapt it to Ethiopia's circumstances."¹¹⁵⁶ On June 9, the State Department cabled the embassy that it was "anxious [to] proceed [with the] treaty project," but had not received any embassy comments in response to its April 19 letter.¹¹⁵⁷

The embassy responded on June 15. The embassy reported that "the Legal Advisor to the Ministry of Foreign Affairs believes it would be advantageous, mutually, to conclude a modern treaty of friendship and commerce."

By summer, the State Department had developed the short draft that it needed. Through either abridging or removing provisions, the Department was able to reduce

¹¹⁵⁴ Letter dated April 19, 1950, from the Secretary of State to the Chief of Mission in Addis Ababa, NARA, Record Group 59, Department of State File No. 611.754/4-1950.

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ Telegram dated June 9, 1950, from the Secretary of State to the U.S. embassy in Addis Ababa, NARA, Record Group 59, Department of State File No. 611.754/6-950.

the draft to about half the length of the model then in use for negotiations with Ireland, Uruguay and most other countries.¹¹⁵⁸

The State Department regarded the abridged version of the standard treaty that it prepared for the negotiations with Ethiopia as appropriate for countries “not very far advanced in their administrative and economic development.”¹¹⁵⁹ To distinguish it from the standard FCN treaty, it was titled a treaty of “Amity and Economic Relations.”

Notably absent from the treaty was the standard provision requiring that each party grant investors of the other party national treatment with respect to the right to engage in business activities. The omission of the national treatment obligation reflected the State Department’s recognition of Ethiopia’s less developed status and its belief that Ethiopia should retain the discretion to exclude unwanted foreign investment. In transmitting the proposed treaty to the U.S. embassy in Addis Ababa on July 18, 1950, the Department explained to U.S. ambassador George R. Merrell that “[t]he Department has endeavored to abridge, and to adapt to Ethiopian circumstances, within the framework of established treaty policy, the standard draft which the Department normally uses as the basis for negotiating with most countries (for example, Uruguay, Italy and Ireland) in prosecuting its program of modernizing and extending the network of treaties of this type to which the United States is

¹¹⁵⁸ *Current Economic Developments*, October 23, 1950, NARA, Record Group 59, Department of State Lot Files.

¹¹⁵⁹ Robert R. Wilson, “Access-to-Courts Provisions in United States Commercial Treaties,” *American Journal of International Law* 47 (1953), 20, 45.

party.”¹¹⁶⁰ Yet, the Department explained, “[i]n its purpose and scope . . . the enclosed draft remains essentially like the Department’s standard negotiating draft. The one significant variation in principle is that it refrains from asking commitments as to what sorts of American enterprises the Ethiopian Government is prepared to allow to become established within the country, but rather leaves Ethiopia free to determine which enterprises it desires.”¹¹⁶¹ The proposed treaty thus preserved the goal of promoting the rule of law, while abandoning much of the goal of securing access for U.S. investors.

As it happened, the U.S. focus on the rule of law would create the most difficult obstacle to negotiations, both because of the nature of the Ethiopian legal system, which the United States regarded as inadequate, and because of a history of European disparagement of that system. In the case of the treaty with Ethiopia, the rule of law principle that the State Department believed to be most at risk was that of due process. Of course, a failure of due process could place other principles at risk, given that their enforcement often would often depend upon the legal system of the host country.

Like China, Ethiopia as late as the 1940s was subject to a regime of extraterritoriality.¹¹⁶² France had concluded a treaty with Ethiopia in 1908 under which foreign nationals were governed by French law in Ethiopia. Italy invaded

¹¹⁶⁰ NARA, Record Group 59, Department of State File No. 611.754/6-1850.

¹¹⁶¹ *Ibid.*

¹¹⁶² Memorandum headed, “Legal Position of Foreigners in Ethiopia,” dated June 21, 1946, NARA, Record Group 59, Department of State Lot Files, Office of the Legal Adviser.

Ethiopia in 1935 and occupied it until 1941, when a combination of British and Ethiopian forces deposed the Italian rulers. The United Kingdom and Ethiopia signed a treaty the next year in which Ethiopia agreed that foreign nationals would be subject to the jurisdiction of special courts administered in large part, though not entirely, by British subjects. The 1942 treaty was supplanted by a 1944 treaty that continued British participation in the Ethiopian courts, but that treaty by its terms expired in December 1946, leaving foreign nationals subject entirely to the Ethiopian courts.

The U.S. embassy believed that the Ethiopian courts were seriously inadequate. Thus, the State Department puzzled over the extent to which, in light of the abolition of the extraterritorial court system, the treaty should include a provision on the administration of justice, a matter on which the Department consulted the embassy. In its July 18 response to the embassy's comments on the proposed draft treaty, the State Department noted that the embassy's comments were "helpful to the Department in its efforts to devise formulations with real meaning under Ethiopian conditions whilst avoiding sacrifice of the principle of mutuality or that of scrupulously avoiding the appearance of asking any extrality [extraterritoriality] status."¹¹⁶³ The Department decided to propose that the treaty require that, in cases involving Americans, at least one judge have judicial experience in other lands.

The Department was sensitive to the charge that the treaty would provide special privileges to U.S. nationals and companies. The State Department told the ambassador, "With reference to treaty stipulations calculated to safeguard Americans

¹¹⁶³ *Ibid.*

against the well-known inadequacies of the present Ethiopian system of justice, the Department would be reluctant, in view of the treaty's underlying purpose of fostering cordial relations between sovereign equals over an indefinite future, to propose textual provisions which might appear to demand special privileges, or cast what might be regarded as offensive aspersions."¹¹⁶⁴ Accordingly, the letter suggested that the issue of the administration of justice be addressed in a separate exchange of diplomatic notes rather than in the treaty itself.

Coincidentally, the chief negotiator for Ethiopia was an American lawyer named John Spencer, who served as an advisor to Emperor Haile Selassie on international law from 1936 to 1974.¹¹⁶⁵ In his account of his experiences in Ethiopia, written more than 30 years later, Spencer recalled that "[t]he most difficult point of negotiation was the insistence by the United States that in any trial 'American citizens shall have the right to demand that one of the judges sitting shall have had judicial experience in other lands' and that they 'shall be incarcerated only in prisons which are approved by an officer who has had experience in modern prison administration.'"¹¹⁶⁶ Spencer explained that "[t]he fact that the language had been taken from the Anglo-Ethiopian agreement of 1944 in no way endeared the formula to the Ethiopians."¹¹⁶⁷ He portrayed the State Department as all but oblivious to the

¹¹⁶⁴ Letter dated July 18, 1950, from Willard Thorp to Ambassador George Merrill, NARA, Record Group 59, Department of State File 611.654/6-1550.

¹¹⁶⁵ John H. Spencer, *Ethiopia at Bay: A Personal Account of the Haile Selassie Years* (Algonac Michigan: Reference Publications, Inc., 1984).

¹¹⁶⁶ *Ibid*, pages 261-262.

offensive nature of the language on administration of justice, writing that, “Despite my strenuous objections on the ground that those provisions were unnecessary and disobliging, the United States insisted. So much resentment was caused that to resolve the difficulty the language was deleted from the body of the agreement and consigned to an exchange of notes. The United States in the early 1950s had only a dim awareness of the resentments which such privileges had engendered in the Third World.”¹¹⁶⁸

Spencer’s claim that the United States insisted upon the provision is consistent with the archival records. His portrait of the State Department as almost clueless about the sensitivity of the issue seems overstated, however. As noted above, the Department’s July 18, 1950, response to the embassy in Addis Ababa alluded to the sensitivity of the issue. Further, the same July 18 response indicated that, at the very moment that the State Department was forwarding its proposed treaty to Ethiopia and six months before Spencer became involved in the negotiations, the Department already had decided to embody the language relating to the administration of justice in an exchange of notes, rather than in the body of the treaty. Although unquestionably this was done to deemphasize the language in the hopes of making it more palatable to the Ethiopian government, the idea to use an exchange of notes originated with the State Department, not Spencer, indicating that the United States understood that its proposal was likely to offend Ethiopia.

¹¹⁶⁷ *Ibid*, pages 261-262.

¹¹⁶⁸ *Ibid*, pages 261-262.

The negotiations continued between the embassy and Spencer over a period of several months, without mention of the administration of justice issue. Rather, the major issue in the early negotiations was the provision on withdrawals. Ethiopia proposed a number of revisions to that provision. In particular, it sought to limit the provision to dollar investments.¹¹⁶⁹ The State Department objected to the proposal. The treaty sought “to assure investors that they will enjoy as much freedom in transferring their assets out of Ethiopia as is reasonably feasible.”¹¹⁷⁰ The Department believed that the exceptions already contained in its proposed language gave the parties “ample latitude” to protect their foreign exchange reserves.¹¹⁷¹ The exception proposed by Ethiopia would indicate that outward transfers might be prohibited even if Ethiopia had “generous exchange reserves,” a signal that would not be conducive to encouraging private investment. In any event, the exception would be impractical to administer because an investment might have been established with a mixture of dollars and reinvested local currency. Determining whether a particular withdrawal was of principal or earnings or was related to an investment of foreign or domestic currency would be difficult and could require complex accounting and engender disputes.

The administration of justice issue finally surfaced in the communications between the Department and the embassy on August 3, 1951. A telegram from the

¹¹⁶⁹ Memorandum dated March 5, 1951, from the U.S. embassy in Addis Ababa to the Secretary of State, Enclosure No. 2, NARA, Record Group 59, Department of State File No. 611.754/3-551.

¹¹⁷⁰ Airgram dated March 5, 1951, from the Secretary of State to the U.S. embassy in Addis Ababa, NARA, Record Group 59, Department of State File No. 611.754/3-551.

¹¹⁷¹ *Ibid.*

ambassador on that date reported that “Spencer and I drafted [the] proposed exchange of notes [regarding] Admin Justice.”¹¹⁷² On August 7, the Department cabled the embassy proposing the inclusion of an additional sentence in the exchange of notes providing that American citizens would have the right to have cases to which they were a party removed to the Ethiopian High Court.¹¹⁷³

In subsequent negotiations, Ethiopia proposed the deletion of certain language from the diplomatic notes on the administration of justice, but the cable reporting on that deletion appears to have been lost. In any event, the State Department accepted the Ethiopian proposal, provided that the additional language that it suggested on August 7 was included.¹¹⁷⁴ With this major issue resolved, the treaty was signed on September 7.¹¹⁷⁵

Spencer’s memoir seems to contradict the claim that the United States exerted little pressure on other countries to negotiate FCN treaties. Spencer recalled that “[i]n 1951, before Ethiopia could concentrate on the problems of establishing the federation, she was confronted with a persistent demand by the United States that she first conclude with it a treaty of friendship and economic relations. Ethiopia was unable to obtain postponement of that undertaking. My weeks of work on it had to be

¹¹⁷² Telegram dated August 3, 1951, from the U.S. embassy in Addis Ababa to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.754/8-251.

¹¹⁷³ Telegram dated August 7, 1951, from the Secretary of State to the U.S. embassy in Addis Ababa, NARA, Record Group 59, Department of State File No. 611.754/8-751.

¹¹⁷⁴ Telegram dated August 31, 1951, from the Secretary of State to the U.S. embassy in Addis Ababa, NARA, Record Group 59, Department of State File No. 711.753/8-2351.

¹¹⁷⁵ Telegram dated September 7, 1951, from the U.S. embassy in Addis Ababa to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.754/9-751.

crammed in before I could fully address the more urgent problems of the federation.”¹¹⁷⁶ Spencer had become involved in the negotiations in January 1951, while traveling in the United States with the Ethiopian delegation to the United Nations. During the trip, he met with four members of the State Department to discuss the proposed draft treaty, which he said that he had not yet had time to study in detail, although he had completed a first reading of it.¹¹⁷⁷ The treaty, of course, had been proposed to Ethiopia in July of the previous year. Thus, the implication that somehow the treaty needed to be negotiated in a matter of weeks is misleading, in that it already been under consideration for six months before Spencer became involved.

Further, the record suggests that much of the urgency for concluding negotiations was attributable to the desire of the Ethiopians to sign the treaty before the planned departure of the U.S. ambassador. On March 1, 1951, approximately eight months after the United States provided its proposed treaty to the Ethiopian foreign minister, the Ethiopian government gave a diplomatic note to the U.S. embassy. The note read in part, “The Imperial Ethiopian Government have [sic] given the most favorable attention and study to the draft treaty of Amity and Economic Relations between Ethiopia and the United States of America. The draft, with substance, appears to be eminently reasonable and presents but few problems of any marked difficulty.”¹¹⁷⁸ The note then informed the embassy of Ethiopia’s desire to

¹¹⁷⁶ Spencer, *op. cit.*, page 261.

¹¹⁷⁷ Memorandum of Conversation dated January 24, 1951, NARA, Record Group 59, Department of State File No. 611.754/1-2451.

conclude the treaty quickly: “In view of this fortunate situation, and, in view, on the other hand, of the desire of both his Imperial Majesty and of the Imperial Ethiopian Government, as a mark of the esteem in which is held His Excellency George R. Merrell, first Ambassador of the United States of America to Ethiopia, now about to be reassigned, to sign and conclude such a treaty before his departure, the Ministry of Foreign Affairs have [sic] devoted their best and most urgent efforts to prepare the way for such signature. . . .”¹¹⁷⁹

The Ethiopian government’s statement of respect for Ambassador Merrill apparently was sincere. Spencer himself described Merrill as “by far the most successful and admired of all U.S. representatives.”¹¹⁸⁰ Although Ethiopian officials usually only reluctantly accepted dinner invitations from foreign missions, according to Spencer, they “gladly responded” to Merrell’s.¹¹⁸¹ Such was Merrill’s stature, reported Spencer, “that even the Emperor came to dine.”¹¹⁸² As a gesture of appreciation for Merrell’s efforts to build good relations with Ethiopia, Spencer recommended that Ethiopia propose raising the diplomatic missions to the level of an embassy, a proposal that was made and promptly accepted. In short, Spencer appears to have exaggerated the pressure on the Ethiopians to conclude the treaty. The

¹¹⁷⁸ Telegram dated March 2, 1951, from the U.S. embassy in Addis Ababa to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.754/3-151.

¹¹⁷⁹ Telegram dated March 2, 1951, from the U.S. embassy in Addis Ababa to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.754/3-151.

¹¹⁸⁰ Spencer, *op. cit.*, page 169.

¹¹⁸¹ *Ibid.*

¹¹⁸² *Ibid.*

urgency was to a considerable extent self-imposed. Indeed, by 1951, the United States had been contemplating an FCN treaty with Ethiopia for five years and had waited four years before proposing the negotiation of a treaty. In any event, the negotiations were concluded after about fourteen months and the treaty was signed on September 7, 1951.

Negotiating an FCN Treaty with Japan

The last successful FCN treaty negotiation of the Truman administration was that with Japan. The negotiation would not conclude, however, until a few months after the inauguration of Truman's successor, Dwight Eisenhower.

The negotiation of an FCN treaty between the United States and Japan had been contemplated by Article XII of the peace treaty that ended the war between the two countries.¹¹⁸³ It would be the first FCN treaty signed by Japan after the war and would be regarded by Japan as a model for its commercial treaties with other countries.¹¹⁸⁴ The United States and Japan had concluded an FCN treaty in 1911, but the United States had terminated the treaty in 1940.¹¹⁸⁵

The process of negotiation began in January 1951, when the Department of State sent to the U.S. mission in Tokyo a copy of the model FCN treaty then in use, as

¹¹⁸³ *Current Economic Developments*, March 24, 1953, NARA, Record Group 59, Department of State Lot Files.

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ Letter dated June 13, 1940, from Assistant Secretary of State Jack McFall to Senator Henry Dworshak, NARA, Record Group 59, Department of State File No. 611.944/6-550.

well as copies of the completed treaties with Italy, Uruguay and Ireland.¹¹⁸⁶ The U.S. business community in Japan had expressed an interest in being kept informed of developments with respect to the treaty. The Department authorized the release of copies of the completed treaties in order to educate the business community as to the features of modern FCN treaties, to preempt “ill-considered demands for unwarranted preferential treatment,” and to provide the business community with an opportunity to make recommendations regarding any future treaty.¹¹⁸⁷

The Department cautioned the U.S. mission that, while the mission should solicit the views of U.S. business interests prior to negotiation, the Department would not be able to discuss particular issues in the negotiation once it began. To do so would be impractical because it would mean that the State Department effectively would be negotiating with U.S. business interests and Japan simultaneously and because a government cannot easily recede from a position once that position has been taken publicly.¹¹⁸⁸

The Department hoped to begin negotiation of an FCN treaty with Japan as soon as a peace treaty between the two countries was concluded. It did not wish to commence formal negotiations until after conclusion of the peace treaty, lest it appear that the United States regarded conclusion of the FCN treaty as a condition precedent to conclusion of the peace treaty, a perception that could trigger an unfavorable public

¹¹⁸⁶ Airgram dated January 24, 1951, from the Secretary of State to the U.S. political advisor to Japan, NARA, Record Group 59, Department of State File No. 611.944/1-2451.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ Airgram dated June 29, 1951, from the Secretary of State to the U.S. political advisor to Japan, NARA, Record Group 59, Department of State File No. 611.944/6-2951.

reaction in Japan.¹¹⁸⁹ The United States wanted to avoid even a perception that it had coerced the conclusion of an FCN treaty. The Department, however, was willing to begin informal “technical discussions” that could achieve considerable progress before formal negotiations began.

In July, the U.S. mission supplied the Japanese government with copies of U.S. FCN treaties with Italy, Uruguay, Ireland and Colombia and formally asked the American Chamber of Commerce for an expression of its views.¹¹⁹⁰ The Japanese government responded that it was “favorably disposed” toward the negotiation of a new FCN treaty.¹¹⁹¹ In August, the Japanese government provided the U.S. mission with a model FCN treaty that it had spent two years preparing and that it hoped to use as a basis for negotiations with other countries. The Japanese model had been drafted with “particular reference” to the U.S. postwar FCN treaties.¹¹⁹² Thus, the Japanese believed that the negotiation of an FCN treaty with the United States would not be “too difficult” or prolonged.¹¹⁹³ Notably, the Japanese model omitted some of the investment related provisions found in recent U.S. FCN treaties, but the Japanese government was “fully prepared” to discuss the inclusion of such provisions.¹¹⁹⁴

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ Despatch dated August 16, 1951, from the U.S. political advisor in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/6-1651.

¹¹⁹¹ *Ibid.*

¹¹⁹² *Ibid.*

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*

The Department of State preferred to use the U.S. model as a basis for negotiations, in part because such a treaty would be familiar to the Senate and thus would more easily gain Senate approval. The Department, however, declined to insist upon the use of the U.S. model and as a gesture of good will was prepared to negotiate on the basis of the Japanese model if the Japanese “strongly desire[d]” to do so.¹¹⁹⁵ In that event, however, the Department would propose a number of modifications to the Japanese model.

One of the modifications to the Japanese model proposed by the State Department was the reinsertion of the standard provision on submission of disputes to the International Court of Justice, a provision that had been significantly modified in the Japanese model. The Department explained that the standard language had been included in all U.S. postwar FCN treaties concluded to date without “significant alteration” and was regarded by the Department “as an outstanding achievement of its current treaty program.”¹¹⁹⁶ Further, its inclusion was “the clearest kind of indication that the treaty establishes a rule of law.”¹¹⁹⁷

By November, the Japanese government had agreed to use the U.S. model as the basis for negotiations.¹¹⁹⁸ Informal discussions began on December 4. The Japanese government posed a number of questions, including the meaning of the term

¹¹⁹⁵ Despatch dated November 1, 1951, from the Secretary of State to the U.S. political advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/6-1651.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ Airgram dated November 29, 1951, from the U.S. political advisor in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/11-2951.

“equitable treatment” in Article 1. The Japanese expressed the concern that the term was not yet defined in international law, that it added ambiguity to the treaty, and that it would become the cause of future disputes concerning the application of the treaty.¹¹⁹⁹

The United States replied that the term was “a link” between the preamble, which declares the purposes of the treaty, and the rest of the treaty.¹²⁰⁰ The equitable principles that the two parties “undertake to apply in particular places [were] spelled out by the specific terms of the provisions commencing with Article II.”¹²⁰¹ That is, the term “equitable treatment” was a general reference to the basic principles of the treaty. The term served additional purposes. First, where more than one construction of the treaty language was equally possible, the construction that would lead to an equitable result was to be preferred. Second, it served as “a guiding principle in cases where the exact terms of the treaty’s provisions do not afford complete and definitive guidance.”¹²⁰²

The Department acknowledged that the term “equitable” was not a precise one and that it likely would be invoked only in “extreme or unusual cases” because the other terms “define the normal commitments” that the parties have undertaken.¹²⁰³

¹¹⁹⁹ Airgram dated December 7, 1951, from the U.S. political advisor in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/12-751.

¹²⁰⁰ Airgram dated December 31, 1951, from the Secretary of State to the U.S. political advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/12-751.

¹²⁰¹ *Ibid.*

¹²⁰² *Ibid.*

Yet, the term was not entirely novel and could be found in the ITO charter and other international instruments. It also was in use in the state trading provisions of recent U.S. FCN treaties where the Department had not yet been able to devise “a more precise rule.”¹²⁰⁴ The Japanese, however, continued to express concern about the imprecision of the term. Ultimately, the Department agreed to omit the provision on the ground that it was causing “more friction than benefit.”¹²⁰⁵

By November 25, the extensive technical discussions had ended and Japan was ready to commence formal negotiations.¹²⁰⁶ The most important issue in the Japanese negotiations involved Japan’s desire to reserve the right to discriminate against foreign investment. Japan’s foreign investment law authorized the screening of foreign investment as well as discrimination against foreign investment once established. The State Department accepted Japan’s right to discriminate with respect to the establishment of investment in certain sectors of the economy, but insisted upon nondiscriminatory treatment for investment once established.¹²⁰⁷ The embassy urged that the discriminatory provisions in Japanese law be amended prior to submission of the treaty to the Diet, which would allow the treaty to be portrayed as consistent with existing, or already contemplated amendments to, Japanese law. If the treaty was

¹²⁰³ *Ibid.*

¹²⁰⁴ *Ibid.*

¹²⁰⁵ Airgram dated April 19, 1952, from the Secretary of State to the U.S. political advisor in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/3-2752.

¹²⁰⁶ Telegram dated November 25, 1952, from the U.S. embassy in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/11-2552.

¹²⁰⁷ Telegram dated December 2, 1952, from the U.S. embassy in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/12-252.

submitted first, subsequent efforts to amend the law would be portrayed as unwarranted interferences in domestic policy.¹²⁰⁸

The Japanese believed that their enterprises were undervalued because of an excessive reliance on credit for financing and because of currency depreciation. Thus, a foreigner, with a modest investment, could gain a controlling interest in Japan's leading enterprises. Accordingly, Japan sought to defer the right of U.S. investors to acquire interests in Japanese companies for a period of at least three years, by which time Japan expected that the problem of undervaluation would be remedied through recapitalization. The embassy concurred on the ground that few Americans were likely to purchase stock on the Japanese market because U.S. investors could obtain a better return on investment through time deposits in banks. Accordingly, the United States accepted a provision limiting the right of U.S. investors to purchase shares in Japanese enterprises for a period of three years.¹²⁰⁹ With that issue resolved, the parties signed the treaty on April 2, 1953.

The final text of the FCN treaty with Japan included two important new investment related provisions. The first was a provision authorizing the issuance of visas to Japanese nationals traveling to the United States to establish or manage an

¹²⁰⁸ Telegram dated December 11, 1952, from the U.S. embassy in Tokyo to the Secretary of State, NARA, Record Group 59, Department of State File No. 611.944/12-1152; Memorandum dated December 29, 1952, from Counselor to the Embassy Frank Waring to Ambassador Murphy, headed "Proposed Timing for Conclusion of FCN Treaty," NARA, Record Group 59, Department of State File No. 611.944/1-753.

¹²⁰⁹ *Current Economic Developments*, March 24, 1953, NARA, Record Group 59, Department of State Lot Files.

investment.¹²¹⁰ This language took advantage of a new provision of the Immigration and Nationality Act that had entered into force on December 24, 1952, providing for such visas.¹²¹¹ Congress had enacted the provision in order to provide the State Department with a basis for seeking from other countries a right of U.S. investors to send managerial and technical personnel overseas to operate U.S. investments.¹²¹² The Department could not demand such a right for U.S. investors investing abroad unless it could provide a similar right to foreign investors investing in the United States. The second was a prohibition on retroactive application of new limitations on national treatment.¹²¹³

The Department was very pleased by the results of the negotiations. It regarded the Japan FCN treaty as “among the best of its type yet signed”¹²¹⁴ and characterized the national treatment guarantee as a “substantial achievement.”¹²¹⁵

In submitting the Japanese FCN treaty to the president, the State Department observed that the treaty “expresses the common faith of the two countries in liberal principles.”¹²¹⁶ The memorandum then became more specific about the version of

¹²¹⁰ Article 1(1)(b).

¹²¹¹ *Current Economic Developments*, March 24, 1953, NARA, Record Group 59, Department of State Lot Files.

¹²¹² Wilson, *op. cit.*, page 42.

¹²¹³ Article VII(2).

¹²¹⁴ Letter dated April 13, 1952, from the Secretary of State to the U.S. embassy in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/4-1353.

¹²¹⁵ Memorandum dated March 23, 1953, from Mr. Young to Mr. Allison, NARA, Record Group 59, Department of State File No. 611.944/3-2353.

liberalism that the treaty espoused. After a brief reference to the trade and navigation provisions, the memorandum turned to the investment related provisions. The treaty, said the memorandum, “formally endorses standards regarding the protection of persons and their property and interests that reflect the most enlightened constitutional principles” while recognizing “the need for special attention to the problem of stimulating the flow of private capital investment.”¹²¹⁷ The State Department linked the investment protection provisions to U.S. constitutional law, while also confirming a further treaty purpose of promoting investment.

Senate Advice and Consent to Ratification

The decision of the State Department to omit from the treaty with Ethiopia the provision guaranteeing national treatment with respect to the establishment of investment prompted the NFTC to oppose Senate advice and consent to that treaty. At Senate Foreign Relations Committee hearings on the treaty conducted in 1952, John Swingle, the NFTC president, submitted a letter arguing that the less rigorous provisions of the treaty with Ethiopia would set a precedent leading to the dilution of protection for U.S. investors in future treaties.¹²¹⁸ Swingle observed that “it seems doubtful whether, at the present stage of Ethiopia’s economic development, any satisfying mutual convictions, or common ground for stipulations regarding private

¹²¹⁶ Memorandum dated June 22, 1953, from the Secretary of State to the President, NARA, Record Group 59, Department of State File No. 611.944/6-2253.

¹²¹⁷ *Ibid.*

¹²¹⁸ *Commercial Treaties*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 82nd Cong. 2d Sess., May 9, 1952, page 21.

investment can be found. Moreover, a recent canvass of representative members of the Council has not developed any positive expression of interest in potential investment in that country. Therefore, it seems undesirable to dilute the pattern of our bilateral treaties”¹²¹⁹

The State Department defended its decision to omit the provision on national treatment. In a May 15, 1952, letter to the committee responding to Swingle’s letter, the Department enclosed a memorandum which objected to Swingle’s characterization of the negotiations. As the Department explained, “This lack of commitment concerning the entry of investment capital was not, as suggested in Mr. Swingle’s letter, a failure to overcome an obstacle to mutual understanding. On the contrary, it was evident that, in Ethiopia’s existing circumstances, Ethiopia could not be expected to undertake treaty limitations upon her right to regulate the entry of foreign investment.”¹²²⁰ The Department argued that “No benefit was to be gained from attempting in this treaty to force Ethiopia to accept American investment, especially as no American would be likely wish to venture his capital in Ethiopia anyhow except with the express sanction of the Ethiopian government.”¹²²¹ Thus, the Department did “not regard this treaty as at all ‘diluting the pattern of our bilateral treaties,’ as

¹²¹⁹ Letter dated May 8, 1952, from William S. Swingle to Willard R. Thorp, NARA, Record Group 59, Department of State File No. 611.004/5-852.

¹²²⁰ Memorandum by Herman Walker, dated May 13, 1952, NARA, Record Group 59, Department of State File No. 611.759/5-1552.

¹²²¹ *Ibid.*

suggested in Mr. Swingle's letter. It is specially designed for a country like Ethiopia, not for a country of Western Europe."¹²²²

During the hearings the following year, the committee inquired about the NFTC's concern that the Ethiopia treaty would set a bad precedent for future treaties. The State Department witness assured the committee that the treaty with Ethiopia had not been treated as a precedent in subsequent negotiations with Denmark and Japan.¹²²³

Although the NFTC opposed Senate advice and consent to ratification of the treaty with Ethiopia, it recommended approval of the FCN treaties with Colombia, Denmark, Greece, and Israel and the supplemental treaty with Italy, provided that the parties to the treaties amended the new provision that prohibited "unreasonable or discriminatory" measures.¹²²⁴ NFTC President William Swingle explained that the implication of this clause was that a state was entitled to adopt measures that impaired acquired rights as long as the measures were reasonable and nondiscriminatory. He argued that "if the Government of a foreign country takes measures which would destroy or impair the rights or interests of an American national irrespective of the purposes underlying such destruction or impairment, corresponding payment should

¹²²² *Ibid.*

¹²²³ *Commercial Treaties*, Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 83rd Cong. 1st Sess., July 13, 1953, p. 21.

¹²²⁴ Memorandum of Conversation dated June 11, 1952, NARA, Record Group 59, Department of State File No. 611.754/6-1152; Letter dated May 8, 1952, from William S. Swingle to Senator John Sparkman, NARA, Record Group 59, Department of State File No. 611.004/5-852.

be made.”¹²²⁵ Thus, Swingle contended that the existing treaty language should be replaced with new language that read, “Neither Party shall take measures that would impair the rights or interests within its territories of nationals and companies of the other Party except on payment of prompt, adequate and effective compensation.”¹²²⁶ In the view of the NFTC, the government must fully compensate foreign investors for any loss in the value of their investment resulting from government action.

Swingle also recommended deletion of the provision imposing on each party an obligation not to “unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology needed for economic development.” He argued that the provision should be deleted for two reasons. First, the obligation would fall principally on the United States. Second, terms like “unreasonable” and “equitable” were too broad and obscure.

The State Department endeavored to maintain the support of the business community, particularly the NFTC. Harold Linder, the deputy assistant secretary for economic affairs who testified on behalf of the State Department in favor of the treaties, responded to the NFTC by contending that the reopening of a treaty that already had been concluded was a “hazardous procedure,” but offered to meet with NFTC representatives “to review the present treaty situation.”¹²²⁷

¹²²⁵ Letter dated May 8, 1952, from William S. Swingle to Willard R. Thorp, NARA, Record Group 59, Department of State File No. 611.004/5-852.

¹²²⁶ *Ibid.*

¹²²⁷ Letter dated May 26, 1952, from Harold S. Linder to William S. Swingle, NARA, Record Group 59, Department of State File No. 611.004/5-1352.

On June 11, 1952, several State Department officials met with Swingle.¹²²⁸ The officials explained that the Department could not adopt the NFTC's position that "compensation should be given if rights are destroyed" because the United States itself could not abide by such a rule.¹²²⁹ Earlier internal State Department deliberations concerning the provision had noted that the U.S. Constitution prohibited only unreasonable discriminations.¹²³⁰ Once again, the State Department sought to conform FCN treaty obligations to U.S. constitutional principles. Because treaty obligations were mutual, the United States could not ask its treaty partners to accept the NFTC's proposed language either.¹²³¹ The Department also reassured the NFTC that the provisions on the right to establish investment in the treaty with Ethiopia would not be regarded as a precedent for any country "other than one in a similar political and economic status."¹²³² Despite the meeting, the NFTC refused to reconsider its position regarding the pending treaties.¹²³³

¹²²⁸ Report of Meeting in the Office of Harold F. Linder, dated June 17, 1952, NARA, Record Group 59, Department of State File No. 611.004/6-1852.

¹²²⁹ *Ibid.*

¹²³⁰ Memorandum dated November 15, 1949, from Stanley Metzger to Michael Cardozo, NARA, Record Group 59, Department of State Lot Files, Folder marked "Commercial Treaties."

¹²³¹ Report of Meeting in the Office of Harold F. Linder, dated June 17, 1952, NARA, Record Group 59, Department of State File No. 611.004/6-1852.

¹²³² *Ibid.*

¹²³³ Letter from William S. Swingle to Harold F. Linder, dated August 1, 1962, NARA, Record Group 59, Department of State File No. 611.004/8-152.

Nevertheless, on July 21, 1953, the Senate gave its advice and consent to ratification of all of the pending treaties by a vote of 86-1.¹²³⁴ The Department interpreted the vote as a “strong renewed endorsement” of the FCN treaty program.¹²³⁵ The Senate had approved previous U.S. postwar FCNs under a unanimous consent procedure and thus the vote was the first time since the war that members of the Senate had gone on record individually as supporting the FCN treaty program.

¹²³⁴ Department of State Circular Airgram dated August 6, 1953, NARA, Record Group 59, Department of State File No. 611.004/8-653.

¹²³⁵ *Ibid.*

Epilogue

Investment Treaties at the End of the Truman Administration

At the end of 1952, as it prepared to relinquish power, the Truman administration surveyed the status of the FCN treaty program after seven years of negotiations.¹²³⁶ Since 1945, the Department had considered the negotiation of FCN treaties with 70 countries. It had signed treaties with nine countries – China, Colombia, Denmark, Ethiopia, Greece, Ireland, Israel, Italy and Uruguay -- and was in active negotiations with Japan. Colombia and Uruguay ultimately would decide not to ratify their FCN treaties with the United States and those two treaties would never enter into force, but the negotiations with Japan would conclude successfully early the next year. Thus, the Truman administration would successfully negotiate eight FCN treaties during the eight years between 1945 and 1953, an average of one treaty per year.

The status of the treaty program with respect to the 62 countries with which no treaty was concluded illustrates the difficulties that the United States faced in trying to develop a comprehensive network of FCN treaties. In the case of sixteen countries, the Department had decided that circumstances were not favorable for the negotiation of an FCN treaty. Typically, the reasons were that the political situation did not allow the negotiation of an FCN treaty (Austria, Burma, Cambodia, Finland, Guatemala,

¹²³⁶ Memorandum headed, "Present Status of Program for Negotiating Treaties of Friendship, Commerce and Navigation Treaties," dated December 1, 1952, NARA, Record Group 59, Department of State File No. 611.004/3-453.

Indonesia, Laos, and Vietnam), the country's economic policies were not consistent with FCN treaty commitments (Panama, Switzerland, and Thailand), or the economy was not sufficiently developed for the country to be able to agree to FCN treaty commitments (Iceland, Nepal, Saudi Arabia, and Yemen). In the case of Korea, the war had precluded negotiations. The United States would eventually conclude FCN treaties with South Korea and South Vietnam.

In the case of eleven countries, the United States had proposed treaty negotiations, but the other country had not responded. These countries were Bolivia, Ceylon, Iran, Jordan, Libya, Luxembourg, New Zealand, Nicaragua, Norway, South Africa, and Venezuela. In the case of three other countries – the Dominican Republic, Haiti, and Turkey – the other country was still reviewing the U.S. proposal. Ultimately, the United States would conclude FCN treaties with Iran, Luxembourg and Nicaragua.

Fourteen countries had identified sufficiently serious objections to negotiating an FCN treaty with the United States that formal negotiations had never commenced. These countries were Afghanistan, Belgium, Canada, Chile, Cuba, Ecuador, Iraq, Mexico, Pakistan, Portugal, Spain, Sweden, Syria and the United Kingdom. The objections varied. For example, Afghanistan, Portugal and Syria complained about the length and complexity of the treaty. Belgium was preoccupied with forming the Benelux union with Luxembourg and the Netherlands. Sweden and the United Kingdom did not see a sufficient need for such a treaty. Chile believed that conclusion of the treaty would cast aspersions on the Chilean legal system. Cuba and

Iraq cited political opposition. Several countries, including Afghanistan, Canada, Cuba, Ecuador, Mexico, Pakistan and Spain, cited substantive problems that precluded negotiation of the treaty. Eventually, Belgium and Pakistan would conclude an FCN treaty with the United States.

In the case of ten countries, negotiations had begun but then had stalled. These countries were Argentina, Brazil, Costa Rica, Egypt, France, Germany, India, Lebanon, the Netherlands, and the Philippines. In most cases, the negotiations stalled because of an insoluble disagreement over one or more issues. In the case of Lebanon, however, the parties had completed their negotiations, but then Lebanon declined to sign the treaty because of the situation in Palestine. In the case of the Netherlands, much of the problem was the desire of the Dutch government to coordinate negotiations with Belgium, which was not yet ready to negotiate an FCN treaty with the United States. Eventually, France, Germany and the Netherlands would conclude an FCN treaty with the United States.

In the case of three countries – El Salvador, Honduras and Liberia – the State Department in 1952 was still considering whether to propose a new FCN treaty to replace or supplement FCN treaties concluded with these countries during the interwar period. In the case of Peru, the United States had decided to propose negotiations, but had not yet done so. In the case of Australia and Paraguay, the Department anticipated that negotiations would begin soon. The Department could not know this in 1952, but none of the negotiations with these six countries would be successful.

Despite the lack of progress, the State Department remained committed to promoting outward foreign investment. Only days before the November 1952 election, the Department announced an investment promotion plan comprising three parts: the encouragement of conditions favorable to private investment, both local and foreign; the identification of specific opportunities for investment and of interested investors; and the assembly and dissemination of background information needed by foreign investors.¹²³⁷

The reference to the second and third points indicated the increased attention to transparency in U.S. foreign investment policy. The report noted two benefits from increased transparency. First, “[t]he assembly of background information on a country by country basis will provide potential US investors with competent and reliable data as to the conditions and circumstances under which a private enterprise can be established and conducted.”¹²³⁸ Second, the information would also be “useful in efforts to develop a more favorable atmosphere for private enterprise, and [would] help in negotiations with the host country on specific restrictions which adversely affect domestic and foreign private capital, and in negotiation of international agreements, such as friendship, commerce, and development, investment guarantee agreements, and tax treaties.”¹²³⁹

¹²³⁷ *Current Economic Developments*, October 27, 1952, page 6, NARA, Record Group 59, Department of State Lot Files.

¹²³⁸ *Ibid.*

¹²³⁹ *Ibid.*

The Department asked its missions abroad to explore “all possible means” of furthering private enterprise through technical assistance. Of particular importance were programs to facilitate private investment through advice relating to government fiscal policies and administration, tax laws, and mining and corporation laws. As this indicates, the administration was seeking through the Point Four program to facilitate legal reform that would promote capital formation. The report noted that missions should discourage the use of public funds in cases where private capital could be induced to undertake development projects. Missions were encouraged to direct the attention of host countries to the benefits of private investment in furthering national policy. At the same time, missions were cautioned to avoid creating the impression that the United States was seeking “to force US capital on unwilling customers.”¹²⁴⁰ Yet, efforts should not be suspended “simply for fear of attacks from pro-Communists.”¹²⁴¹

Continuity in the Eisenhower Administration

The election of a Republican president in November 1952 had little discernible impact on the FCN treaty program. On March 4, 1953, the State Department, now headed by John Foster Dulles, sent an airgram to all of its missions except those in “iron curtain” countries, that is, those in Bucharest, Budapest, Prague, Moscow, Trieste and Warsaw. The airgram voiced strong support for the FCN treaty program.

¹²⁴⁰ *Ibid.*

¹²⁴¹ *Ibid.*

“It is essential,” the State Department told its missions, “that the negotiation of FCN treaties of the type concluded since World War II be considered an important part of any program relating to private investment.”¹²⁴² After noting the language in section 516(d) of the Mutual Security Act of 1952 calling upon the State Department to “accelerate” the negotiation of FCN treaties, the Department said that the American business community attached “great importance” to treaties protecting foreign investment. American investors would be reluctant to assume the risks involved in foreign investment unless they received “reasonable assurances of fair treatment” for that investment.¹²⁴³ While it was not to be expected that conclusion of an FCN treaty would “necessarily be followed by a marked increase in American capital investment” in the territory of the other treaty party, the willingness of that party to conclude the treaty would “reflect a responsible attitude” toward foreign investment and the treaty itself constituted “a formal expression of policy which can be the basis of confidence and the growth of sound business relationships.”¹²⁴⁴

Accordingly, the Department proposed to “take more initiative in focusing the attention of foreign governments upon the mutual advantages inherent in FCN treaties.”¹²⁴⁵ The Department also intended to involve the Technical Cooperation Assistance (TCA) and Mutual Security Assistance (MSA) missions more closely in

¹²⁴² Circular Airgram dated March 4, 1953, headed “FCN Treaty Program of the United States,” NARA, Record Group 59, Department of State File No. 611.004/3-453.

¹²⁴³ *Ibid.*

¹²⁴⁴ *Ibid.*

¹²⁴⁵ *Ibid.*

the effort to conclude FCN treaties. This did not mean, the Department assured the missions, that it intended to require the negotiation of an FCN treaty as the price of receiving foreign assistance. Rather, the objectives of FCN treaties were aimed at economic growth, as were the objectives of the assistance programs. The assumption underlying U.S. assistance was that the recipients of that assistance were seeking to tap all possible resources, including private investment. The Department emphasized that FCN treaties “cannot and should not be negotiated unless there is a genuine interest” on the part of the other country, but believed that much could be done to stimulate interest and understanding with respect to U.S. FCN treaties.¹²⁴⁶ The Department did not wish other countries to regard the conclusion of an FCN treaty “to be merely a favor to the United States.”¹²⁴⁷ Rather, the Department wished other countries to understand “the mutual nature of the benefits which can accrue from such treaties.”¹²⁴⁸

The Department attached to the airgram copies of the FCN treaties concluded with Colombia and Denmark, which it regarded as “good, representative treaties of their kind.”¹²⁴⁹ To the missions in Afghanistan, Iceland, Jordan, Libya and Saudi Arabia, it sent a copy of the FCN treaty with Ethiopia.

The Department invited missions in those countries where active FCN treaty negotiations were not occurring to appraise the situation jointly with the TCA and

¹²⁴⁶ *Ibid.*

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid.*

¹²⁴⁹ *Ibid.*

MSA missions in order to identify factors both favorable and unfavorable to the negotiation of a treaty and to begin focusing more local attention on the nature, purpose and importance of FCN treaties. Still adopting a pragmatic stance, the Department indicated that, where local policies or practices presented obstacles to negotiations, “there may be a variety of ways whereby the treaty can be adapted to local situations without violation to its basic principles.”¹²⁵⁰ The Department noted that, in special circumstances, it might be realistic to consider the negotiation of an abridged treaty relating principally to establishment and investment, rather than a standard FCN treaty. In other words, the investment provisions were now so important that the Department was prepared to regard the FCN treaty as essentially interchangeable with a treaty devoted exclusively to investment.

Later that month, the Department announced internally that it was intensifying its effort to promote U.S. private investment “in countries outside the Communist satellite areas as a means of promoting economic well-being, social progress and stability throughout the free world.”¹²⁵¹ The effort consisted principally of steps to apprise foreign governments of the benefits of private foreign investment for economic development.

The Department explained that the United States was “seeking balanced foreign economic development and encouraging US private investment abroad in fields which contribute to improving levels of employment and better living

¹²⁵⁰ *Ibid.*

¹²⁵¹ *Current Economic Developments*, March 24, 1953, NARA, Record Group 59, Department of State Lot Files.

conditions.”¹²⁵² The Department believed that U.S. investment could be particularly useful in the industrial sector of the economy.

The Department acknowledged the “public relations difficulties” in connection with encouraging U.S. private investment abroad, but believed that charges of economic imperialism should not deter U.S. efforts and that the United States should stress the mutual benefits associated with increased investment in developing countries.¹²⁵³ The Department noted that the United States should encourage investment from other capital-exporting countries as well because the U.S. goal was to “encourage the productive and socially desirable use of all resources available in the free world.”¹²⁵⁴

The Department observed that several approaches had been made to improving the investment climate abroad, the most recent of which was the proposed expansion of the FCN treaty program. The TSA and MSA were attempting to involve private enterprise to a greater extent in foreign assistance programs. The Department of Commerce was providing information to private businesses concerning investment opportunities abroad and general background information about the investment climate. For the past three years, the MSA had operated a clearing house in Western Europe that it intended to extend to the Near and Far East and to Latin America. The clearing house put Americans wishing to invest abroad in contact with foreign

¹²⁵² *Ibid.*

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid.*

businesses. Since 1948, the MSA had operated an investment guarantee program, which was now operating in fifteen countries.¹²⁵⁵ The program insured investors against the risk of loss through exchange controls or expropriation.

Unfortunately, the Department had found that conditions “highly conducive” to foreign investment rarely existed.¹²⁵⁶ The State Department nevertheless intended to “press[] ahead” with its treaty program.¹²⁵⁷ Between 1953 and 1966, when the last FCN treaties in U.S. history were concluded, the United States would sign thirteen more FCN treaties, with Belgium, France, Germany, Iran, South Korea, Luxembourg, Muscat and Oman, the Netherlands, Nicaragua, Pakistan, Thailand, Togo, and South Vietnam. Thus, the State Department would manage to conclude 21 FCN treaties in 21 years.

Evaluating the Postwar FCN Treaty Program

Robert A. Pollard, in his detailed study of U.S. foreign economic policy between 1945 and 1950, concluded that the FCN treaties were “a resounding flop.”¹²⁵⁸ In support of his conclusion, he noted that only eight countries had ratified an FCN treaty with the United States by 1963. Pollard’s research, however, was faulty. In fact, by 1963, nineteen of the countries that had signed a postwar FCN treaty with the

¹²⁵⁵ *Ibid.*

¹²⁵⁶ *Ibid.*

¹²⁵⁷ Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States*, March 1952, NARA, Record Group 59, Department of State File No. 611.004/3-453.

¹²⁵⁸ Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945-1950* (New York: Columbia University Press 1985), page 204.

United States had ratified their treaties and all nineteen treaties had entered into force.¹²⁵⁹ Of the 21 U.S. postwar FCN treaties that would eventually enter into force, only two – those with Thailand and Togo – were not in force as of 1963 because they would not be signed until 1966.

Pollard's comment, in any event, does raise the question of the proper criteria by which to judge the success of the U.S. postwar treaty program. Pollard assumed that at least one measure of success is the number of treaties concluded. The rate of successful treaty negotiations – approximately one treaty concluded per year – was a little better than the historical average for the United States. As has been noted, the State Department calculated in the early 1950s that the United States had concluded some 130 FCN treaties since 1776, a rate of less than one per year.

Comparisons across time, however, must take into account more than the number of treaties concluded per year. For example, the number of available treaty partners has grown over time. The treaties themselves have varied over time. The earlier FCN treaties demanded much less of the treaty parties with respect to investment protection than did the later treaties and, in any event, investment protection was not the purpose of the early treaties. By contrast, the U.S. postwar FCN treaties were the most rigorous FCN treaties in the history of the United States or any other country, at least with respect to investment protection, and the United States concluded them at a time when it regarded investment protection as their primary purpose. The State Department's interest in negotiating FCN treaties has also varied.

¹²⁵⁹ The date when a treaty enters into force is a matter of public record and may be found in the State Department's annual publication, *Treaties in Force*.

For example, particularly in the decades between the Civil War and the turn of the century, the United States was not very actively seeking to negotiate FCN treaties.

The climate for negotiations has varied as well. The United States negotiated the postwar FCN treaties at a time when rising nationalism, severe shortages of foreign exchange, and vivid memories of capital flight in the 1930s gave most potential treaty partners ample cause to fear penetration by international capital and thus the negotiation of an investment promotion treaty was especially difficult. These considerations may not all militate in the same direction at any given moment and the various combinations of circumstances that can occur suggest caution when judging a treaty program solely by the number of treaties concluded.

The success of a treaty program might be measured, either additionally or alternatively, by the impact of the treaties concluded. Among the impacts that treaty parties might have anticipated were an increase in capital movements and a more favorable investment climate.

In the period immediately following World War II, political and economic uncertainties imposed “formidable” deterrents to investment.¹²⁶⁰ As President Truman himself observed in his 1949 message to Congress transmitting his proposed legislation to implement Point Four, “the problem of substantially increasing the flow

¹²⁶⁰ Sir Arthur Salter, *Foreign Investment* (Princeton: Princeton University Press, 1951), page 54. Sir Arthur included on his list of formidable obstacles “memories of past losses, a shortage of United States ‘equity’ capital and highly remunerative opportunities of investment in domestic equities, political uncertainties in the capital-needing countries with dangers of inconvertibility and confiscation.” The most thorough inventory of the obstacles to U.S. foreign investment in the late 1940s was Cleona Lewis’ monumental study. Cleona Lewis, *The United States and Foreign Investment Problems* (Washington: The Brookings Institution, 1948), especially pages 141-168.

of American capital abroad presents serious difficulties.”¹²⁶¹ Currency exchange controls were the norm and U.S. investors suffered “sizeable losses” from expropriation.¹²⁶² Businesses also faced the new phenomenon of the “creeping expropriation,” a series of regulatory measures that gradually eroded an investment’s profitability, although the government never seized title or possession of the investment.¹²⁶³

These were precisely the kinds of risks that the State Department designed the investment provisions of the FCN treaties to address. Potential capital importing countries, however, were reluctant to conclude FCN treaties because these countries wished to retain the discretion to control international capital movements, particularly in light of their low foreign exchange reserves. Thus, in only a handful of countries were FCN treaty protections available as a means to promote investment.

Further, many of those countries that did conclude an FCN treaty were especially poor candidates for foreign investment. China concluded its FCN treaty amidst a civil war that discouraged the entry of foreign investment.¹²⁶⁴ The war would result in the victory of communist forces, the expropriation of all U.S. investment by

¹²⁶¹ Harry S. Truman, “The Point 4 Program: Aid to Underdeveloped Areas,” June 24, 1949, reprinted in Department of State, *A New Era in World Affairs: Selected Speeches and Statements of President Truman, January 20 to August 29, 1949*, Department of State Publication 3653 (Washington: Government Printing Office, 1949), page 31.

¹²⁶² Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge: Harvard University Press, 1974), page 301.

¹²⁶³ *Ibid.*, pages 307-307.

¹²⁶⁴ Cleona Lewis, *The United States and Foreign Investment Problems* (Washington: The Brookings Institution, 1948), page 82.

1950, and the expulsion of the regime with which the United States had concluded the treaty. Greece too suffered through a civil war during the latter half of the 1940s and, at war's end, had insufficient foreign exchange reserves to allow even its existing British investors to withdraw their earnings.¹²⁶⁵ In Italy, the strength of the communist party frightened away foreign investors.¹²⁶⁶ Israel, following its independence in 1948, had been invaded by several Arab countries and, after the war, remained surrounded by hostile neighbors. Ethiopia held such little allure for foreign investors that, as noted in Chapter Six, the NFTC reported that none of its members foresaw investing there. An FCN treaty simply was not adequate to counterbalance these political and economic circumstances and thus the conclusion of an FCN treaty with most of the countries that concluded such a treaty during the Truman administration could not be expected to lead to substantial new investments. As the State Department noted in 1950, "even with [treaty] protection, it is not likely that large amounts of private investment will flow to the underdeveloped world in the near future."¹²⁶⁷

While the United States endeavored through the conclusion of FCN treaties to encourage U.S. investment abroad, other policies sometimes undermined those efforts. One such policy was the maintenance of high trade barriers in the United States,

¹²⁶⁵ Even before the war, Greece carried a foreign debt burden that was "extraordinarily heavy." *Ibid.*, page 76.

¹²⁶⁶ Wilkins, *op. cit.*, page 309. Further, as Cleona Lewis noted in 1948, Italy had insufficient purchasing power to pay for necessary imports and thus could hardly afford to allow foreign investors access to convertible currency to repatriate their earnings. Lewis, *op. cit.*, page 73.

¹²⁶⁷ Department of State, *Our Foreign Policy*, Department of State Publication 3972, (Washington: Government Printing Office, 1950), page 75.

especially with respect to the agricultural commodities that many developing countries hoped to export to the United States. U.S. investors would be unlikely to invest abroad in the agricultural sector if they could not export their farm products to the United States.¹²⁶⁸ The inability of developing countries to acquire dollars through agricultural exports to the United States would also prevent them from accumulating foreign exchange reserves needed to service debt owed to U.S. lenders or to permit U.S. investors to repatriate their earnings,¹²⁶⁹ a circumstance that, as Italy found, would discourage inward investment. U.S. trade protection in the agricultural sector thus created a further obstacle to outward foreign investment.

Despite and, in some cases, because of these various impediments, U.S. foreign investment did increase during the years of the Truman administration. The book value of U.S. foreign direct investment doubled from 1946 to 1952, from \$7.2 billion to \$14.81 billion.¹²⁷⁰ The greatest increase was in the petroleum sector, where the book value of U.S. foreign direct investment tripled between 1946 and 1954.¹²⁷¹ The oil companies, drawn by the promise of high profits, were the only “truly aggressive” investors in the immediate postwar years.¹²⁷² The book value of U.S. foreign direct investment in the manufacturing sector doubled during those years, but

¹²⁶⁸ David A. Baldwin, *Economic Development and American Foreign Policy, 1943-1962* (Chicago: The University of Chicago Press, 1966), pages 70, 114.

¹²⁶⁹ *Ibid.*, pages 17-18.

¹²⁷⁰ Wilkins, *op. cit.*, page 329.

¹²⁷¹ *Ibid.*, page 301.

¹²⁷² *Ibid.*, page 314.

as in the interwar period much of the increase was the result of reinvested earnings. U.S. investors often reinvested their earnings, rather than withdrawing them, because exchange controls prevented withdrawal and they wanted to reinvest them quickly before currency devaluations eroded their value.¹²⁷³ Thus, in the manufacturing sector, the increase in U.S. foreign investment reflected to some degree an unfavorable, rather than a favorable, investment climate overseas. Under these circumstances, the growth in outward foreign investment, on the whole, was disappointing. Columbia University economist Ragnar Nurkse reflected the general attitude in 1954 when he observed that “private foreign investment throughout the period since 1945 has fluctuated at a low level and without any sign at all of an upward trend.”¹²⁷⁴

In any event, State Department officials, as has been noted, believed that it was not possible to demonstrate a statistical correlation between the conclusion of FCN treaties and an increase in investment flows.¹²⁷⁵ This would have particularly been true during the Truman administration, when the number of treaties was small, rendering it prohibitively difficult to control for the great range of variables that might

¹²⁷³ *Ibid.*, page 308.

¹²⁷⁴ Ragnar Nurkse, “International Investment To-Day in the Light of Nineteenth-Century Experience,” *The Economic Journal* XLIV (1954), 744.

¹²⁷⁵ Seymour Rubin, the chief negotiator for the United States of the investment provisions of the ITO charter, noted in 1956 that there was “little evidence” to support a correlation between the conclusion of an FCN treaty and an increase in investment flows. Seymour J. Rubin, *Private Foreign Investment: Legal & Economic Realities* (Baltimore: The Johns Hopkins Press, 1956), page 84. Even in the first decade of the current century, when investment treaties number in the thousands, economists continue to debate the question of whether such treaties result in an increase in investment flows. Much of the research is collected in Karl P. Sauvant and Lisa E. Sachs, eds., *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009).

affect investment flows, including variations in the obligations imposed by the treaties themselves.

Indeed, one might not be surprised if FCN treaties were to some degree inversely correlated with international investment flows. Countries with the least favorable investment climates, all else being equal, might be the most motivated to conclude an FCN treaty in order to compensate for their poor investment climates and thus FCN treaties would enter into force in countries where they were least likely to produce results.¹²⁷⁶ At the same time, countries with features attractive to foreign investors, such as large reserves of petroleum or valuable ores, could expect the lure of high profits to attract investors even if the country never concluded an FCN treaty. Thus, investment flows might be greatest to those countries that had the least need for an FCN treaty and, accordingly, the smallest incentive to incur the costs associated with negotiating and adhering to a treaty.

Judging from the paucity of documents in the archives, the FCN treaties concluded during the Truman administration seem not to have been the subject of a great deal of diplomatic correspondence in the years following their conclusion, although the possibility exists that governments altered their policies in order to conform to the treaties, thereby improving the investment climate without producing a record of investment disputes. In other words, a lack of records showing that the

¹²⁷⁶ The statement in the text is subject to an important qualifier. If the reason that the potential capital importing country had a poor investment climate was government hostility to foreign investment as a matter of policy, then such a country presumably would be unlikely to conclude an FCN treaty. Thus, one would expect to see FCN treaties concluded in countries with a pro-investment policy, but other deterrents to investment, such as low foreign exchange reserves that would inhibit the withdrawal of earnings.

treaties had been invoked to resolve investment disputes could be regarded as evidence that the treaties had succeeded in creating a favorable investment climate. It also could be regarded, however, as evidence that the treaties had failed to provide a useful remedy for injurious host state conduct.

Alternatively, the lack of such records could merely demonstrate that those countries willing to conclude an investment treaty were those countries that already had adopted a policy favorable to foreign investment and thus would be unlikely to take action in violation of an investment treaty.¹²⁷⁷ In a time such as the Truman administration, when few countries concluded investment treaties, the probability is that the treaties would be concluded among countries that would violate them on the fewest occasions.¹²⁷⁸ In other words, FCN treaties might exist only where investors did not need them and would not have occasion to use them.

The treaty with Italy did lead to an investment dispute before the International Court of Justice, but not until some four decades had passed since the conclusion of the treaty. In the 1980s, the United States submitted to the court a claim that Italy's treatment of an Italian subsidiary of the Raytheon Company violated the postwar FCN treaty between the United States and Italy. On July 20, 1989, the court issued a

¹²⁷⁷ Baldwin, *op. cit.*, pages 114-115.

¹²⁷⁸ Seymour Rubin, who during the Truman administration served as assistant legal advisor for economic affairs, argued in 1956 that the United States was able to conclude an FCN treaty only with those countries that already had a pro-investment policy. He concluded, accordingly, that the use of FCN treaties to protect foreign investment had been "much oversold." Seymour J. Rubin, *Private Foreign Investment: Legal and Economic Realities* (Baltimore: The Johns Hopkins Press, 1956), page 85.

judgment rejecting the U.S. claim.¹²⁷⁹ The existence of the treaty thus provided no basis for relief for the U.S. investor.

FCN treaties concluded during the Eisenhower administration would also lead to claims before the court. The United States submitted a claim against Iran alleging that the seizure of the U.S. embassy and its diplomatic personnel in Tehran on November 4, 1979, violated the postwar FCN treaty between the two countries. Iran declined to appear in the case, arguing that the court lacked jurisdiction over the claim. On May 24, 1980, the court rendered a judgment against Iran, ordered Iran to release the hostages, and found that Iran was under a duty to make reparations to the United States.¹²⁸⁰ The United States discontinued the case in 1981 as part of its settlement of the dispute with Iran. As part of the same settlement, the United States and Iran established a tribunal in The Hague to which U.S. investors could submit claims for losses that they suffered as a result of Iranian treaty violations during the Islamic Revolution. In resolving the cases before it, the Tribunal has relied not only on the settlement agreement between the United States and Iran, but also on the provisions of the FCN treaty between Iran and the United States. The tribunal has resolved approximately 4000 claims and has made a substantial contribution to the development of international investment law.¹²⁸¹

¹²⁷⁹ *Case Concerning Elettronica Sicula, S.P.A. (ELSI)* (United States v. Italy), 1989 I.C.J. Rep. 15.

¹²⁸⁰ *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1980 I.C. J. Rep. 3.

¹²⁸¹ Discussions of the contributions made by the Iran-U.S. Claims Tribunal, including the role of the FCN treaty between Iran and the United States in resolving claims, may be found in Charles N. Brower,

In two cases, other countries have submitted claims to the International Court of Justice alleging FCN treaty violations by the United States. In 1984, Nicaragua submitted a claim to the court alleging that U.S. support for military forces seeking to overthrow the Sandinista government violated the postwar FCN treaty between the two countries. The United States invoked the exception in the treaty for measures necessary to protect a party's essential security interests, arguing that each party is the sole judge of whether measures it adopts are within the exception and, therefore, the dispute before the court was nonjusticiable and the court was without jurisdiction. The court rejected the U.S. argument, whereupon the United States declined to appear further in the case. On June 27, 1986, the court issued a judgment on the merits finding that the United States had violated the treaty and was under a duty to pay compensation to Nicaragua. Nicaragua later withdrew the claim after elections brought to power a government friendly to the United States.

The argument made by the United States in the *Nicaragua* case rested on precisely the interpretation of the essential security interests exception that the U.S. delegation had rejected at the ITO negotiations in Geneva. The court rested its decision on the absence of any language in the exception expressly conferring on either party the power to determine conclusively whether its actions fall within the

The Iran-United States Claims Tribunal (The Hague: Martinus Nijhoff Publishers, 1998); Christopher R. Drahozal & Christopher S. Gibson, eds., *The Iran-U.S. Claims Tribunal at 25* (New York: Oxford University Press, 2007); Richard B. Lillich & Daniel B. McGraw, eds., *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington on Hudson: Transnational Publishers, 1998); and Rahmatullah Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contributions* (Dordrecht: Martinus Nijhoff Publishers, 1990).

exception. The account in Chapter Three indicates that the court decided the issue correctly.

In 1992, Iran submitted a claim against the United States arising out of the destruction by U.S. naval vessels of three oil production facilities located in the Persian Gulf and owned by the National Iranian Oil Company. Although it again invoked the essential security interests exception, the United States participated in both the jurisdictional and the merits phases of the cases. The court reaffirmed the interpretation of the essential security interests exception that it had adopted in the *Nicaragua* case. Nevertheless, in 2003, the court rejected Iran's claim on the merits.¹²⁸²

The most significant impact of the U.S. postwar FCNs lies not in specific claims resolved in accordance with the obligations imposed by those treaties, but in their contribution to the development of international law. Evidence exists that those involved in negotiating the treaties regarded this criterion as precisely the measure of their success. Herman Walker, one of those responsible for negotiating FCN treaties during the Truman administration, when evaluating the treaty program in 1956, observed that “[q]uantitatively, the group of treaties concluded to date between the United States and like-minded countries since World War II measure perhaps but a modest accomplishment; qualitatively, moreover, shortcomings in the degree of completeness with which they meet all conceivable company requirements are

¹²⁸² *Case Concerning Oil Platforms* (Iran v. United States), 2003 I.C.J. Rep. 161.

doubtless detectable.”¹²⁸³ Nevertheless, Walker continued, “they mark a definite advance in an area in which progress through multilateral agreements has so far been lacking.”¹²⁸⁴ Further, “[t]he growth of this pattern, if and as it occurs with the accretion in time of additional examples, should be conducive to the development of international standards of practice . . . with respect to the treatment of companies.”¹²⁸⁵

Only three years later, just as the U.S. FCN treaty program was nearing its end, the international community would see the beginning of a small explosion in the number of additional examples. Between 1959 and 1966, the year that the United States concluded its last FCN treaty, Germany, France, Switzerland, the Netherlands, Italy, the Belgium-Luxembourg Economic Union, Sweden, Denmark and Norway all inaugurated new bilateral investment treaty programs. The content of these treaties was based to a large extent on the investment related provisions of the U.S. postwar FCN treaties.¹²⁸⁶ In the years following the demise of the U.S. FCN treaty program, other countries initiated their own bilateral treaty programs, including in 1977 the United States, which similarly drew upon its postwar FCN treaties in developing the content of its bilateral investment treaties. Today, the network of bilateral investment treaties worldwide includes some 3000 treaties, with approximately 180 countries

¹²⁸³ Herman Walker, Jr., “Provisions on Companies in United States Commercial Treaties,” *American Journal of International Law* 50 (1956), 373, 393.

¹²⁸⁴ *Ibid.*

¹²⁸⁵ *Ibid.*

¹²⁸⁶ I have traced the origins of the provisions in the European bilateral investment treaties in Kenneth J. Vandavelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (New York: Oxford University Press, 2010).

having concluded at least one such treaty.¹²⁸⁷ Since the 1990s, hundreds of claims have been submitted to binding arbitration under these treaties and hundreds of millions of dollars in compensation have been awarded to investors.¹²⁸⁸ The U.S. postwar FCN treaties laid the foundation for much of the legal framework for global capitalism, a framework structured largely by U.S. constitutional principles reflected in the FCN treaty provisions.

* * * *

U.S. FCN treaty negotiators in the 1940s and 1950s did not remotely foresee the explosion in treaty negotiations that would occur in the last decades of the twentieth century. There was a world in which foreign exchange reserves were limited, nearly every country was concerned about the impact of unrestrained capital movements, fear of economic imperialism was epidemic among newly independent developing countries and rarely could negotiators expect to conclude more than one or two FCN treaties in a year.

Despite this slow pace, the State Department persevered with its postwar FCN treaty program in an effort to extend principles of liberal legality throughout the world. The Department noted as much at the end of the Truman administration in a 1952 public policy statement on the postwar FCN treaties, where it observed that

¹²⁸⁷ The United Nations by the end of 2008 had identified 2676 bilateral investment treaties plus another 273 free trade agreements with investment related provisions similar to those found in bilateral investment treaties. United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements (2008- June 2009)* (Geneva: United Nations, 2009).

¹²⁸⁸ In October 2012, an international tribunal ordered Ecuador to pay \$1.76 billion in compensation to Occidental Petroleum for the expropriation of its investment in the petroleum sector, the largest award under a bilateral investment treaty to date. Awards are available online at www.italaw.com.

“[t]heir fundamental objectives – protection of the foreigner, maintenance of good order in everyday business affairs, mutual encouragement of economic development, strengthening the rule of law in the dealings of one nation with another – all are manifestations of friendship between nations and a practical example of how they can act together, under law, for their own and the common good.”¹²⁸⁹ In sum, said the Department, “When an American goes abroad, these treaties can be for him much the same sort of shield that the Constitution is at home.”¹²⁹⁰

¹²⁸⁹ Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States*, (Washington: Government Printing Office, 1952).

¹²⁹⁰ *Ibid.*

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