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THE RELATIONSHIP BETWEEN THE MOST FAVOURED NATION CLAUSE AS CODIFIED BY THE INTERNATIONAL LAW COMMISSION AND THE EUROPEAN COMMUNITIES

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Introduction:

The purpose of this paper is to examine the relationship between the Most Favoured Nation principle, as codified by the International Law Commission, and the European Communities. A fundamental problem exists in this relationship. The creation of the European Communities has resulted in the denial of most favoured nation benefits under the multitude of commercial treaties which its individual members maintained with third States. This fact alone appears to limit the usefulness of the Most Favoured Nation principle, since the European Communities are the largest trading bloc in the world. The European Communities are not however an isolated phenomenon; the process of regional integration is being experimented with throughout the world, a trend that has intensified in the 1970's. If, therefore, regional economic intergration results in the denial of most favoured nation benefits under the commercial treaties which its individual participants maintained with third states, the present usefulness of the most favoured nation clause appears greatly impaired. If, as is the case, the process of regional integration in practise results in the exclusion of the Most Favoured Nation principle, it is significant to determine on what legal foundation, if any, this practise is based. The determination of this question will be therefore the immediate concern of this paper. The case example used is that of the European Communities, since it is the most important, and certainly the most sophisticated of such regional groups. In one respect, the answers arrived at specifically in relation to the European Communities are academic since, in practice, their relationship with, the MFN principle has now long been settled. This does not discount the utility of resolving the legal position in that these answers arrived at in relation to the EC are applicable to other regional groups and more important, to future experiments in regional integration, which are likely to be numerous if present trends are anything to go by.

There is, however, another major issue raised by this relationship, independently of the legal verdict, one which has a direct bearing on the involvement of the International Law Commission in the topic commanded as it is by Article 1 of the Statute of the International Law Commission to promote "the

progressive development of international law" - namely, whether, in light of the phenomenon of regional integration existing today to an unprecedented degree, the favours within regional groups should be excluded from the operation of the Most Favoured Nation principle. The Draft Articles produced by the International Law Commission in 1978 on the Most Favoured Nation clause, quite apart from embodying the most recent, and most authoritative discussion of the topic, are of direct relevance to the determination of this issue. For these reasons therefore it is proposed to examine the overall relationship of the Most Favoured Nation clause and the European Communities within the framework of the Draft Articles produced by the International Law Commission, concluding with some observations on this body's involvement in the topic.

CHAPTER 1

1.

Historical Background to the Most-Favoured-Nation clause:

Despite its appearance of contemporaneity, the Most-Favoured-Nation clause has an old and noble pedigree. It can be traced back to the eleventh century as the French and Spanish trading cities eyed the North African market dominated by the dynamic Venetian traders and proposed, in overtones of insistence, to the ruling Arab princes that the treatment accorded to French and Spanish merchants should be not inferior to that already being accorded to the Venetians. 1. The idea of the Most Favoured Nation was thus born. The pledge was incorporated in the franchise given to the newly arrived traders to operate. The intense competition between the North Italian city states for the commerce of the Mediterranean basin in the twelth century resulted in an increasing use of the clause by which a framework wherein trade could be conducted was established. Certain common characteristics of these original clauses emerged: the rights accorded were reduced to writing, normally being incorporated in the state's franchise, and though an offshoot of trading activities, the rights granted to foreign merchants related to their personal rights and jurisdictional favours rather than relating directly to the wares they dealt in; they were unilateral pledges on the part of the market place authorities without a corresponding pledge by the grantees; lastly, they specifically envisaged the treatment accorded to other specific states as the standard expected. By the end of the fifteenth century, the clause became composed predominantly of bilateral promises, and simply set up the treatment given to any foreign nation as the relevant standard. The clause became popular during the seventeenth century, though its structure was modified in the eighteenth century with the separation of the political and commercial interests served by the clause. Repeating their failure to secure a monopoly of trade in West Africa in the eleventh century in Asia in the seventeenth and eighteenth centuries, the European powers again settled on the Most Favoured Nation clause as an acceptable standard of security.

1. - Yearbook of the International Law Commission 1969 Vol.II p 159

The clause went through subsequent mutations, It became a feature of treaties of capitulation; by their nature, these were unilateral. By the eighteenth century, clauses were employed that closely resemble the modern form of the clause. An example of such a clause in the commercial field is provided in Article 8 of the Treaty of Utrecht 1713 concluded between England and France. It stipulated:

"'It is further agreed and concluded, as a General rule, that all and singular the subjects of each Kingdom, shall, in all Countrys and Places, on both sides, have and enjoy at least the same Privileges, Libertys and Immunitys, as to all Dutys, Impositions or Customs whatsoever, relating to Persons, Goods and Merchandizes, Ships, Freight, Seamen, Navigation and Commerce; and shall have the like Favour in all things as the subjects of France, or any other foreign Nation, the most favour'd have, possess and enjoy or at any time thereafter may have, possess or enjoy'" 2.

Such a clause was the forerunner of the modern commercial clause in its unconditional form. The eighteenth century also saw the emergence of the conditional clause, first introduced in the treaty concluded between France and the United States of America in 1778, which became the standard form of the clause for all commercial treaties concluded by the United States. Article II of the 1778 treaty between France and the USA provides a typical example of such a conditional clause:

"'The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional'" 3.

In fact, the United States, until 1923, interpreted all MFN clauses as conditional, the most conspicuous example being its interpretation of the Louisana Purchase where a conditional interpretation was placed on the standard "shall be treated upon the

2. - Yearbook of the International Law Commission 1969 Vol.II p 160

3. - ibid at p 161 quoting from "Treaties Conventions, International Acts, Protocals and Agreements between the United States of America and other Powers 1776-1909" W.M. Malloy Vol. I p 468

footing of the most favoured nation" despite the apparent unconditionality of the clause. Europe indeed endorsed such an approach until 1860, from when the unconditional clause reigned supreme. By 1909 the unconditional MFN had gained such popularity that an American commentator could confidently assert that it represented "the cornerstone of all modern commercial treaties" 4.

The First World War, and its aftermath, proved a mixed blessing for the clause: the polarization of the developed world into hostile factions proved an unsuitable theatre in which an economic concept based on extensive and friendly international contact could operate. The clause was eclipsed - partly to avoid indirect imports or exports to the enemy, and partly in the interests of the war effort. Others emerged from the Great War denouncing tariff discrimination more vehemently, even citing it as a cause of the war, and turned to the most favoured nation concept for salvation. Lukewarm adherence to the clause did resurface in the immediate inter war years, this period also being notable for the abdication by the United States of the conditional form in favour of the unconditional form. The League of Nations International Economic Conference in 1927 renewed interest in the clause. Such tentative resurgence of popularity was soon dashed however by the grim realities of the international economic order from 1929 onwards when an unprecedented downturn in the economies of all the major states produced a hostile climate to the principle on which the clause is based i.e. that of trade liberalization. In fact the clause and trade liberalization do not necessarily go hand in hand; indeed, trade restrictions may be equally processed by the clause as trading favours. However, the dramatic drop in the number of MFN treaties entered into in this period is indicative of states' acceptance of its traditional association with trade liberalization: 90% of commercial treaties concluded before 1931 contained it, compared to only 42% after 1931. By 1931, 26 major trading nations had introduced discriminatory import and exchange controls: perhaps

4. - American Journal of International Law Vol. 3 No. 2 1909 p 395 per S.K. Hornbeck

the nadir of the clause was represented by the Tariff Truce Conferences of 1930 and 1931. Exiled from the real world, the most favoured nation principle became predominantly an academic interest discussed by lawyers and economists with a trace of nostalgia, much as sunshine is remembered in the midst of a bitter winter. But the experience of the Depression in addition had produced a doctrinal reaction against the concepts of free trade and the clause, by association, suffered correspondingly. The views of John Maynard Keynes gained currency; an excerpt from National Self Sufficiency is indicative of the hostility with which free trade came to be regarded:

"Let goods be homespun whenever it is reasonably and conveniently possible...We do not wish...to be at the mercy of world forces" 5.

Officially government pronouncements endorsed the principles of free trade but contradicted these principles in their actions. As succinctly put by Clair Wilcox:

"Each for himself and the devil take the hindmost became the general rule" 6.

The sole exception to this trend was the newly established Soviet Republic which incorporated most favoured nation treatment in the Treaty of Rapallo with Germany, concluded in 1922 and expanded on in the subsequent treaty with Germany in 1925.

Despite these setbacks, the appeal of the principle persisted: the Preparatory Commission of Experts advised the World Monetary and Economic Conference convened in London in 1933 that the most favoured nation principle should, under normal conditions, form the basis of international commerce. Likewise, the Seventh International Conference of American States declared in 1933:

"Accordingly, they undertake that whatever agreements they enter into shall include the most favoured nation clause in its unconditional and unrestricted form, to be applied to all types of control of international trade" 7.

Such fine sentiments were tentatively translated into action in the period before the Second World War, the United States con-

5. - National Self Sufficiency : Yale Review Vol. XXII Summer 1933
6. - A Charter for World Trade p 5-9
7. - Yearbook of the ILC 1969 Vol 2 p174

cluding MFN agreements with 20 nations. Stronger nationalist forces operated, however, to hinder any wholesale return to liberalized international trading.

But the simple fact remained that the measures of trade restriction and discrimination persued during the Depression had not worked and this realization dominated post-war thinking. The restored favour which trade liberalization experienced was expressed in the Commercial Policy Chapter of the International Trade Organisation, which flatly prohibited practically every form of trade restriction, though in fact the ITO Charter has also been viewed as embodying the concept of the supremacy of national action against the interest of international co-operation. In any event, the ITO Charter was not ratified by the negotiating countries and "soon collapsed of its own weight" 8. However, its commercial policy rules did survive, thanks to their incorporation in the General Agreement on Tariffs and Trade 1947, in itself originally a temporary subsidiary of ITO but after the latter's demise, rose, phoenix-like, to becoming the principal forum of international trade negotiation; the text of the Agreement conspicuously enshrines the most favoured nation clause as the basis of commercial relations between the Contracting Parties in Article 1. This general revival of acceptance of the clause was reflected in the codification of its principles by the International Law Commission, completed in 1978, reflecting its importance as one of the dominant principles of international relations.

8. - R.N. Gardner : Sterling-Dollar Diplomacy 1956 p 379

CHAPTER 2

General Overview of the Most Favoured Nation clause:

The basic idea underlying the Most Favoured Nation clause is a relatively simple one. The clause sets up a standard of treatment in the relationship between two or more states; one state undertakes an obligation towards another state to treat the latter's goods, nationals or any aspect of their mutual relations encompassed by the treaty, as the case may be, on a basis not inferior to the treatment it accords to whichever happens to be the most favoured third state it deals or will deal with in that field. Traditionally the clause has operated in the context of international commerce, establishing a regime on customs duties for example, but certainly its operation is not limited to this field; Mr Endre Ustor as Special Rapporteur on the topic, identified the following areas which have been governed by a most favoured nation clause:

"(a) International regulation of trade and payments

(b) Treatment of foreign means of transport

(c) Establishment, personal statute and professional activities of foreign physical and juridical persons

(d) Privileges and immunities of diplomatic, consular and trade missions

(e) Intellectual property

(f) Recognition and execution of foreign judgements and arbitral awards" 1.

Thus, although this paper will be concerned with the operation of the clause mainly in the context of international trade, because that field is the clause's most important alleged captive, one should bear in mind its multitude of subject matter. Similarly, one should also, at the outset, qualify the expression "the" most favoured nation clause; though it is true that most clauses are similar enough in wording and objective, in setting up a similar standard of treatment in any one field to generalize about them, nevertheless every clause bears the individual imprint of

1. - Yearbook of the Internation Law Commission 1968 Vol. II p 167

its creators i.e. the parties to it; hence to the extent that the parties differ, the clauses they enter into will differ. As Schwarzenberger has pointed out:

"Speaking strictly, there is no such thing as the most favoured nation clause; every treaty requires independent examination" 2.

It is therefore open to the parties to determine the type of most favoured nation obligation and rights being entered into. This qualification does not detract from the identity of rationale lying behind all MFN clauses, and it is on this identity, on which the collective label most favoured nation clause is justified, that the following generalizations will be based.

In this part of the paper, a selection of definitions of the MFN clause is offered, followed by a brief description of the effects of its operation in the 'real world'. In order to highlight its features by way of contrast, a comparison between the MFN principle and similar concepts will then be drawn, paying individual attention to its relationship with the principle of non-discrimination. From this perspective, we turn to the legal ingredients of the MFN clause itself: the discussion follows a chronological order, outlining the legal ingredients of its creation, its legal structure once established - including an outline of the types of clauses commonly employed today - and concluding with a description of how rights enjoyed under an MFN treaty are terminated.

Definitions of a "Most Favoured Nation clause":

There would appear to be almost as many definitions of MFN clauses as there are clauses themselves; in many respects, this is hardly surprising, since each clause differs from the other. There is no one "standard" clause, and hence no one standard definition that will serve all clauses equally adequately. However, to the extent that the generalization 'the MFN clause' is valid, and it is, the

2. - International Law and Order (1971) p 138

following definitions are offered.

Usenko defines it thus:

"Under the MFN principle is understood the stipulation contained in international treaties according to which each contracting party is obliged to grant the other contracting party in a certain domain of their mutual relations defined in the treaty the same rights, advantages, privileges and favours as it grants or will grant in the future to any third state" 3.

D. Vigues puts forward a simpler definition:

"The most favoured nation clause is a provision in a treaty whereby a State grants another State such advantages as it has already granted or may subsequently grant to any other State" 4.

Given its importance and susceptibility to independent treatment it is often considered wise to define commercial MFN clauses separately. C. Hyde's definition is geared toward this particular species:

"Briefly defined, the most favoured nation clause is simply a pledge of non-discrimination against the commerce of the other party equally favoured with any third party. The customary wording however, has been a pledge to grant to the other party treatment not less favourable than may be granted to the "most favoured" among other countries" 5.

Finally, the Special Rapporteur's definition is offered:

"Most Favoured Nation treatment is treatment accorded by the granting state to the beneficiary state or to persons or things in a determined relationship with that state not less favourable than treatment extended by the granting state to a third state or to persons or things in the same relationship with a third state" - Draft Article 5. 6.

Certain themes recur through all these definitions; at the heart of a MFN clause lies the idea of a standard being established

3. - Forms of the Regulation of the Socialist International Division of Labour, 1965 p 226 quoted in Yearbook
4. - "La clause de la nation la plus favorisee etsa pratique contemporaire" Recevil des Cours de L'Academie de droit international de la Haye 1971 Vol 130 p 213
5. - "International Law chiefly as Interpreted and Applied by the US" 2nd Rev. Ed. 1947 Vol. II p 1503
6. - Report of the International Law Commission 1978 p 41

below which a state may not legally be treated. The standard is dynamic in so far as it is determined precisely by reference to the granting state's treatment of all other states it has dealings with who are not parties to that clause. This independent criterion of comparison necessarily fluctuates since the clause itself places no fetters on how the granting state will treat third states in the future. This dependent orientation on ulterior factors in many ways characterizes the clause.

How the MFN clause works:

The political and economic aspects of most favoured nation clauses are the subject of prolific books and articles, due in part no doubt to its involvement in the old debate on free trade. It is outside the context and competence of this paper to consider those aspects except briefly to summarize the operation of the clause in the 'real world' as an aid to appreciating its legal aspects.

The entrenchment of the clause as the basis, obstensibly, of international trade has proved to be its most significant association, so it is to this particular 'real world' that attention will be focused. One may be forgiven for assuming a natural kinship between the MFN clause and the liberalization of trade, because this is accepted generally as its usual effect and it is traditionally associated with liberalizing international trade by lowering customs tariffs and restrictions. Certainly Article 1 of the GATT proceeds on this assumption. Unfortunately the MFN clause guarantees nothing of the sort; it merely guarantees the relevance and accountability of action by the granting state to the states it has promised MFN treatment to; it does not, on the other hand dictate what that action to third states will be. The granting state, after having entered into an MFN treaty, remains perfectly free to regulate the treatment it accords to third states from among whom the "most favoured nation" will emerge; against those third states it is perfectly entitled to raise tariffs as high as it pleases, and this will be the level the

beneficiary will have to accept. Indeed, the clause generalizes an increase in the level of a tariff, thereby increasing the general level of tariffs. The comtemporary interpretation of the clause, as a favourable influence on the liberalization of trade, has not always been shared by past generations; as reminded by Gerard Curzon, commenting on the inter war years:

"The most favoured nation clause, under these circumstances (of increasing tariffs) reinforced protectionist tendencies. Even less favourable theories came to be evolved during this period which went so far as to accuse the clause of favouring the highest tariffs" 7.

Indeed, the Special Rapporteur starkly confessed:

"It can be linked to the most diverse systems of economic policy, to free trade as well as to protectionism" 8.

However, the type of clause entered into does carry with it some inherent effect; if a state sees itself as principally a successful exporter, it naturally looks to the unconditional MFN clause to maximise the realization of its potential. As the United States' experience indicates the conditional form of the clause, or indeed, the absence of any clause at all, is naturally linked with protective economies.

The significance of the clause appears to be, therefore, not that it necessarily leads to a further liberalizing of trading relationships (which in itself is accepted as a good thing, but its natural association with the clause, it is submitted, misconceived) but rather that it establishes some sort of framework in which the international relationship of these two or more states may be governed. As the Special Rapporteur commented in qualification of the above accusation of philosophical promiscuity:

"The most favoured nation clause has a harmonizing and levelling effect...it renders the conclusion of new individual agreements superfluous...it creates favourable conditions for the development of mutual commercial relations between states. It consists of two main factors: the granting of favours and the elimination of discrimination" 9.

7. -"Multi Commercial Diplomacy" 1965 p 59
8. - Yearbook 1968 Vol. II p 168
9. - ibid

Certainly it is true that the clause will, by its very nature, operate to eliminate discrimination. The subsequent actions by the granting state to third states, which will determine the content of the clause, may, however, strain the normal meaning attributed to the word 'favour'; it cannot, for example, always be equated with the reduction of tariffs, since the granting state may increase them against third parties, creating a margin in which the tariffs against that beneficiary state may, under the MFN treaty, actually be increased. No doubt this may still be regarded as a 'favour' but one whose content may fluctuate; its meaning is qualified in that the treatment the beneficiary state gets may be worse after the MFN treaty then it had been previously. Such a fluctuation is inherent in the MFN clause. As Rossillion explains:

"The clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign states by the grantor state; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other states" 10.

The MFN clause compared with similar concepts:

The basis of the MFN clause is in the promise to grant MFN treatment. Other forms of expressing this promise may be employed to convey the same idea; likewise, a similar form to the MFN clause may be employed to express a promise in different circumstances from the traditional spheres embraced by MFN clauses. As an aid to understanding the structure of an MFN clause, it is proposed to compare it to these similar promises.

The traditional MFN clause promises MFN treatment. Other "most favoured nation" phrases do exist, however, expressing essentially the same idea. The MFN 'standard' is employed sometimes; Schwarzenberger believes this to mean simply the standard of most favoured nation treatment 11. (The latter has

10. - "La clause de la nation la plus favorisee dans la jurisprudence de la Cour Internationale de Justice" J.D.I. de Paris 82nd Year No. 1 p 106
11. - International Law and Order" (1971) p 138-9

already been defined. 12.) This may be contrasted with other standards in international law, such as the Minimum Standard, the standard of preferential treatment, the standard of identical treatment, the standard of equitable treatment, the standard of the open door, the most favourable conditions standard (granted by the French Government to the international organization UNESCO) and the standard of national treatment. The last deserves special attention because MFN treatment is often coupled with national treatment, involving a comparison of the standards concerned. Schwarzenberger explains the distinction:

"whereas the MFN standard aims at foreign parity, the object of the national standard is inland parity." 13.

The Special Rapporteur recognised the association between the two by including two Draft Articles covering their relationship. Draft Article 18 confirms that the grant of national parity to a third state is certainly one of the rights processable by the MFN clause which the beneficiary may claim; Article 19 deals with the situation where the beneficiary has been granted both national treatment and MFN treatment "or other treatment" by the granting state: the Draft Article allows the beneficiary to elect which treatment it prefers according to whichever is most advantageous to it. A grant of national treatment differs from MFN treatment in that the former exists independently of treatment the granting state confers on third states: it is therefore a direct, substantial grant, giving the beneficiary automatic rights, because a government always has dealings with its nationals, whereas, of course, MFN treatment is an empty grant till given content by the granting states' dealings with a third state. 14.

12. - p 9
13. - op cit
14. - As the British delegation argued in the Anglo-Iranian Oil Company case before the International Court of Justice:
"it acquires its content only when the grantor state enters into relations with a third state, and its content increases whenever fresh favours are granted to third states"- Report of the ILC 1978 p52 quoting I CJ Pleadings, Anglo-Iranian Oil Co case 1952 p533. In fact, the potential emptiness of the MFN clause is never fully realized because every state, to varying degrees, has relations with other states simply through inhabiting a common planet. In relation to the specific subject matters of the MFN clause, however, a granting state may indeed have no dealings with a third state: in this situation, due to the operation of the ejusdem generis rule, the MFN treaty remains empty of content as long as that isolation in the particular field persists.

The MFN clause, based as it is on a comparison, has cousins of a different sort - related not on conceptual grounds, but due to the context in which they operate. An example of these include 'most favoured organization' clauses, created usually between a state and an international organisation. The promise is identical to a MFN clause, except the standard incorporated is that of the most favoured "organization". Article VIII, paragraph 4 of the FAO constitution provides an example of such a most favoured organization clause": it stipulates inter alia:

"Each Member Nation and Associate Member undertakes (....) to accord to the Director General and senior staff diplomatic privileges and immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations." 15.

Other examples are clauses relating to aircraft, which differ from a normal MFN clause since the standard envisaged is the state's treatment of its own aircraft ie national treatment. Again national treatment figures significantly as the standard in the field of pledges between states relating to shipping. The other standards employed in this field are those of most favoured nation, or simply a promise of non discrimination.

The Most Favoured Nation clause and the principle of non-discrimination:

The status of the MFN clause in international law

15. - Yearbook of the ILC Vol. 2 p 214

brings into focus its relationship with the established principle of non-discrimination. The two indeed are intimately linked to such an extent that it is a matter of conjecture whether in fact one is not merely a particular manifestation of the other. Indeed the International Court of Justice has described the intention of an MFN clause in general terms that appear to admit this interpretation - "to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned" 16. Clearly the two, closely associated as they are, work to achieve similar results. The chief consequence of accepting the two as the same is that it elevates the MFN clause, if an ingredient of the principle of non-discrimination, into a general principle of international law. The Special Rapporteur rejected this view, maintaining that the two were distinct from each other:

"The close relationship between the MFN clause and the general principle of non-discrimination should not blur the differences between the two notions" 17.

He went on to distinguish:

"The obvious rule, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship. In other words, the principle of non-discrimination may be considered as a general rule which can always be invoked by any state. But a State cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned has itself received the general non-discriminatory treatment on a par with other states" 18.

The Commission illustrated the difference by reference to the Vienna Convention on Diplomatic Relations, Article 47 of which provides:

"1. In the application of the provisions of the present convention the receiving state shall not discriminate as between states.

2. However, discrimination shall not be regarded as taking

16. - "Rights of Nationals of the USA in Morocco" ICJ Reports 1952 p 192
17. - Yearbook 1976 Vol. 2 Part 2 p 8
18. - ibid

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place:

(b) Where by custom or agreement states extend to each other more favourable treatment than is required by the provisions of the present convention" 19.

The right to such "more favourable treatment" must be based on an explicit commitment of the state granting the favours - such as an MFN treaty. Clearly, however, if MFN treatment in a particular situation is in fact identical to the level of "general non discriminatory" treatment, the MFN treaty is rendered unnecessary as the beneficiary will have an independent right to such treatment. To what extent the two principles will overlap is dubious in fact, due to the limited and uncertain scope of the principle of non discrimination. As one representative of the Sixth Committee observed:

"It followed from the content of that provision (Article 47) that its purpose was the general observance of the obligations stipulated by the convention for all States. By stipulating those obligations as a minimum standard in diplomatic relations, the Vienna Convention made it possible for States to grant each other broader advantages, for example, in the form of the most favoured nation clause. However, such a standard did not exist in other fields, particularly in the commercial-political field" 20.

Creation of the clause:

As the historical introduction suggests the MFN clause is very much a product of the world of international commerce, firmly rooted in the practise of states. It emerged in response to a need to establish a framework within which contact between states could be stablized and made a little more predictable.

Today, MFN clauses are always created by their incorporation in a written treaty negotiated by subjects of international law. It is quite true that theoretically an MFN clause could be created orally - the requirement that it be reduced to writing cannot therefore be considered a definitional pre-requisite; however, oral MFN clauses are today so rare, if existent at all, that they

19. - Report of the ILC 1978 p 16
20. - Report of the Sixth Committee 1978 p 17-8 A/33/419

may safely be disregarded. Likewise, the typical subject of international law creating the clause today invariably is the state, though as with MFN clauses, it is possible that other subjects of international law, such as an international organisation, could become a party to a treaty incorporating such a clause, and this does happen. Though the clause in fact is almost always created when one state grants it to another state pursuant to a written treaty, this does not represent the only context in which it may operate. Draft Article 4 of the Draft Articles 21. produced by the International Law Commission specifically excludes oral MFN clauses, and those including a subject of international law other than a state from the provisions of the Draft Articles, but does not in any way undermine the validity of such clauses outside the scope of the Draft Articles (limited by Draft Articles 1 and 4 to written MFN clauses contained in a treaty concluded between states) - indeed, Draft Article 3 is expressly included to negate this suggestion. These limitations were consciously designed to run parallel with the Vienna Convention on the Law of Treaties, from which study the idea of codifying the Most Favoured Nation clause was born. From the outset the commentary acknowledges the association between the two studies: in relation to Draft Article 1 the Special Rapporteur explained:

"This article corresponds to article of the Vienna Convention"22.

Again in relation to Draft Article 3:

"This article is drafted on the pattern of article 3 paragraphs (a) and (b) of the Vienna Convention" 23.

The attempt to maintain the symmetry between the Draft Articles on the MFN clause and the Vienna Convention on the Law of Treaties resulting in the exclusion of subjects of international law other than states from thier operation is fundamental to their relationship with the European Community.

The context within which MFN clauses may be created varies; the most common context is that of one state granting it to another state in a treaty to which both are parties - this is labelled a "bilateral clause", since two states are the contracting parties.

21. - Report of the International Law Commission 1978 p 33
22. - ibid p 28
23. - ibid p 32

However, a state may conclude a MFN clause with two or more other states - such a context labels it as a 'multilateral clause', the most conspicuous example being Article 1 of the GATT 24. In legal terms, little turns on the context, bilateral or multilateral, in which the clause is created; this is recognised in Draft Article 17, establishing the irrelevance of the context in which the clause is created. The unilateral form of the clause was excluded from the Draft Articles because today it is hardly ever employed; theoretically, it represents a perfectly valid form of the MFN clause. It does, however, lack that element of formal reciprocity that exists in both bilateral and multilateral clauses where MFN treatment is accorded to, and by, the parties to the treaty. This reciprocity has been described as 'the clause's essential ingredient' 25. Merely stipulating the condition of offering reciprocity in a unilateral clause casts no obligation on the beneficiary to grant reciprocal treatment - which is the case under bilateral clauses; failure to do so by the beneficiary simply jeopardizes the MFN treatment granted to it by the granting state.

The Most Favoured Nation clause in international law:

This introductory perspective is required initially to understand the principles governing an individual clause. As a result of its overwhelming popularity in the practise of states, the possibility exists that today the clause has been elevated to a principle of international law, as opposed to being governed by such principles. On this, the Special Rapporteur endorsed the established view; the following quote is practically lifted out of Schwarzenberger:

"Although the grant of most favoured nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary law" 26.

Thus MFN treatment arises where it has been expressly agreed on; overwhelmingly, this agreement is enshrined in a treaty concluded between states, though theoretically agreement could still

24. - The General Agreement on Tariff and Trade, 30th October 1947
25. - Yearbook 1976 Vol. 2 Part 2 p 27 per Special Rapporteur
26. - Schwarzenberger : International Law and Order p 138-9 (1971)

validly be concluded orally; likewise "binding resolutions of international organisations" and "legally binding unilateral acts" 27 could provide the source of such agreement. The principle of international law compelling observance of the clause when it is incorporated in a treaty is that of pacta sunt servanda. Because international law imposes no obligation independently of the agreement of states to grant MFN treatment, Draft Article 7 merely stated that MFN treatment was bound to be accorded where it was based on a legal obligation.

The source of the right to MFN treatment:

The typical pattern followed in the majority of MFN clauses comprises a promise on the part of the granting state to accord the beneficiary state MFN treatment; it is this promise of MFN treatment that gives the phrase promising it the label "most favoured nation clause". The content of such a promise is shaped by the subsequent actions of the granting state to a third party - the most favoured nation. This poses a logical question: where is the foundation of the beneficiary's right to MFN treatment in the original treaty, or in the subsequent actions or treaty of the granting state to the most favoured nation? To this question, the International Court of Justice in the Anglo-Iranian Oil Company case answered unequivocally:

"The treaty containing the most favoured nation clause is the basic treaty...It is this treaty which establishes the juridical link between the United Kingdom (the beneficiary state) and a third party treaty and confers upon that state the rights enjoyed by the third party" 28.

Clearly this view is now accepted, and is reflected in Draft Article 8(1). If, however, one accepted the MFN clause as being an exception to the rule that treaties only produce effects as between the contracting parties, as contended by Fauchille 29, then one has to concede the logic of the British position:

"A most favoured nation clause is in essence by itself a clause without content; it is a contingent clause...It acquires

27. - Yearbook 1976 Vol. II p 20
28. - ICJ Reports 1952 p 109
29. - Fauchille : Traite de droit international p 359

its content only when the grantor state enters into relations with a third state, and its content increases whenever fresh favours are granted to third states" 30.

From that analysis, it is easier to regard the beneficiary's rights as being founded in the treaty or actions granted to the third state. However, such a view soon runs into difficulties where the favour granted to a third party is not pursuant to a treaty, or even an agreement, the original treaty clearly emerges as the basis of the beneficiary's right, in that the only competing source is simply the fact of the favour having been granted, and consequently, not nearly as compelling as a "source" of that right; in logic, this may be so; in legal terms, it is not. Furthermore, basing the obligation in the original treaty conforms to the rules of the law of treaties concerning the effect of treaties on states not parties to a particular treaty. In conclusion, Sir Gerald Fitzmaurice's description of the relationship appears apt:

"If the latter treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands around" 31.

Legal Nature of a Most Favoured Nation clause:

The International Law Commission completed its codification of the rules relating to MFN clauses in 1978. The draft rules produced highlighted the legal principles governing their operation once an MFN clause has been concluded. The apparent simplicity behind the idea of an MFN clause conceals it peculiar legal structure. The basis of this peculiarity stems from the fact that the content of the treaty is totally dependent on the treatment that the granting state accords a non party i.e. the third state. As the Special Rapporteur pointed out:

"The effect of the MFN process is by means of the provisions of one treaty to attract those of another" 32.

Reference to that treaty itself may prove problematical; its

30. - ICJ Reports 1952 p 533
31. - "Law and Procedure of the ICJ" 1951-4; BYIL.32.88
32. - Yearbook 1976 Vol II p 32. This explanation of the MFN process may be a little misleading; it is fundamental to the nature

translated impact on the treaty determining the corpus of that treaty is even more complex. It is this aspect of the clause to which we now turn.

Scope of a most favoured nation clause:

Obviously the substantial contents of a MFN clause are individually distinct, in this respect the individuality of the clauses is dominant. Nevertheless, certain generalizations about the operation of its substantial

13. - Contd: of an MFN clause that it is the fact of a favour being granted to a third state (provided, of course, it be ejusdem generis to the subject matter of the MFN treaty) that confers on the beneficiary state the right to that favour - unless the MFN treaty is expressly limited to favours granted to a third state originating from a treaty. As the Special Rapporteur explained in relation to Draft Article 5 defining "Most Favoured Nation treatment":

"It is not necessary for the beginning of the operation of the clause that the treatment actually extended to a third state... be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause." Report of the ILC 1978 p 45.

The Special Rapporteur subsequently commented on this point in relation to Draft Article 8:

"if there is no treaty or other agreement between the granting State and the third state, the rule stated in the article is even more evident. The root of the right of the beneficiary state is obviously the treaty containing the clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting state to the third state. " Report of the ILC 1978 p 55 (emphasis mine)

Clearly therefore, the comment being discussed is only accurate where the favours granted to the third state are pursuant to a treaty - and even in this context, it is the fact of a favour actually being granted that activates the MFN treaty.

aspects are valid, and indeed, form the corpus of the principles governing MFN clauses. This does not hide, however, the simple fact that these generalizations do operate on the fringes of the clause; the core of it is created by the individual contracting parties.

It has already been pointed out that it is the promise of MFN treatment accorded to one state by another state that gives the beneficiary his right to MFN treatment. (The subsequent actions of the granting state give vitality to the MFN clause). The MFN clause will describe the beneficiary of the promise - either the beneficiary state, or persons or things in a determined relationship with it. Here again, the will of the contracting parties is dominant; the MFN clause is always created, despite the inherent generality of the concept, in relation to a particular field - for example, shipping, commerce or establishment. The scope of the promise made however is one aspect of the MFN clause whose universally accepted delimitation is a product of the jurisprudence of international tribunals, national courts and diplomatic practise. 33. This definition is the "ejusdem generis" rule. The essence of the rule in relation to MFN clauses is that the promise involved "can only operate in regard to the subject matter which the two states had in mind when they inserted the clause in their treaty" 34.

The Commission of Arbitration in the "Ambatielos Case" 35, recognised this rule as the principle governing MFN clauses:

"The commission holds that the most favoured nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates" 36.

The Special Rapporteur maintained the applicability of this rule to all MFN clauses - commercial or otherwise:

"Unless this process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting state obligations it never contemplated" 37.

33. - Yearbook 1976 Vol. II Part II p 29
34. - A.D. McNair "The Law of Treaties" p 287
35. - ICJ Reports 1953 p 10
36. - UN Reports of International Arbitral Awards Vol. XII p 107
37. - Yearbook 1976 Vol. II p 32

As reflected in Draft Articles 9 and 10, the ejusdem generis rule pervades the interpretation of any MFN clause. Its most significant results are:
- The restriction of any right able to be claimed by the beneficiary state to "those rights falling within the scope of the subject matter of the clause" - Draft Article 9.
- The restriction of persons or things able to claim such a right to those specified or implied from the subject matter of the clause.

This governs what rights may be claimed, and who these rights may be claimed by. The influence of this rule goes beyond this however. It dictates the actual rights the beneficiary is entitled to, and again, who actually is entitled to claim them, since it is only the rights and favours granted to the most favoured nation by the granting state having a substantial identity with those stipulated in the MFN clause that may be claimed by the beneficiary state. Hence, in commercial MFN clauses, the complex question of 'like products' developed, representing perhaps the most obvious manifestation of this rule. The Special Rapporteur reduced the potentially unlimited complexity inherent in this comparison to the simple explanation:

"If the most favoured nation clause promises most favoured nation treatment solely for fish, such treatment connot be claimed under the same clause for meat" 38.

However, the application of the ejusdem generis rule has its limitations; despite its insistence on limiting the scope of the clause to situations where a sufficiency of identity between the rights, persons or things contemplated in the MFN clause and the treatment accorded to the third party, such identity is not required when comparing the "price" paid, if any, by the third state to secure that treatment that the beneficiary has claimed for itself. This, at any rate, is in the opinion of the Special Rapporteur, the conclusion of modern thinking on the issue; this view is codified in Draft Article 15 which states that the beneficiary state is not affected by the question of whether the

38. - ibid

treatment accorded by the granting state to a third state has been extended against compensation" 39. This applies to all unconditional MFN clauses, as well as to MFN clauses silent on the subject of conditions; the question does not arise in regard to clauses expressly stipulated to be subject to a condition of compensation.

Likewise, the MFN clause operates independently of any restrictions agreed upon by the granting state and the third party state; despite the popularity and limited recognition given to "clauses reservees", which contradicts this principle, the logic of more compelling legal principle, namely the general rule regarding third states of the Vienna Convention (Articles 34-35) and the fact that the legal source of MFN treatment is the original MFN clause, force the conclusion that the MFN clause operates independently of certainly any subsequent, and probably precedent, restriction agreed upon by the granting state and a third state.

The different types of most favoured nation clauses:

Considering the variety of MFN clauses that do exist, it is remarkable how similar in fact their structure remains - making it possible to develop legal principles governing the interpretation of this structure. The similarity between the clause extends even to the actual words employed. The divisions that do exist are broad, and hence fairly easily recognisable. The MFN clause, though in itself a single idea, in fact can be broken down into a variety of subspecies. They are:

(a) The "conditional" MFN clause:

This single description is itself slightly deceptive since a variety of conditional clauses exist. They are:

- The "American" conditional clause, called this because of that state's unqualified devotion to its principles until 1923. The essence of such a clause was that the granting state, after a MFN

39. - Report of the ILC p 90 - Draft Article 15

treaty had been concluded, still was not required to treat the beneficiary state equally with the most favoured nation till that beneficiary state granted "concessions 'equivalent' to the concessions made by such third party" 40. At the heart of this interpretation lay the Anglosaxon concept of consideration, resulting in the view of an unconditional clause as "giving something away for nothing". The hallmark of such a clause was the standard inserted freely, if the concession was "freely made or on allowing the same compensation or the equivalent if the concession was conditional" 41. Even if the treaty was silent on the question of conditions the United States until 1923 construed a treaty as conditional. Draft Article 11 now provides that unless an MFN clause is made subject to a "condition of compensation" a term defined in Article 2, the clause will be interpreted unconditionally. This then creates a presumption of unconditionality in the absence of conditions stipulated in the MFN treaty or outside it.

Draft Articles 12 and 13 are both concerned with conditional MFN clauses. Draft Article 12 establishes the general rule:

"If a most favoured nation clause is made subject to a condition of compensation, the beneficiary state acquires the right to most favoured nation treatment only upon according the agreed compensation to the granting state" 42.

Quite clearly, the condition stipulated is not necessarily incorporated in the MFN treaty; all that is required is that it be agreed upon by the granting and beneficiary states. The Special Rapporteur explained:

"Such...conditions have to be inserted in the clause, or in the treaty containing it, or be otherwise agreed between the granting and the beneficiary states" 43.

The particular conditions which the beneficiary may be subjected to may be quite independent of the favoured treatment envisaged within the MFN treaty, such as economic advantages (a long term loan for example) or political advantages. Draft Article 13 deals with MFN treaties stipulating a specific type of compensation,

40. - Report of the ILC 1978 p 73 quoting United States of America Department of State Bulletin 58 1940
41. - ibid p 72 quoting Treaty between USA-France - W.M. Malloy Treaties Conventions
42. - Report of the ILC 1978 p 72
43. - ibid p 82

that of "reciprocal treatment"; the beneficiary state is only entitled to MFN treatment from the granting state once it has accorded to that granting state the same or equivalent treatment granted by the granting state to the third state. Conditional clauses subject to reciprocal treatment are invariably employed in relation to consular rights and privileges, private international law and establishment matters. The Special Rapporteur explained why this type of conditional clause was singled out for individual treatment:

"The Commission deemed it appropriate to provide separately for this type of condition in view of its being the most commonly found among the possible conditions of compensation. The rule of article 13 is an application of the general rule contained in article 12 to the specific case of most favoured nation clauses subject to the condition of reciprocal treatment" 44.

Thus Draft Article 12 establishes the general rule applicable to all MFN treaties subject to any condition of compensation, while Draft Article 13 deals specifically with those subject to the conditions of reciprocal treatment.

(b) the unconditional clause:

This represents the dominant form of the clause today. Draft Article 11 provides:

"If a most favoured nation clause is not made subject to a condition of compensation, the beneficiary state acquires the right to most favoured nation treatment without the obligation to accord any compensation to the granting state" 45.

Thus the unconditional clause is created in the absence of a condition of compensation, a term defined in Article 2 as "a condition providing for compensation of any kind agreed between the granting state and the beneficiary state, in a treaty containing a most favoured nation clause or otherwise" 46. It is interesting that the previous Draft Article establishing unconditional clauses in 1976 was more directly concerned to stipulate expressly the presumption of unconditionality arising in the absence of agreed conditions. Draft Article 8 provided:

44. - ibid p 87
45. - ibid p 72
46. - ibid p 29

"A most favoured national clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree" 47.

In contrast, the presumption created by Draft Article 11 is much more indirect.

Whereas the conditional form of the clause sets up fulfilment of the conditions stipulated as the vehicle of MFN treatment, an unconditional clause itself operates as the vehicle of such favoured treatment. The following description of the latter's operation conveys well the immediate effect produced upon the conclusion of an MFN treaty in the commercial context.

"The unconditional form of the MFN clause provides that any advantage, favour, privilege or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party" 48.

A significant difference between the conditional and unconditional clauses arises in relation to when the right of the beneficiary state to MFN treatment commences; under the unconditional form of the clause, the beneficiary's right to MFN treatment comes to maturity immediately the granting state accords a relevant favour on a third state; in relation to a conditional clause subject to a condition of compensation or reciprocal treatment, the right of the beneficiary state to MFN treatment arises at the moment when the relevant treatment is extended by the granting state to a third state or to persons or things in the same relationship with that third state (as with an unconditional clause) but subject to the additional test of when "the agreed compensation is accorded by the beneficiary state to the granting state" 49 or "the agreed reciprocal treatment is accorded by the beneficiary state to the granting state" 50 respectively. This is the regime established under Draft Article 20. Again it may be contrasted with Draft Article 18 of the 1976 Draft Articles which set up the communication by the beneficiary state to the granting state of the former's consent to accord "material reciprocity" as the criterion

47. - Yearbook of the ILC Vol. 2 Part 2 p 22
48. - supra, footnote 40
49. - Report of the ILC 1978 p 122
50. - ibid

on which the beneficiary's right to MFN treatment was to be determined as having arisen.

Termination or Suspension of Most Favoured Nation Treatment: Draft Article 21 establishes 3 rules regulating the termination or suspension of rights enjoyed by the beneficiary under a MFN clause. Paragraph 1 stipulates the general and obvious rule that the right of the beneficiary state to most favoured nation treatment is terminated or suspended if the granting state terminates or suspends the relevant treatment to the third state. This rule applies to conditional and unconditional MFN clauses; the former however, may in addition be terminated in the manner prescribed in paragraphs 2 and 3. Paragraph 2 stipulates that a MFN clause subject to a condition of compensation may be "equally terminated or suspended at the moment of termination or suspension by the beneficiary state of the agreed compensation". A MFN clause subject to the condition of "reciprocal treatment" is "equally terminated or suspended at the moment of termination or suspension by the beneficiary state of the agreed reciprocal treatment" 52.

A possible problem may arise in relation to the criterion established under paragraphs 2 and 3 " at the moment of termination.. of the agreed compensation" and " at the moment of termination ... of the agreed reciprocal treatment" respectively. When, precisely, is that moment? When the beneficiary state terminates compliance with the condtion, or when such termination is communicated to the granting state? The words employed in each instance suggest that the former time is envisaged "at the moment of termination". The commentary to these Draft Articles on the other hand indicates that the latter time is envisaged by the use of these words:

"in such cases the right of the beneficiary state... will also be terminated... at the time when the beneficiary state withdraws its consent to accord the agreed compensation or reciprocal agreement" 53.

51. - Report to the ILC 1978 p 129
52. - ibid
53. - ibid p 133

Such an interpretation is in fact consistent with the 1976 Draft Articles which expressly stipulated in Draft Article 18(2) communication to the granting state by the beneficiary of the latter's withdrawal of consent to comply with the condition as the time when the beneficiary's right to MFN treatment was terminated.

Exceptions to the Operation of the Most Favoured Nation clause:
The historical introduction to the development of the MFN clause concentrated exclusively on its positive development - its evolving structure due to increasing popularity and application. The picture is incomplete, however, in that it takes no account of the negative consequences of such a development - the emergence and establishment of exceptions to the operation of the MFN clause. The significance of these 'exceptions' cannot be underestimated; normally one could assume that the existence of exceptions, by their very nature, would leave the general rule intact. This is not necessarily the case here. Undoubtedly, the exceptions to the MFN rule form as much an integral part of its ultimate definition as its positive statement. Considering the apparent simplicity and generality of the positive MFN rule, it is perhaps not surprising that a number of exceptions should exist, restricting, or lending precision to the application of the basic rule. The significance of the present exceptions goes beyond this however, and appears to threaten the survival of the rule itself. It is proposed to concentrate chiefly on the 'customs union' exception - because it is at present the most important, and because its operation, it is said, threatens to empty the MFN principle of any meaningful purpose. It is precisely because of this possibility that an inquiry into the exceptions to the MFN principle takes on added significance - indeed, a widely held view maintains that the MFN principle survives today only in the application of the exception to it.

Though this paper will concentrate mainly on the customs union exception, in the interests of completeness, and partly in order to put the customs union exception in perspective, the other 'recognised' exceptions will be summarised.

From the outset, the Special Rapporteur identified the following possible exceptions:

"(i) Customs Unions

(ii) Frontier Traffic

(iii) Interests of developing nations
(iv) Interests of public policy and security of the contracting parties
(v) Other exceptions" 1.

The Special Rapporteur's "hunch" proved a little premature however; the final shape of the Draft Articles on exceptions differed significantly from the fields originally conceived as possible exceptions in 1968. The rather loud silence of these Draft Articles on the customs union exception is perhaps the most conspicuous departure from the fields originally conceived. Those finally adopted were:

Draft Article 25:

This establishes the so called "frontier traffic" exception; the essence of this rule is that a beneficiary state may not claim, pursuant to a MFN treaty, from the granting state the advantages that granting state accords to a "contiguous third state in order to facilitate frontier traffic" 2.

In fact it may be doubted whether this represents a true exception at all; as the Special Rapporteur explained:

"It seems to be founded on the basic philosophy of the most favoured nation clause and notably on the ejusdem generis rule... It seems evident that a beneficiary state which has no common frontier with the granting state is not in a position to claim the same treatment for its nationals which the granting state extends in respect of those nations of the contiguous third state who are residents of the frontier zone" 3.

Thus, to the extent that favours granted by the granting state to a third state are not being extended to the beneficiary state, this represents an exception to the general rule; however, the fact that such rights are not extended stems from the limitations inherent in the MFN principle itself (i.e. the ejusdem generis rule) rather than stemming from repeated exclusion of such rights in the practice of states. We shall deal subsequently with exceptions to the rule whose exceptionality cannot be traced back to within the principle itself.

1. - Yearbook 1968 Vol. II p 169-70
2. - Report of the ILC 1978 p 16
3. - ibid p 165

Draft Article 26:

This article establishes the inability of a coastal state beneficiary of a MFN clause to claim for itself the same advantages accorded by a granting state to a third landlocked state. The source of this exception lies in "the fundamental right of a landlocked state to free access to the sea" 4. In fact the Special Rapporteur expressly refrained from making the basis of this exception on the "rights and facilities which are needed by landlocked states or which are due to them under general international law" 5. Instead he cited the general recognition that such rights could not be claimed under a MFN clause. This affords an example of how an exception is invoked, and recognised in pursuance of securing the legitimate interests of states in a disadvantageous position, and one cannot help but feel that an element of "progressive" codification existed in the inclusion of this exception -

"The adoption of the rule will facilitate the extension of free access rights to those countries" 6.

Clearly then this exception may be contrasted with the frontier traffic exception. The latter stems directly from the MFN clause itself and its structure, whereas the former seeks its justification in the overall relationship between the operation of the MFN clause and international law; one could hardly argue that it followed logically from the ejusdem generis rule, or any ingredient of the MFN rule for that matter.

A more blatant example of this latter type of exception is that relating to developing nations; Draft Article 23 states: 7

"A beneficiary state is not entitled under a most favoured nation clause to treatment extended by developed granting state to a developing third state on a non reciprocal basis within a scheme of generalised preferences established by that granting state..."

The rationale underlying this exception is precisely the opposite from that of the "frontier traffic" exception; the latter exists because of the MFN principle - the ejusdem generis

4. - Yearbook 1976 Vol. II Part II - proposal by Czechoslovakia
5. - ibid
6. - Report of the ILC 1978 p 168
7. - ibid p 138

rule logically dictates such a limitation flowing naturally from the principle itself. The developing nations exception, on the other hand, is erected precisely to limit the natural operation of the MFN principle. Likewise, its existence owes nothing to any established principle of international law; this could not be otherwise, since no principle of international law exists, apart from widespread sympathy stipulating any rights for developing nations. As the Special Rapporteur commented:

"While all these developments show that there might be a tendency among states to promote the trade of developing countries...the conclusion of the Commission was that this tendency was not yet crystallized sufficiently to permit it to be embodied in a clear legal rule which could find its place among the general rules on the functioning and application of the most favoured nation clause" 8.

Its inclusion is primarily a product of the conclusion that some consequences of the untampered operation of the MFN clause are unacceptable.

"To apply the most favoured nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community...The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most favoured nation clause will not apply to certain types of international trade relations" 9.

The possible development of rules of international law in favour of developing nations was facilitated as much as possible in Draft Article 30.

"The present Articles are without prejudice to the establishment of new rules of international law in favour of developing nations" 10.

Like Draft Article 26, the "developing nations exception is justified not by reference to any principle of international law (because none at present has emerged) and certainly not by refer-

8. - Report of the ILC 1978 p 176
9. - ibid p 138 quoting Secretariat of UNCTAD
10.- Report of the ILC p 173

ence to the limitations inherent in the clause itself, but rather in the general agreement...that states will refrain from invoking their rights to most favoured nation treatment" 11, such agreement being expressed in the United Nations organs, and the agreement by the Contracting Parties to GATT to waive their rights to MFN treatment where the advantages involved are granted to a developing nation. This "general agreement", though not a rule of customary law, is akin to the general recognition of "the legitimate interest of landlocked states"12; both are examples of the International Law Commission fixing on a degree of consensus relating to a certain field (not intense enough to represent a rule of customary law), and, performing it function of "progressive development", taking that consensus and establishing a rule based on it.

The Customs Union Exception:

Purely in terms of economic consequence , the customs union issue represents the most important exception. Its importance stems partly from the field it operates exclusively in - that of commercial MFN clauses, traditionally regarded as the most important domain in which the MFN principle operates. The issue dominates the commercial sphere of the MFN clause for the simple reason that its domination of world trade threatens to empty the operation of the principle itself of any meaning. Certainly today the importance of the customs union exception may be appreciated by the fact that it is difficult, in matters of commerce, to discuss the operation of the MFN principle without some reference to this alleged exception. In light of the pervasive tendency of the world to align itself in economic matters into regional blocs, the relevance of the customs union exceptions takes on unprecedented significance; there is little meaning left to the MFN principle in commercial matters if in reality the bulk of the world's trade is conducted on the principle of an exception to that principle - the customs union. Indeed today strong grounds exist for claim-

11. - ibid at p 153
12. - ibid at p 168

ing that the exception has become the rule; this tendency to form customs unions had been discerned as far back as 1963 when K.W. Dam commented:

"The last dozen years have seen a proliferation of customs unions and free trade areas of unforeseen proportions 13.

True in 1963, this trend has, if anything, intensified in the 1970's. In part this increasing customs unionization of the world's trade is due to the impact of the European Communities, established in 1957. The impact of this customs union on the world's trade stems from the simple fact that it is the largest trading bloc in the world; partly in retaliation, and partly in emulation of the European Communities, other formerly independent trading nations formed themselves into large trading units to an unprecedented degree.

In this part of the paper, it is proposed to look into the general nature of the customs union exception including the ILC's views on it. The relationship between this customs union exception and its application to the European Communities will then be examined; this will involve an inquiry into the nature of the European Communities itself.

The customs union:

It is important, as a preliminary, to understand what is meant by a customs union. It is not proposed to get involved in the economic aspects of the customs union in depth, because this aspect is outside the orbit of this paper. The paper will only deal with the economic aspects of the customs union as they arise in pursuit of the legal aspects.

A discussion of the customs union exception must, in its initial stages, confront the basic question; what is a customs union? Partly as a result of the customs union rage in the 1950's and 1960's, discussions on the subject by economists came into vogue, resulting in a prolific amount of literature on the subject. This paper will limit its involvemnt in this field to the extent needed to give the reader an indication,

13. - University of Chicago Law Review 1963 Vol. 30 p 615

albeit rough and ready, of what a customs union basically is.

Definitions:

In contrast to the variety of opinion surrounding customs unions generally, a happy degree of consensus exists as to what they are, though obviously the leading definitions vary somewhat according to the context in which they are invoked. Considering the dominance of the economic element in this subject, it appears appropriate to defer initially to the economic definition of a customs union, the classical example of which is usually accepted to be that of Viner's in 1950:

"It has generally been agreed that a perfect customs union must meet the following conditions:

(1) The complete elimination of traffis as between the member territories

(2) The establishment of a uniform tariff on imports from outside the union

(3) Apportionment of customs revenue between the members in accordance with an agreed formula" 14.

Count Cavour's definition in 1857 insists on the fusion of the tariff interests of two or more states; otherwise what is left is simply another commercial treaty. Cavour specified 4 prerequisites which a customs union must satisfy: 15

(a) uniformity of export and transit tariffs

(b) free exchange of the products of the united countries

(c) pooling of customs revenue and their sharing out among member states of the union

(d) uniformity of the external import tariffs of the member countries and suppression of an internal tariff line.

R.G. Lipsey approaches the subject from another angle:

"When a customs union is formed, the tariff changes are of the country - discriminating type; the tariff systems of the contracting states are amended to discriminate in favour of the members and against the outside world" 16.

Still in the economic sphere but moving closer to the legal

14. - The Customs Union Issue - J. Viner p 5
15. - ibid p 4
16. - The Theory of Customs Unions - R.G. Lipsey p 1

sphere, Article XXIV paragraph 8 of the GATT provides another definition of a customs union:

"A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that:

(i) duties and other restrictive relations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) ...substantially all the same duties and other regulations of commerce and applied by each of the members of the union to the trade of territories not included in the union" 17.

An additional requirement must be fulfilled, it transpires, before the GATT definition is complied with; paragraph 4 stipulates that the purpose of a customs union should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories 18.

Finally, the legal definition of a customs union was handed down by the Permanent Court of International Justice in 1931 in an Advisory Opinion on a customs regime between Germany and Austria. It cited the following ingredients:

"uniformity of customs law and customs tariff; unity of the customs frontiers and of the customs territory vis-a-vis third states; freedom from import and export duties in the exchange of goods between the partner states; apportionment of the duties collected according to a fixed quota" 19.

Certain features stand out from these definitions generally agreed upon as being necessary. The most obvious is the creation of a new frontier for economic purposes, composed of joining up, physically and figuratively, the previous national frontiers. This appears to rest on the assumption (admittedly a safe one) that it will always be states who are members of a customs union. Another recognised characteristic is that the union is purely a commercial matter; its vital features are all commercial ones.

17. - GATT, Basic Instruments and Selected Documents Vol IV p 43
18. - ibid p 41
19. - PCIJ Series AB No. 41 p 51

The members must adopt the same tariffs against the outside world and must eliminate the tariffs on the bulk of inter member trade. One can be more specific about its features; the various definitions all limit the features not merely to commercial measures, but to tariff measures. Thus the principal interest of a customs union is the trade of goods of the member states between each other and between the union and the world, and not consciously, for example, to how those products being traded are produced. It acts as a single state only in regard to a specialized sector of commerce - trade. As revealed by the definitions, the customs union has traditionally been limited to securing the free flow of goods and products produced by the countries belonging to it. Its characteristic features - the elimination of tariffs between its members, a uniform tariff on imports into the union, pooling of such revenues between the members - relate by definition to physical goods. As the following section will reveal, this can be regarded as the most superficial level of integration.

In defining customs unions, one should bear in mind that other associations do exist with varying degress of similarity to the customs unions. The most obvious is the free area; another accepted cousin is the interim agreement leading to the formation of either a customs union or a free trade area. Reduced to basics, the difference between a customs union and a free trade area consists in the external policy adopted by the group.

"In a customs union, member states have to erect a common tariff wall towards the outside world, in a free trade area member states are free to maintain or modify independently their external structure of tariffs and other barriers to import from third states" 20.

It should also be added that in fact a customs union envisages a lot more integration between the member states, resulting in more substantial common institutions.

20. - "The Structure, Function and Law of a Free Trade Area" p 23 - Lambrinidis J.S.

The European Communities as a Customs Union:

One possible interpretation of the EC is that it is merely a highly sophisticated customs union. Undoubtedly this is true, and yet this description is inaccurate because the EC is also a lot more.

The original treaties founding the EC furnish some insight into its "customs union" element. Certainly the term "customs union", "free trade area" and "common market" are expressly included in these treaties; it is significant, however, that the ultimate description of all 3 treaties fixed on the word "community". It is true that the basic idea underlying the customs union concept is expressly incorporated in the EC; Articles 12-29 of the EEC Treaty expressly provide for the creation of a single customs territory, freeing the trade of members from tariff, quota, charge restrictions. Likewise, Section 2. creates a common tariff wall. From this it may safely be concluded that the EC incorporates the customs union concept. The treaties, however, reveal that the regime established goes well beyond what is traditionally understood to be a 'customs union'.

The first area this occurs in is actually related to the customs union concept - the common market concept. It is akin to the customs union because it is still within the economic sphere whereas the customs union traditionally has sought to create freedom of trade in goods, the common market concept supplements this process by providing for union in other economic spheres - such as the right of establishment of companies, the free movement of capital and labour, the free supply of services across national frontiers and common rules for competition between states. Thus by this common market, a wider range of economic spheres are integrated, going beyond that normally embraced by the customs union.

The EC is more than purely a customs union in another and potentially much more significant aspect. The EEC Treaty provides the best example of this aspect; interpreting the object of the treaty as simply limited to economic union would leave unexplained a number of express suggestions that an ultimate

object is envisaged - political union; this is incorporated by the customs union since all levels of apparently purely economic integration contain a political comment; it is typically the first step in such a process. Where the European Community is unique however is that it expressly refers to this ultimate object, albeit in guarded terms. Article 2 specifically singles out the 'closer relationship between its members' as one purpose of the EC; this cannot mean purely close economic union as that is achieved by the preceding purposes of Article 2. The preamble again outlines 'the foundations of an ever closer union among the European peoples' as one of its highest goals. This reinforces the view taken of Article 2 that it is the foundations of political union that is being talked about; the European peoples' in the Preamble being a reference to the European Parliament. The inescapable conclusion is that economic union is to be achieved within the EC to act as the foundation of a political union. The Treaty appears therefore to accept that economic union will only provide the foundation of political union; it does not actually set political union itself within its sights. But the point remains; the express political orientation of the Treaty takes it beyond a normal customs union.

Furthermore the conception of a community policy implemented by the institutions of the EC by them under Part V of the Treaty gives those institutions an independent justification going beyond a customs union; this again indicates that something more than a highly sophisticated customs union has been created. Thus, because it is at the very least a customs union, the alleged customs union exception is revelant to the relationship of the EC and the MFN principle. However the existence in the EC of elements not traditionally contained in a customs union are relevant to the application of the customs union exception to it and form the basis of an independent ground on which favours granted within it may be excluded from the operation of the MFN principle - namely, that an entity analogous to a new state has been created.

Outline of the issues raised by the EC and the MFN principle:

The customs union exception embraces a wide range of issues; the European Community, if anything, is a broader and more complex subject matter. Therefore it is proposed in this paper to limit the consideration of both to the extent that they are relevant to the issues raised by the relationship of the European Community to the MFN principle, and by association, with the customs union exception; it is impossible to examine the principle independently of the exception. In fact, considering the aggressive assertions of the customs union exceptions, the principle to which it is supposed to be an exception often appears relegated to the background, and indeed, after a consideration of the impact of the European Community, this may emerge as too generous a description of its place in the scheme of things. Given the width of the topics, it is now proposed, in an effort to catch the flavour of the problems involved to give a brief outline of the issues raised by this relationship. The EC is, at the very least, a customs union. It is crucial therefore, to determine whether the creation of such a group excludes in itself the operation of the MFN principle. As a "customs union", the EC has a very real interest in the determination of the question whether an implied customs union exception, supported by customary law, exists, particularly where the previous MFN treaties of its member states contained no express customs union exception. The issues raised in relation to the customs union exception are significant in another respect however in that they form the basis of an argument supporting a "supranational state" exception. The treatment of the customs union exception by the ILC is therefore crucial to the relationship of the EC and the MFN principle. First, however, it is proposed to outline the issues raised by the customs union exception.

The New Entity Issue:

A customs union, as may be appreciated by its definition, results in the creation of new links between the

member states. Depending on the quality and quantity of these new links, the issue is raised whether a new entity, independent of the combination of the member states may be said to have been created. This issue becomes more compelling in relation to customs unions because the member states consciously adopt a common stand against the outside world, thus creating an impression of unity. Such a possibility was recognised by the Special Rapporteur:

"Another argument considers a customs union as a new entity and perhaps a new subject of international law. If the association of states in such unions could be assimilated to a uniting of states, the argument goes, the MFN rights based on favours accorded by one member of the union to the other could not be claimed by an outsider after the establishment of the union" 21.

The ILC considered a similar argument, presented in the context of Article 30 paragraph 3 of the Draft Articles on Succession of States which admits the inapplicability of a treaty where one of its partners voluntarily unites with another state. The argument was

"If such a rule can be adopted in the case of a uniting of states, perhaps a similar rule could be adopted for the case of mere association" 22.

The European Community, it will be subsequently revealed, is particularly susceptible to this type of treatment. Indeed the rejection of such a possibility raised one of the crucial issues relating to the European Community.

"The case of a uniting of states cannot be compared with an association in which the members retain their sovereignty" 23.

This comparison is in many respects precisely the issue raised by the European Communities.

Change of Circumstance:

The essence of this issue is whether the formation of a customs union constitutes a sufficient change of circumstances rendering the previous promise of MFN

21. - Yearbook 1975 Vol. II p 16
22. - Yearbook 1975 Vol. II Part II p 47
23. - ibid

treatment by a member of the union to a non member inoperative. Again the most likely candidate to succeed under this argument is the European Community.

Ejusdem Generis Rule:

The nature of this rule has already been indicated. Pescatore argues its operation in the context of the customs union leads to the result that:

"There is no common measure between a treaty designed simply to facilitate international trade and the much more ambitious and fundamental objective of a treaty designed to bring about economic integration in the form of a free trade area, a customs union or an economic union" 24.

It is fair to say that the strength of this argument grows in proportion to the amount of 'integration' involved in the customs union - the more integration, the less common measure there is between the simple commercial treaty and the treaty creating such integration. The validity of this line of argument may be resurrected by the unique degree of integration in quantity and quality terms involved in the Treaty of Rome 1957.

The Special Rapporteur rejected all three arguments purporting to establish a rationale for the alleged exception. His conclusions on the 'new entity' argument and the change of circumstances argument are particularly pertinent to the present discussion. To the suggestion that a customs union represents a new entity, he replied:

"Since the states participating in such unions usually continued as independent and sovereign states, this view is difficult to accept" 25.

After reviewing a sample of economic unions, including the EEC, the Special Rapporteur confirmed his original conclusion:

"This chain of reasoning leads to the conclusion that an economic association or integration of states, however close but falling short of a uniting of states, does not by itself terminate previously existing agreements of participants in general" 26.

24. - Annuaire de L'Institut de droit international 1969 Basle Vol 53 p 209
25. - Yearbook 1975 Vol. II p 16
26. - Yearbook 1975 Vol. II p 17

Subsequently, the Special Rapporteur gives more precision to what constitutes a uniting of states:

"Here again it seem untenable to maintain that in the absence of a political union among the participants..."27.

Thus the political union of two ore more states emerges as the prerequisite before either a "new entity" may be said to have been created. Presumably, the element of political union must occur in addition to economic integration before a new entity may be said to have emerged; though this is not explicitly stated, the context of the Special Rapporteur's comments indicates this conclusion. Likewise, the Special Rapporteur regarded the absence of political union as fatal to the success of the "changed circumstances" argument as a basis on which the operation of the MFN principle could be excluded after a customs union has been created:

"It seems untenable to maintain that, in the absence of a political union among the participants, the changed circumstances of one of the parties should justify a modification by implication. This follows from the general rule that any recognition of the effect of changed circumstances requires more than a voluntary and unilateral change of circumstances" 28.

The Special Rapporteur rejected the ejusdem generis rule, advanced by Pescatore, as a basis on which favours granted within a customs union are excluded from the operation of the MFN principle describing this result as an "unjustified extension" of the rule. Such a conclusion inevitably followed from his interpretation of that rule; in delimiting the operation of that rule, the Special Rapporteur had previously reached the conclusion that:

"The granting state cannot evade its obligations unless an express reservation so provides on the ground that the relations between itself and the third country are friendlier or "not similar" to those existing between it and the beneficiary...It is only the subject matter of the clause which must belong to the same category" 29.

27. - ibid p 17
28. - ibid p 17
29. - YILC 1973 Vol. II p 108

On this view of the ejusdem generis rule, the new relationship bought about by the creation of a customs union between its members is clearly irrelevant in the context of that rule.

These, then, are the central issues raised in the relationship between the MFN principle and the EC. Their solution, it is submitted, involves two aspects. The first is whether under present international law, the favours granted within a customs union are automatically excluded from the operation of the MFN principle. The principles involved in the determination of this question are applicable to the determination of the further issue whether the favours granted within a structure embodying a far more fundamental and extensive element of integration than traditionally envisaged by a customs union - such as the EC - are also excluded from the operation of the MFN principle under present international law. There is however an equally important issue involved, fundamental to the involvement of the ILC in this topic: whether the MFN principle should recognise the exception of favours granted within such a process of integration.

The ILC and the "customs union exception":

The single most striking feature of the Draft Articles produced by the ILC on the MFN clause in 1978 was their conspicuous silence on the customs union issue. In fact on a particular interpretation of Draft Articles 17 and 18, it could be argued that the Draft Articles themselves embody, albeit indirectly, a denial of the customs union exception, and consequently are not in fact silent on that issue. Draft Article 17 entitled "Irrelevance of the fact that treatment is extended to a third state under a bilateral or multilateral agreement" provides:

"The acquisition of rights by the beneficiary state...under a most favoured nation clause is not affected by the mere fact that the treatment by the granting state of a third state has been extended under an international agreement, whether bilateral

or multilateral" 30.

The previous draft article 15 had provided:

"The beneficiary state is entitled to treatment extended by the granting state to a third state whether or not such treatment is extended under a bilateral or a multilateral agreement" 31.

To this similar provision, the EC reacted in the following manner:

"The adoption of such an article could be interpreted as meaning that under the most favoured nation clause, the advantages which the states members of a customs union grant among themselves by virtue of that union should be extended to third countries; in other words, the states members of the community should grant third states the same treatment that they grant to each other" 32.

There is a difference in emphasis between draft article 15 and the 1978 Draft Article; the former is emphatic - "is entitled" whereas the latter is certainly more indirect - "is not affected by the mere fact". Both, however, state the irrelevance of whether the favour is granted pursuant to a bilateral or multilateral agreement. If, therefore, the interpretation feared by the EC of Draft Article 15 is a possible one, it would appear likewise to be applicable to the present Draft Article 17. Are the EC's fears justified? To the extent that customs unions are invariably created between states by international agreement, Draft Article 17 would appear to admit the possibility of being applicable to them. If such an interpretation is possible of Draft Article 17, it is certainly not one intended by the ILC, which expressly stated in paragraph 58 of the introductory commentary that the Draft Articles remained silent on the issue of the customs union exception. 33. This, of course, would not be the case if the interpretation of Draft Article 17 feared by the EC is correct. In this respect it is perhaps significant that Draft Article 17 provides that "the acquisition of rights... is not affected by the mere fact that the treatment" suggesting

30. - Report of the ILC 1978 p 100
31. - Yearbook of the ILC 1976 Vol. 2 Part 2 p 39
32. - Comments of the European Economic Community, Report of the ILC 1978 p 449
33. - Report of the ILC 1978 p 21

that the entitlement of the beneficiary state to such rights must otherwise exist independently and that the framework establishing the right to such favours whether a bilateral or multilateral agreement will not, of itself, disentitle the beneficiary to such a right; an express customs union exception , or a customary rule to this effect leaves the non-member beneficiary without such a right to favours granted within a customs union. Certainly the commentary to Draft Article 17 contains no reference to customs unions as such, and is geared toward curing another ill. It is unconceivable that such an inflammable issue as the customs union exception should be so quietly and incidentally disposed of by Draft Article 17 - and this would be the result if the interpretation of it feared by the EC is the correct one. It is submitted, therefore, that Draft Article 17 does not affect the customs union exception, and that the latter remains at large to be decided.

The same arguments are applicable to the effect of Draft Article 18. Draft Article 16 of the 1976 Draft Articles provided:

"The beneficiary state is entitled to treatment extended by the granting state to a third state whether or not such treatment is extended as national treatment" 34.

To this, the EC responded:

"This draft would imply that the mutual non discriminatory commitments granted to each other by States members of a customs union should be extended to third countries" 35.

Draft Article 18 of the 1978 Draft Articles achieves the same result as Draft Article 16, but once again the different formula; "The acquisition of rights...is not affected by the mere fact..." 36. is employed. Once again, it would appear that the Draft Article 18 only entitles the beneficiary state to such treatment if such a right exists otherwise under the original MFN treaty; it is only concerned therefore to secure this right against an attack on its entitlement on the ground that the granting state is according national treatment to a

34. - Yearbook of the ILC 1976 Vol. 2 Part 2 p 47
35. - Report of the ILC 1978 p 449
36. - ibid p 114

third state. If a customary rule of international law exists, or an express customs union exception is included in the original MFN treaty, the beneficiary state has no right to a promise of national treatment made by the granting state to a fellow member of a customs union. The Article does not, therefore, override an express customs union exception, or one based on a rule of customary law - if the latter exists it is to this question that we now turn.

The customs union exception in itself is a simple concept; it maintains that where a state concludes an MFN agreement with another state, the beneficiary state may not claim the advantages that the granting state has accorded a third state where the granting state and that third state are members of a common customs union, free trade area or interim regime leading to either of these two. The only concession to the customs union exception was made in the 1978 Report, which included, in its introductory commentary, an Article exempting favours granted within a customs union from the operation of the MFN clause (Article 23 bis) 37. It is not however a part of the Draft Articles, but only a model which could be followed should states at a future conference decide to include such an exception. The Draft Articles themselves remain silent on this issue. The Special Rapporteur commented in 1978:

"The Commission, bearing in mind the inconclusiveness of the comments made thereon and the lack of time available to it to consider the matter, agreed not to include an article on a customs union exception in the draft articles. It was understood that the silence of the draft articles could not be interpreted as an implicit recognition of the existence or non-existence of such a rule..." 38.

The ILC's treatment of the customs union exception is evaluated in details in the final chapter of this paper. These comments are however also relevant to the immediate inquiry of defining what the ILC's position on the customs union exception is. The problem with the comments quoted above is that they

37. - ibid p 21
38. - Report of the ILC 1978 p 21

appear inconsistent with the stand taken by the Special Rapporteur in 1975. The customs union exception did, in that year, receive extensive treatment; 11 full pages of the Yearbook is devoted to it. The work of the ILC on the MFN clause spanned a period of 10 years; one questions therefore whether, in fact, it suffered from a lack of time, and whether this was the reason why a conclusive answer on the customs union exception was not arrived at. This leads to the more important point; in 1975 a definite answer was arrived at. The Special Rapporteur came to the definite conclusion that the customs union exception did not represent a rule of customary international law. This conclusion was shared by the Commission in 1976:

"Mr Ustor summing up the discussion, said that it had shown that...there was virtually unanimity among the members as to the position de lege lata; there was at present no general rule of customary international law that would exclude customs union benefits...in the absence of any express stipulation in the treaty" 39.

What therefore does the statement in 1978 "that the silence of the Draft Articles could not be interpreted as an implicit recognition of the existence or non existence of such a rule" 40 mean? This reference appears capable only of being interpreted as a reference to the alleged customary rule; it is only this rule whose existence or non existence is in conjecture. It certainly connot be a reference to any rule based on progressive development since inclusion of such a rule had been rejected. Does therefore this reference indicate that the ILC have retreated from the conclusions arrived at by its Special Rapporteur in 1975, opting in favour of a neutral stand? On its own, the 1978 statement certainly supports the possibility of such a change having occurred. Even if this is so, the Special Rapporteur's work on the topic in 1975 is still highly relevant to the present discussion in that it represents a thorough and certainly the most recent, investigation into the "customs union exception". Moreover, there is an explicit statement by the new Special Rapporteur,

39. - Yearbook of the ILC 1978 p 21
40. - supra, Footnote 38

Mr Ushakov, in 1978 confirming the conclusions reached in 1975:

"A generally recognised exception to the operation of the most favoured nation clause in the case of economic unions of states did not currently exist in international law...Admittedly many exceptions of that kind were to be found in treaties containing a most favoured nation clause...did that prove that such exceptions were admitted as a general rule...? The Commission had answered that question in the negative, and he took the same position" 41.

Thus the conclusion arrived at by Mr Ustor in 1975 in regard to the position de lege lata does appear to enjoy the support of the majority of the ILC.

As, has already been pointed out, customs unions had figured originally in his conception of the establish exceptions to the operation of the MFN clause in 1968. The issue remained in limbo till 1975 when it was dealt with in depth. It is useful, from the outset, to delineate the boundary within which such an exception potentially could apply; as the Special Rapporteur pointed out, the exception could only apply to clauses contained in commercial treates, and in particular those relating to customs duties. A further limitation emerged:

"It is also evident that the problem arises only in cases where the granting state enters a customs union or other association after the conclusion of an agreement containing a most favoured nation clause which is not coupled with an appropriate exception; in the hypothetical case where the granting state was already a member of such a union at the time of the conclusion of the agreement which contains no exception, the automatic extension of the clause to customs unions benefits is obvious" 42.

The Special Rapporteur isolated the two grounds on which codification of this exception could be based (accepting of course that states are free to create an exception relating to customs unions in a MFN agreement); that the exception is now so common as to be regarded as a rule of customary law or that it is a suitable candidate on the basis of progressive development. The

41. - Yearbook 1978 Vol. I p 127
42. - Yearbook 1976 Vol. 2 Part 2 p 45

controversial issue arises as to the existence of an implied exception i.e. one that exists independently if the treaty is silent.

"The crux of the matter is, of course, whether the existence of a customary rule of an implied customs union exception can be established" 43.

The Special Rapporteur concluded:

"No customary rule of international law exists establishing an implied customs union exception" 44.

Though finally definite in this conclusion, it is clear that it was reached only after careful consideration. An established school of thought maintained the existence of such an exception and their arguments carried considerable weight. The majority of trade agreements concluded by states stipulated expressly such an exception and have done so since the inter war years. The most famous exception in this genre is of course Article XXIV of GATT. The League of Nations Economic Committee, and even more forcefully the 1936 resolution of the Institute of International Law supported the implied exception.

The Special Rapporteur rejected this view citing the inadequacy of the recognition accorded to the exception in state practise, putting Article XXIV of GATT in proper, and more limited perspective, the divided nature of academic comment on this view and the immense practical difficulties of reducing the alleged exception into a codified form, he opted in favour of the presumption he felt naturally presented itself from first principles of the MFN clause:

"The presumption obviously militates against such an exception. If states promise each other most favoured nation treatment they are supposed to carry out their promise. They may limit such a promise, but if they do not, they have to bear the consequences"45.

The dominant influence of this view is that of the doctrine of pacta sunt servanda, from which one proceeds to extract a presumption created by the prinples. Certainly it is true that the MFN principle as it stand applies without qualification to all

43. - Yearbook 1975 Vol. 2 p 17
44. - ibid p 19
45. - Yearbook 1975 Vol. II p 15-16

advantages granted, and indeed, this general assumption consitit-utes one of its chief characteristics. From this viewpoint, therefore, the prima facie presumption created by the nature of the MFN principle, in the Special Rapporteur's eyes is valid. The strength of such a presumption is weakened however by the fact that on another occasion, the Special Rapporteur appears to argue that the MFN principle, by its very nature, gives rise to an exception; in justifying the "frontier traffic" exception contained in Draft Article 25, the Special Rapporteur commented:

"It seems to be founded on the basic philosophy of the most favoured nation clause and notably on the ejusdem generis rule"46.

If the basic philosophy of the MFN clause, and particularly the ejusdem generis rule, leads to an exception in favour of "frontier traffic" it appears to undermine the presumption later claimed to arise against excepting customs union advantages; there appears to be no good reason in principle why frontier traffic should attract the limitations of the ejusdem generis rule and customs unions not. Certainly it is true that a greater degree of consensus to the exception by states attaches to the former than the latter but that is irrelevant to the principles involved, and even more irrelevant in the field of presumptions. The ultimate conclusion of the Special Rapporteur on customs union exception is not here being questioned but the presumption he views as arising from the MFN philosophy appears inconsistent with his earlier stand.

The Special Rapporteur concluded that no customary rule of international law had emerged from an examination of the practise of states on the criterion formulated by the International Court of Justice in its judgment in the North Sea Continental Shelf cases 47 - specifically that state practise in this respect was neither sufficiently "settled" or "extensive and virtually uniform" nor did such practise indicate a "general recognition that a rule of law or legal obligation is involved" 48. As the commentary concedes, this conclusion runs contrary to an impressive body of authority which supported the existence of such a

46. - Yearbook 1976 Vol. II Part II p 64
47. - ICJ Reports 1969 p 42
48. - Yearbook 1975 Vol. 2 p 18

rule. Furthermore, the majority of representatives in the Sixth Committee maintained that such a customary rule existed:

"No one had been able to cite a single case where the treatment which states members of a customs union granted each other had been claimed to apply to a state beneficiary of the most favoured nation clause...the conviction was expressed that the exception in favour of customs unions corresponded exactly to the current state of international law and was perfectly in line with the interest of all states...this classic exception had long been accepted by jurists and had been sanctioned by the practise of states as evidence by the frequency of explicit exceptions in treaty practise" 49.

In fact, the frequency of the inclusions of express customs union exceptions in MFN treaties is open to two interpretations; it may either be the foundation of such a customary rule, or may in fact indicate that such a rule does not exist - hence, the need to include an express exception in such treaties. Moreover, as the Special Rapporteur pointed out:

"the states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency even or habitual character of the acts is not in itself enough... that the alleged customary rule of an implied customs union exception...falls far short of the requirement set out above, needs hardly any proof" 50.

Unlike the Sixth Committe, the Special Rapporteur provided examples of a beneficiary claimed under a MFN treaty, the favours granted by one member of the customs union to another. One such example was the position adopted by the United States on the formation of a customs union between Austria and Germany; the Solicitor for the Department of State of the United States of America expressed the view that the establishment of a customs union between Austria and Germany would not constitute an exception to the most favoured nation provisions..."51.

It is submitted therefore that the conclusion arrived at by the Special Rapporteur was justified; though the practise of

49. - Report of the Sixth Committe 1978 p 22 Para 45 A/33/419
50. - supra Footnote 48
51. - Yearbook 1975 Vol. 2 p 14

states indicates that in the majority of cases, the creation of a customs union has resulted in the denial of MFN rights being extended to non member MFN treaty partners - a practise that has been universally followed in relation to the customs unions created in the last 20 years, it is not a practise that is followed "in the belief that this practise is rendered obligatory by the existence of a rule of law requiring it" 52.

The comment made in the Sixth Committee that "No one had been able to cite a single case where the treatment which states members of a customs union granted each other had been claimed to apply to a state beneficiary of the most favoured nation clause" 53 may in fact be accurate if the following distinction made by the EC in its written comments to the Draft Articles is a valid one.

"The Special Rapporteur's argument appears to be inadequate. It is intended to show that there is no customary rule under international law which would implicitly exclude customs unions from the effects of the clause and that in consequence the draft article could not embody any exception relating to customs unions. Even if his argument was conclusive, it would not address itself to the fact that there is also no international custom by which a beneficiary state could obtain all the advantages granted by members of a customs union among themselves; not only is there no such custom, there is not even a single example of such an occurence" 54.

The distinction being made here, it is submitted, is fallacious. A fundamental ingredient of the MFN principle - indeed it could be regarded as its unique feature, is that any favours granted by the granting state to a third state (provided they are, of course, ejusdem generis to the subject matter of the MFN treaty) may be claimed by the beneficiary state. This result is achieved from the natural operation of the MFN clause; it is this right of entitlement that the alleged implied customs union exception threatens to deny; in the absence of such an implied exception the right of the beneficiary to such favours

52. - ibid p 18
53. - op cit
54. - Report of the ILC 1978 p 480

stands; it requires, therefore, no support from 'international custom', and stands quite safely independently of any such custom. This result is achieved by nothing more than the normal application of the MFN principle. This distinction can it is submitted, be disregarded.

The second ground on which the customs union exception could be codified to become a full fledged exception to the operation of the most favoured nation clause is that of progressive development. The Special Rapporteur considered whether customs unions represented a legitimate candidate for such treatment. The problem, as recognised by the Special Rapporteur, is that this is almost exclusively an economic issue - whether customs unions are a good thing - and hence one which the lawyer may not be best qualified to judge. Further, the position is exacerbated by the divided economic verdict on customs unions. To make matters worse, the legal aspects themsevles were daunting, to say the least - in particular, as the experience of GATT testified, and the International Court of Justice confirmed in the North Sea Continental Shelf cases 55 - the attempt to define what a customs union or free trade area is posed highly complex problems. A stranger in an alien field, and insecure on his home front, the Special Rapporteur had no option but to retreat, with the parting conclusion:

"because there is no compelling evidence as to the desirability of substituting a general rule for the particular arrangements of the parties, the best course of action is to leave matters where they are" 56.

The Draft Article as a result did not include any reference to customs unions constituting an exception to the operation of the MFN clauses. Such an omission must be considered high authority for the proposition that the exception is not part of the customary rules of international law. In fact, as the Special Rapporteur himself points out, little consequence may flow from this discovery, since GATT members are protected by Article XXIV in relation to one another and non members of this Agreement fre-

55. - ICJ Reports 1969 p 43
56. - 1975 Vol. 2 p 19

quently expressly stipulate such an exception. The Special Rapporteur in 1975 did indicate that the rejection of such an exception was subject to a more detailed examination of the interests of developing nations; such as discussion did in fact result in a separate exception out of the customs union context in favour of these states in Draft Articles 23 and 24. It is curious however that such an exception should surface initially by association with the customs union issue in light of the contempory bitterness felt by developing countries against the overwhelming power of such unions as the European Community.

Whatever view is taken of the omission to draft a customs union exception, the existence of customs unions and their growing populatiry nevertheless represents the single most significant threat to the survival of the MFN principle, because the simple fact remains that whenever a customs union is created, discrimination inevitably results between the treatment members accord one another and the treatment they extend to non members - indeed, such discrimination is the cornerstone of the customs union concept. Its relationship with the MFN principle is in fact intimate due to the incorporation of both in the GATT (Article XXIV) under which the bulk of the world's trade is conducted; inevitably, the operation of one leads to a consideration of the other. It is proposed to focus on this relationship by its application to the greatest customs union of them all - the European Communities. This inevitably entails an examination of what this creation is; by such an examination and the application of the conclusions arrived at to the MFN principle, a more precise picture of that relationship may be gained.

CHAPTER 4

Overview of the European Communities:

The immediate history of European integration dates back to 1951 with the signing of the Treaty of Paris establishing the European Coal and Steel Community. This was followed in 1957 with the signing of the First Treaty of Rome, establishing the European Economic Community; the Second Treaty of Rome set up the European Community of Atomic Energy. True to the principles of integration the 1969 Merger Treaty put all three Communities under a single Commission and a single Council.

Institutions of the European Communities:

The three European treaties set up Community institutions, which remain intact despite the fusion of the Communities into a single "European Communities". The institutions established are: The European Parliament at Strasbourg: this is a single Assembly with 198 members consisting of "representatives of the peoples of the State-members of the Community".1. It has no legislative or executive functions but exercises a deliberative and consultative function in all matters relating to the scope covered by the former three Treaties. Though Article 138(3) of the Treaty of Rome envisaged election by direct universal suffrage, till 1979 members of this body were nominated by the Parliaments of the member states. It cannot be said not to have any real power, though it must be conceded that its main influence is exercised through public opinion. Further it has the ultimate sanction of a vote of censure on the Commission: it may force the resignation en bloc of the Commission by a two thirds majority vote. It is entitled to be consulted before the exercise of many of the Council's important powers, and may propose amendments to the budget.

The Council of Ministers:

This consists of one representative

1.- Article 137, Treaty of Rome.

from each member state 2. controlling and coordinating the overall direction of the EC. Its members sit on it as representatives of their states, and must be members of the government of that state. It is considered the supreme organ of the Community since it represents the sovereignty of the member states. Its decisions are reached by a majority of its members. Article 145 of the EEC Treaty states that the role of the Council will be to coordinate economic policies of the member states and gives the Council "the power to take decisions". This power of decision lies generally in the field of policy making Community legislation, the conclusion of treaties(Article 228) and the adoption of the budget (Article 203A).

The Commission:

This is the executive body of the Community and as such, a truly Community institution. Its members must be nationals of a member state but once appointed act with complete independence of that state. they are forbidden to seek or take instructions from any government. Article 157 outlines the broad criterion of "general competence and total independence" as the qualifications for office. No more than two members may be appointed by any one member state. The Commission is headed by a President. The powers of the Commission have been described as those of "initiative, preparation and decision".3. It formulates recommendations and opinions concerning the Treaty, and works in conjunction with the Council and the Assembly. Like the Council, the members of the Commission are authorised to act by the grant of a plurality of specific powers of decision. The Commission's participation in decision making cannot be underestimated however. It is true that many of its powers are administrative: by and large, the Commission proposes and the Council disposes. However, the Commission's participation in decision making is nevertheless fundamental in that it has an exclusive right of initiative: without a proposal from the Commission the

2. - Article 148 Treaty of Rome
3. - Lasok & Bridge: "Law and Institutions of the European Communities" 1973 p26.

Council can decide nothing.

The method by which the will of the Council or Commission is transmitted is regulated by Article 189 of the EEC Treaty and Article 161 of the Euration Treaty which provide:

"In order to carry out their task and in accordance with the provisions of this Treaty, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or give opinions." 4.

This discloses a hierarchy. The regulation stands preeminent: it is to "apply generally", to "be binding in its entirety" and to "take direct effect in each Member state" A decision, on the other hand is to "be binding in its entirety upon those to whom it is directed." A directive imposes obligations which are binding as to the result achieved upon each Member state to which it is directed " while leaving to national authorities the choice of form and methods"; recommendations and opinions "have no binding force."

The European Court of Justice:

This single court operates under jurisdiction conferred upon it by the three original treaties. It consists of nine judges and four Advocates General. Article 187 of the EEC Treaty provides for enforcement of its judgments in the national courts of member states. its jurisdiction is limited to:

- proceedings brought against a Member State by the Commission or another Member state for a breach of its obligations under the Treaty of Rome 1957.
- supervision of the exercise of the powers of Community institutions in proceedings brought by member states, other Community institutions, individuals or undertaking.
- ruling on questions arising in national courts and tribunals on the interpretation of the provisions of the Treaty of Rome.

Thus it resmbles more a federal court rather than an international one: its jurisdiction is limited to the admin-

4. - Article 189 EEC Treaty

istration of Community law, and as such is internal to the EC. However, it has power to annul acts of the Commission and the Council. Considering the vigilant role it plays, the label "custodian of the Treaty" 5. is not inappropriate.

It is useful also to establish from the outset, the limited sphere within which Community law operates. The dominant thrust of the Treaties clearly is in the industrial and commercial spheres: in particular, the Lord Chancellor's Department isolated the following areas of activity:6.

1. Customs duties
2. agriculture
3. free movement of labour services and capital
4. transport
5. monopolies and restrictive practises
6. state aid for industry
7. regulation of the coal, steel and nuclear energy industries.

How the Institutions are worked:

The reality produced by this institutional framework varies somewhat from the result which one might have expected. The European Parliament has played a subsidiary role in this structure. The institutions which have emerged dominant have been the Council and the Commission and not least, their interrelationship. One may have anticipated a happy equilibrium to have been achieved in this relationship, but experience indicates otherwise: the last twenty years have seen the continuing dominance of the Council of Ministers, and hence national interests, at the expense of the Commission. The national interest has asserted itself in less institutionalised ways. National officials play an important role in advising the Commission on policy proposals: if any common feature characterises the member states' attitude to the EC, it is a general reluctance to concede autonomous powers to Brussels. The growth of the influence of Permanent

5. - op cit footnote 3
6. - Report of the Lord High Chancellor: " Legal and Constitutional Implications of UK Membership of the European Communities" 1967 HMSO Cmnd 3301 p9.

Representatives of the member states in Brussels has accentuated this trend: they provide a crucial link between the national and Community institutions representing the member states in Brussels to such an extent that they have become a part of the Community itself. Indeed, COREPER now ranks as an official institution of the EC, acting as representative in Brussels of the member states and its various institutions and presenting the community point to the national capitals. The importance of this group is itself testimony to the jealous preservation of national interests in the Community. The national interest of member states is again promoted by the close links maintained between national administrations and the private offices of the Commissioners (including the Commissioners) of their own nationality. The attitude of our "Commissioner in Brussels" on the part of national governments has very real consequences. The insistence on guarding national interests, and reluctance to entrust the Community with vital national interests or deciding a politically sensitive issue has affected the growth of a "community policy" (reflecting the limited growth of the Community itself) and resulting in an emphasis on technical considerations apparently devoid of life and blood personality:

"What is most insidious and destructive in an association of this kind is the practise by members of treating each case that comes before them strictly on its individual merits. In that way they are driven to concentrate exclusively on the effect each such decision might have on any conceivable national interest. The Community process of legislation is then treated less and less as a series of building bricks, each making its contribution towards a future European structure: instead, each brick is examined in isolation, and seen to have potentially sharp edges."7.

The low turn out to the first "European elections" in 1979 8. indicates that even within Europe, the EC remains an indistinct personality: much of this can be attributed to the careful, and sometimes positively deferential attitude

7. - A. Shonfield: The French Spirit and the British Intruder Listener 16 November 1972 p666

8. - On average, 54% The Evening Post, Wellington.

adopted by the Community -"Don't mind us, we're not really here" appears to be the attitude taken whenever the two interests rub shoulders on an important issue. This state of affairs would appear to militate against viewing the EC as a separate creation justifying the exclusion of MFN rights accorded by the member states if in reality, those member states act in such a dictatorial fashion in the group alleged to represent a new entity, especially if this is at the expense of potential autonomy which could develop within the framework provided. In general, the balance is firmly in favour of the continued dominance of the national interest where the two conflict. In certain fields it is true the relationship is reversed: the Common Agricultural Policy, for example, is governed exclusively by Community institutions, with national ministries acting as its agent where required, but in general, the previous comment holds good.

This reality is a tentative indication of what the EC is: the assertion, and reassertion of the national interest by member states is in part a symptom of the rooted reluctance of states to surrender powers to another body; correspondingly, this assertion of national interest, and particularly its reassertion (as indicated by the unforseen vitality of COREPER) can be interpreted as an indication that the EC does pose a threat to their sovereignty. The fact that policy questions in regard to the EC are formulated by the Foreign Ministers of the member states further points to the EC being something foreign and independent of those member states: what that something is remains to be examined.

The European Communities - What are they?

"Europe grew in the form of small nations. In a way, the idea of nation and national sentiment were its most characteristic invention. And now it must surpass itself. This is the outline of the mighty drama which will take place in the years to come. Will Europe be able to free itself from the remnants of the past or will

it forever remain their prisoner? For once before in history a great civilisation died because it could not adopt a substitute for its traditional idea of a state.9.

Thus Jose Ortega y Gasset sounded a chilling warning in 1929. The dream of a unified Europe is as old as Europe itself. It would today be premature to applaud the realization of that dream, because it has not been realized. If any candidate stands poised to fulfill this dream however it is undoubtedly the EC. It is generally recognised that the evolution of this body has resulted in the creation of a uniquely novel regime which fits only uncomfortably into established principles, and yet it is only by those established standards that this creation may be judged. Thus the framework of inquiry, of necessity, gravitates towards the EC's compatibility with the established concept of the state. At some stage, however, one has to admit the inadequacy of this framework and seek another framework within which to place the EC. As previously indicated it is relatively easy to outline the factual basis of the EC: it is less easy, however, to attribute a character to those institutions as a whole. This part of the paper will attempt to do this.

A daunting variety of methods in which to do this present themselves. Since one knows only what one knows, the most natural approach, initially, is to compare it to institutions that already exist to see if it corresponds with one of these traditional institutions. This framework examines the compatibility of the EC with traditional institutions one suspects it might be. The questions asked therefore are: is it a state? If so, what type of state - a federation or a confederation? A contrasting level on which such an enquiry may be conducted accepts the equation between the nature of the law produced and the entity producing it: here, therefore, Community law is focused on as being indicative of the basis on which that community rests. A further comparison is with the national law of the member state. Could it, alternatively

9. - Hay: Federalism and Supranational Organizations 1966 p1.

be treated as merely another international organisation? It has been, in part, the concepts themselves of state or international organisation which have yielded in a bid to accomodate the EC. If one concludes nevertheless, that it is incompatible with such traditional concepts, even where they have been stretched, a new basis must be found for it. The alternative framework is more pragmatic, reaching conclusions as to its nature by the way it acts, particularly in the international sphere. Allied to this is the question of its legal personality. It is generally agreed that the EC represents a new and unprecedented force in international law, but that novelty having been conceded, differing conclusions have been reached on the consequences of that novelty.

The basis of the EC's novelty in the world of institutions is exemplified by the dichotomy presented by the Treaty of Rome 1957: in one respect, it is like any other international treaty, binding because of the principle of international law " pacta sunt servanda". In another respect, however, this treaty may be regarded as representing a constitution between the member states, since it governs the distribution of powers among them. As a constitutional law, it is peculiar in that its force derives from international law and not the will of the people in constitutional assembly, and yet it would be facile, in light of the extensive commitments made by its member states to each other, to conclude that it is merely another international treaty. This dichotomy encapsulates the basic problem of attributing a definite character to the EC: it is not so much that the institutions created in this regime are novel, but rather their effect, especially when considered in unison, leads to a result which is unexpected. Again, the EC resembles in many respects a typical international organisation but as such, peculiar in that they have a definite territorial base, and have direct, though incomplete jurisdiction over the population of this base: in this respect they resemble a state more than an international organisation. In the genres of international organisations, the EC resemble more the political association of states, despite the tentative and still largely potential nature of political union contained in them, because

the alternative "administrative international organization" type is patently more inaccurate in describing them - though here again, it must be admitted its proper classification lies somewhere in between the two. Schwarzenberger states:

"The three Communities....represent the highest form of international integration so far reached."10.

From this flow the basic problems of classifying the European Communities - not merely from the fact of integration, but also from the type of integration achieved within the EC.

The first perspective from which the EC may be viewed is from the outside. The very fact that this perspective is possible, based as it is on a division between the members and the "outside world", in itself suggests that a common bond between the members makes that division possible and perhaps necessary. Two elements are involved: the character it presents, if any, to the outside world, and the verdict of the outside world on this presentation. The validity of such a division leads to the inescapable suggestion that a state like body is involved: the typical context in which a similar distinction arises if "international" is substituted for "outside world", is that of the state. The point is that in many respects, the European Communities do act exactly like a state in their international dealings: the significance of this appearance must therefore be assessed.

The most obvious field in which they act like a state is in the treaties concluded with other subjects of international law. The very fact of this treaty making power is in itself significant: certainly the range of treaties concluded by the EC is limited to the commercial sphere (dictated by Articles 113 and 228 of the EEC Treaty); once this limitation is accepted however, then in terms of practical effect, form and enforceability, it is identical to a treaty entered into by a sovereign state: it applies directly to an established territory and population. The EC themselves are named as the contracting party; its organs, in particular the Commission, must deal

10. - The Frontiers of International Law 1962 p280.

with any breach of it. Certainly the trade agreements to which the EC are a party looks like a typical international treaty concluded by two states: the preferential trade agreements concluded with Spain and Israel give the flavour of such treaties: the treaty is concluded by the "Council of the European Communities" with the "Spanish Head of State"; the Community was represented by both the President of the Council and the President of the Commission. The EC are, therefore, in the true sense of the word the contracting party; the Commission in particular is the organ which initiates and negotiates international treaties ie those with non member states. If that treaty is breached it is the organ which acts. The involvement, even in a conceptual sense as principals of the member states simply does not exist: all Nine acting together cannot interfere because in regard to commercial treaties, the EC have indeed replaced the member states. This, then, is one international sovereign power which has been transferred to the EC, or alternatively the right to participate in this field has been suspended by the member states in favour of the EC. This represents in fact the strongest example of the divisibility of international sovereignty. As such, perhaps this mandate from the member states to the EC (limiting their international sovereignty) may be likened to the federal clause adopted in some federal structures - except that the latter emanates from the internal control of a subject matter exercised by the states to the federal government; treaty making sovereignty suspended by the member states relates exclusively to their external relations of both the member state and that of the EC. If a state did enter a commercial agreement with another state, it could only be subject to the consent of the Community to introduce the appropriate implementing legislation.

Having touched on the aspects of its treaty obligations it is worthwhile to consider if in fact the EC succeed to treaties of the member states - an aspect particularly pertinent to the MFN clause, since the promise of MFN treatment is invariably included in a treaty; the context in which the issue arises is where an MFN treaty has been concluded before one party became

a member of the EC. The conflict posed is in fact relevant to all treaties to which member states were bound: what is the position of treaties concluded before a member state became a party to the EC? Clearly the possibility of conflict exists: Article 234(EEC Treaty) is quite clear on this point, providing that pre-membership treaty provisions involving non members "shall not be affected by the Provisions of this Treaty". However, members are also required to take due steps to harmonize or withdraw from such treaties to bring them into line with the obligations under the Treaty of Rome. States will therefore remain bound by previous treaties unless they can be lawfully terminated. This conclusion prima facie applies to MFN treaties. This view is supported by the ILC's conclusion in the context of succession to treaties:

"Thus Article 234 of the Treaty of Rome unmistakably approaches the question of pre-Community treaties of member states with third countries from the angle of the rules governing the application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention) on the Law of Treaties. In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of the succession of states."11.

On this view, the EC do not succeed to pre-membership treaty obligations of the member states even in the areas (mostly in the commercial sphere) covered by the Treaty, because the Treaty of Rome is viewed as remaining on the intergovernmental plane. The consequences of this are rather startling: if the EC could be considered to "succeed" to prior MFN treaties of the member states, the only favours a non member could claim would be those granted by the EC to another state: this indeed, is the position taken by the EC. It is not, however, the accepted interpretation of the Treaty of Rome which views the member states as still bound by their MFN treaties after accession. As Wohlfarth points out:

"We must start from the fact that at the present time the

11. - Yearbook 1974 Vol 2 Part 1 p253-4.

member states still possess their commercial policy competences, and that they are bound by treaties of commerce, and in principle can also conclude new trade agreements with third countries....As far as existing agreements between the member states and third countries are concerned, efforts must also be made to assimilate and adapt them to the situation produced by the introduction of a common customs tariff." 12.

In fact the vitality of the MFN treaties of member states in areas regulated by the Treaty of Rome depends on whether the favours granted by one member to another may be claimed by non member MFN partners because after membership, "the States members of the Community have relinquished all powers in the field of trade policy to the Community and, as individual countries, no longer have the necessary means of fulfilling bilateral commitments. They no longer have individual customs tariffs. They cannot,therefore, grant customs or trade advantages not provided for by the common system".13.

The issue therefore is whether the favours granted by one member of the EC to another may legally be claimed by a non member MFN treaty partner under the continuing treaty, and to what extent the inclusion of an express customs union excludes such favours from being claimed. As Feld points out, these favours were, in practise, claimed by certain countries under bilateral MFN treaties with member states:

"the Soviet bloc countries have demanded that thay be accorded under the most favoured nation clause the same tariff advantages from which the member states have benefited in their internal trade."14.

The United States of America likewise is a party to treaties of Commerce and Navigation with Germany, Italy and the Netherlands, and to a Convention of Establishment with France. Hay outlines the attitude of the EC in regard to the MFN treaties of the member states:

"The Six of the EEC have already determined that the most favoured nation treatment will not be extended third countries

12. - "The European Economic Community and World Trade": B11CL Special Publication No 7 1965 p11.

13. - Comments of the EEC: Report of the ILC 1978 p448

14. - Texas Law Review 1965 43 p899 citing 6EEC Comm Gen Rep.

with regard to benefits under the EEC Treaty. The United States has not questioned, and is not likely to question this, albeit unilateral denial of most favoured nation benefits lest the desired effects of the Common Market as a tool of economic and possibly political integration be perverted."15.

The dominant motive in the United States acquiescence in the attitude adopted by the EC was therefore a political one, not a legal one. The Special Rapporteur's interpretation of non member government's reactions to the creation of the EEC led him to the same conclusion:

"Nor can the fact that controversies, protests and diplomatic steps have led in several cases to more or less satisfactory compromises mostly to the detriment but sometimes to the benefit of outsiders, be considered as sufficient to establish a general practise and communis opinio of States".16.

The legal validity of the EC's position therefore remains to be decided. Where the previous treaty and the Treaty of Rome are consistent, but the State by its membership of the EC, does not have the power to implement it, Community implementation must be sought, or permission for the member to comply with its international obligations be granted. An alternative to such a loose system could be based on a parallel to Article 116 (EEC Treaty) which provides for the Community to take over the role of separate members in organizations: this principle of succession could be applied to previous treaties now covered by Community jurisdiction, or a "community clause" making the treaty entered into by the member state subject to Community implementation. In regard to unilateral conventions not governing economic matters such as the European Convention on Human Rights the individual member state remains in all senses the contracting party, and the EC have only an informal "obligation" to conform to it. Visually, the result achieved by Article 116 in respect of membership of international organizations is negligible because the actual individual state membership remains: on EC matters, however, all must vote

15. - The EEC and The Most Favoured Nation Clause: 23 V. Pittsburg LR 1962 p662
16. - Yearbook ILC 1975 Vol 2 p18

together in proceeding "by common action": in this respect, in real terms the EC have succeeded to the organization. Formally the divisions between member states persist: this is the case with its membership of GATT - certainly in the Second Haegeman Case 17 the Court of Justice considered the EC itself a partner to the Gatt.

The corollary of entering directly into international legal relationships raises the issue of the EC's liability. Certain legal consequences flow from this participation: if the EC themselves are the contracting party to a trade agreement, then it is the only possible defendant. The majority of contentious issues will normally only involve the EC as the party to deal with because it is typically the Commission and Court of Justice (ie non national organs) who are dominant in the fields likely to lead to non member government intervention. Only if the Council was involved could an organ of the EC possibly lead to the involvement of the member states: in other circumstances, it is the EC with whom one must negotiate diplomatically, claim reparation from, or engage in arbitration with.

The EC have certain other features which in practise resemble the functions of a typical state. The most obvious is the ius legations: this is limited at present to EC Ambassadors in Washington D.C., New York, and Tokyo, representing the group's interests, though the potential exists for direct representation in more foreign capitals. If state practise is anything to go by, the President of the Commission is accorded Head of State status outside the EC. On the home front, a separate diplomatic corps is accredited to the European Commission in Brussels - in this respect it is treated in fact exactly like a state. Against this similarity of State attributes however is the fact that overseas the interests of nationals are safeguarded exclusively by the member state: the European Communities are excluded from this field, as indeed they are in all matters except trade.

17. - 12 CMLR 1975 77 Case 181/73

Political Aspects of the European Communities

The single greatest obstacle to classifying the EC as a state is that politically the member states cannot be considered to have united. Obviously if the EC may be treated as a state, the favours granted by one member to another cannot be claimed by a non member (the MFN principle processes only favours granted from one state to another state) because the members can no longer be regarded as separate states. Since the degree of political unity plays a crucial, if not decisive role in the determination of statehood, it must be considered.

To many commentators, the political disunity of the EC is conclusive evidence that it cannot be treated as a state. The Special Rapporteur on Most Favoured Nation clauses in particular cited the absence of political unity in customs unions, in particular the EEC, in rejecting the argument that the EEC constituted a new entity or a sufficient change in circumstances to exclude the operation of MFN treaties: the process of economic integration alone is regarded as falling short of a uniting of states. 18. Since economic integration, however close cannot be regarded as uniting the states, what type of unity could achieve this result? The clearest implication is that of political unity - presumably in addition to the economic integration already achieved. This suggestion is subsequently confirmed by the Special Rapporteur's answer to the "change of circumstance" argument:

"Here again it seems untenable to maintain that in the absence of a political union among the participants..."19.

This confirms that the gap created by economic integration falling short of a uniting of states" would indeed be filled by political union. Such a conclusion as it stands, is unsatisfactory because it takes no account of the degrees of political union: it appears to assume that a state of political union either exists or it doesn't, which clearly in relation to the EC is not an appropriate criterion. If political union consists

18. - Yearbook Vol II 1975 p17
19. - ibid.

of the peoples voting for their representatives to a common assembly, the the EC can be considered as containing an element of political union, (albeit in a limited form) to the extent that the "peoples of Europe" now vote directly for their representatives in the European Parliament. It is too early of course to assess the significance of the advent of direct elections, in particular whether it will elevate the European Parliament from being little more than a propoganda forum. Certainly the parliament is now politically representative in that political loyalties, rather then national loyalties now provided the basis of division, so that it can hardly be regarded as a subsidiary of the member states' parliaments in this regard. Till direct elections, it did reflect the potential divisions of the member states' parliaments in that the political parties sent representatives to Strasbourg in proportion to those represented in the home parliaments. Direct elections however will mean at the very least that the European Parliament will represent an independent political verdict from that existing in the home parliaments. Hay predicted:

"The direct election of the Parliament would mark the establishment of the first branch of a "European government" 20.

This may be true, but would hardly displace the Special Rapporteur's verdict, which is justified in terms of the limited powers that the parliament enjoys; it has no control over the most important policy making organ, the Council, and only an emergency power against the Commission. Thus, though the Special Rapporteur is correct as matters stand at present, in his conclusion it is clear that the label "political union" requires a more specific definition - especially since the indications are that the groundwork is being laid at present for the development in the future of the type of "political union" the Special Rapporteur has in mind.

20. - Hay - Supra Footnote 9 p 78

Conceptual description of the European Communities:

This section will be devoted to finding a conceptual framework that fits the EC. The consequences of such a classification process are of direct relevance to the immediate concern of this paper; delivering a verdict of statehood on the EC clearly would scotch any suggestion that MFN treatment extended to favours granted within that "state"; likewise the application of the 'customs union exception' becomes strained if one may characterize the EC as a state. It is quite clear, however, that if the impact of the EC on the MFN principle is to be evaluated, first of all one must evaluate what the EC are, since much of the relationship turns on that question.

The feature which strikes one immediately about the EC is that in some respects it is independent from its creators, the member states, and further, has power over them suggesting a federal structure. This superficial impression is reinforced by the fact that the nature of this power extends beyond the administrative and technical to life and blood policy making, including political representation; further, the EC's law regulates the individuals of the member states directly and not through the member state as intermediary. We begin the examination of what the EC are by comparing to the most familiar structure, the state.

Are the European Communities a state?

A superficial examination of the EC on its own reveals certain statelike characteristics, and more precisely, federal statelike powers. Community law, for example, is directly binding on the individuals of the group, and being so, may be regarded as internal law. The institutions created by the 3 Treaties may be regarded as creating the "embryo" of a state structure - the Council of Ministers becomes the upper house where sectional interests are represented, the Commission becomes the Cabinet, popular representation is exercised in the European Parliament, and the European Court of

Justice acts as a supreme constitutional and administrative court. The immediate application of the law of this body to its individuals, on this interpretation, forms the strongest evidence that a specified degree of sovereignty relating to its competence has been transferred to the EC by the original mamber states. On this view:

"The Community is a hierarchical structure built from within and below and constituting the highest common reference for its members; (it) is not a collateral structure but integrates existing ones" 21.

This view interprets the EC as potentially representing a new federal state because of the character of the institutions created, and viewed simply in isolation, this view has considerable force. Unfortunately, it is impossible to view them in isolation, because the influence of the member states persists in this structure. Hesitation surrounds the conclusion that the EC are a state because the operation of its institutions is limited to specific fields - mostly economic. Thus the institutions may be described as federal in effect, which in itself indicates their orientation without actually concluding that they bring a federal state into existence. Pescatore focuses on similar features as Hay in distinguishing the EC from anything that has preceded it - including the federal state:

"It permits the formation of a political will, the creation of a common body of legislation, the management of common interests, and lastly the regulation of disputes on the basis of a compulsory jurisdiction exercised by the tribunal endowed with a general competence" 22.

By the traditional definition, the EC may superficially be regarded as fulfilling three of the four requirements of a state[23]; it has "people" who "live together as a community"; the borders of the nine fulfill the requirement of "a country in which the people have settled down"; the EC may be regarded as its Government. It is in the fourth requirement - of a sovereign government - that the EC and the traditional definition of a state part company; as Oppenheim states:

21. - Supra Footnote 9 p 61
22. - Common Market Law Review 7 1970 p 170
23. - They are set out in "Oppenheim's International Law" - Lauterpacht Vol 1 8th Ed. 1955 p 118-9

"Sovereignty is a supreme authority, an authority which is independent of any earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country" 24.

The EC, of course, is not "independent all round" - but there again, on this definition, neither are the member states. In fact the issue of sovereignty emerges as decisive in determining whether the EC are a state - and more precisely that of "external sovereignty" since "internal" sovereignty may be shared between constitutional units wihout any encroachment on its status of statehood. As pointed out by Jaenicke:

"The existence of sovereign powers is indivisibly connected with the existence of state powers from which the former is derived" 25.

On this criterion, it cannot be said the sovereign powers were transferred to the EC; the foundation of these powers is the founding treaties; it is hard to conceive of "state" powers being created in an international treaty for the simple reason (apart from the inherent conceptual conflict of the suggestion) that being treaty powers, it is open to the parties to the treaty to dismantle the EC, including its powers - or an individual state may unilaterally withdraw. This fact is inconsistent with the existence of sovereign powers having been transferred to the Community. Such a conclusion still holds good if one interprets the Treaty of Rome as giving the EC the right to act in a certain field (undoubtedly it has this "right" since it can decide and bind the member states by its decision) but the member state, though not having the right, has the power to act in that field because if may revoke its authorization to the Communities. Such a conclusion inevitably flows from conceiving of sovereignty as indivisible and cannot therefore by definition be transferred except to another state. On this interpretation, the Communities have no "life of their own"; it is not a state because it weilds no sovereign powers;

24. - ibid, p 119
25. - Hay Supra Footnote 9 p 64

it has no sovereign powers because those powers it has may be revoked, which in turn testifies to the residual sovereignty of those latter powers.

Different conceptions of sovereignty hold more promise in labelling the EC as a state. This view suggested initially by E.N. van Kleffens and amplified upon by Van Hecke, takes as its starting point a more pragmatic (and less demanding) view of the ingredients of sovereignty:

"In every international institution, part of the sovereignty of its members is ceded by the to international organs"26.

At first sight, this view appears to support the school of thought which regards any international commitment as a loss, albeit small, of that state's sovereignty. This impression is soon corrected; the quality of integration envisaged before it can be said that the state's sovereignty has been extinguished requires both an irrevocable and an unconditional commitment on the part of the state. In this respect, it is identical to the traditional school; it only conceives of an international organ having sovereign powers because a state has emptied its sovereignty in its favour; sovereign power, like the sting of a bee, can only arise with the death of the transferor. For the reasons suggested previously, the EC cannot be regarded as exercising sovereign powers under this interpretation; its member states certainly do continue to exercise extensive sovereign powers, and again, they may revoke the powers enjoyed by the EC.

It would be tempting to conclude at this stage that the EC are nothing more than the member states; the latter's sovereign powers are undoubted, and there is consequently no room left for another body within the same area exercising sovereign powers. Hay, however, takes issue with such a strict conception of sovereignty - this difference proves crucial to his ultimate conclusion. He makes the apparently innocent suggestion that sovereignty is a divisible concept - that indeed, a littel sovereignty can be transferred.

"Circumstances which show the loss of sovereignty may be

26. - Sovereignty in International Law 82 Receuil des Cours 1953 p 119

whether decisions of the organisation require a unaminous vote or a majority; whether the organisation has jurisdiction to determine its own jurisdiction and whether the decisions of the organisation bind the member state automatically...whether the decisions of the institutions bind individuals directly and automatically" 27.

The relevance of such a modification to the task of classifying the EC is readily apparent: they comply with all these criteria. It is particularly relevant in that it accepts that sovereign powers may shift as a result of an express grant or by evolution, or both; with the EC in mind, it is clear that a grant of powers was made in the Treaty of Rome 1957. The grant of powers related directly to economic matters, but the EC have evolved beyond such matters, incorporating a unified financial policy and extending to direct elections to the European Parliament. Such evolution is taken into account in this assessment of sovereignty.

This view regards sovereignty as a "collection of powers analogous to the common law notion of a bundle of rights" 28. Sovereignty is thereby conceived of as essentially a power (the supreme one in fact) regulating a certain subject matter. The particular bundle of rights transferred in this instance is the commercial policy of the member states; such a transfer affects both the internal and external sovereignty of the member states; the EC jurisdiction in this respect replaces that of the member states both in the latter's internal law and in its external relations, since the EC became the proper party in this respect that third states must deal with.

The inescapable conclusion on this interpretation of sovereignty is that the EC do wield some sovereign powers - an apparently dramatic conclusion. The significance of such a conclusion is, unfortunately, somewhat of an anti-climax; the flexibility of this contrasting conception of sovereignty is won at the expense, ultimately, of the significance attributed to labelling these powers as "sovereign" because their inevitable

27. - Hay Supra Footnote 9 p 69
28. - ibid p 70

link with statehood is broken. Hay admits:

"It intends to say nothing about the existence of statehood" 29.

The significance of regarding sovereignty as a divisible concept, and hence claiming that the EC do exercise sovereign powers, is limited because it is not necessarily indicative of statehood. The traditional state structures which admit shared sovereign powers are the federation and the confederation. The federation is composed of separate constituent states internally, but externally operates a single unit. The diversity of interests represented by a federation must have a territorial base; the EC comply with this requirement in that they are territorially limited - they are the European Communities. The internal division of powers envisaged in a federation resembles the division of sovereign powers created by the EC; externally, however, the federation must appear as a single sovereign entity. The member states of the EC pursue independent foreign policies; this fact is inconsistent with the traditional structure of a federation, and therefore, the EC must fail as a federation. Hay concludes:

"Federation is associated with statehood; and the communities, unquestionably, are not states" 30.

This unequivocal conclusion exemplifies the limited significance to be attached to the notion that sovereign power may be divided. The independent participation of the member states in the international community is invoked to show that the EC are not a federation. But the member states are not completely independent externally; their external commercial policies are conducted exclusively by the EC. Since sovereign powers may be divided along the lines indicated by Hay, could not this sovereign power indicate that the EC represent a limited federation? Or must a federation monopolize the external policies of its member states before it may properly be called a federation. The latter suggestion is inconsistent with the very notion that sovereign powers may indeed be divided. The concept of dividing sovereign powers lends itself to the concept of a "limited

29. - ibid p 73
30. - ibid p 87

federation - indeed, it may be wondered whether in light of the member states' abdication of involvement in their commercial policies whether they should not be labelled "limited" states.

Labelling the EC as a confederation holds out more hope however. A confederation is an association of states esblished by a treaty between its sovereign members. Institutions are normally created by this treaty to implement the objectives of this association. Being a treaty the members may withdraw from it. Their sovereignty consequently persists (withdrawal from a federation, on the other hand, generally culminates in a civil war, as the American experience in 1860 shows). The law binding the members of a confederation is consequently only international law; in this respect, the EC fit in only awkwardly because Community Law consists of a mixture of international law and law peculiar to itself. However, if the treaty establishing a confederation may admit cooperation only in limited areas of common interest between the member states, as contained in the Treaty of Rome, (and here the notion of a sharing of sovereign powers is crucial) then the EC may be classified as a limited confederation, because the cooperation established by the Treaty of Rome relates only to a limited sphere - principally economic. An alternative label could be therefore an economic confederation.

It is accepted that the operation of the MFN principle is excluded if the favours granted are granted within a federal state; even if it can be argued that the EC represents a limited federal state, it is uncertain whether the principle is excluded by this "limited" form. Likewise, the same uncertainty surrounds the impact of a "limited" confederation on the MFN principle. It may be doubted in fact whether a full fledged confederation itself would exclude the principle. The answers to these questions are taken up later in the concluding pages of this chapter.

An alternative interpretation of federalism produces yet another verdict on what the EC are. The emphasis of this interpretation looks less at the conceptual structure of a federal state but focuses on the functional reality achieved by such an

association as the criterion of concluding that a federal principle exists. It is therefore an internal analysis of the structure, concentrating on the reality produced within it. This view accepts that the essence of federalism lies in its recognition of diversity within the structure. From such diversity, independence and interdependence combine in the relationship between the unit and the central authority. A constitution regulating such a relationshipe is therefore necessary. In functional terms such a diversity is qualified by the following circumstances:

- physical neighbourhood of the territorially diverse groups
- the expectation of increased economic prosperity
- similarity in the political nature of the member governments
- the sharing of some unifying ideal

The EC are particularly susceptible to this approach because the significance of their peculiarity as a whole is minimized if their independent functions are taken as the criterion. Unquestionably the EC members constitute a physical neightbourhood. The desire for increased economic prosperity formed the initial reason for its creation; likewise the desire for greater international impact can be attribted to it if one can accept its limitation to the economic sphere. The governments of the member states are all "democratic" and the dream of a unified Europe may be considered its unifying ideal, reinforced in the recent Paris Summit of 1978. The degree of independence and interdependence exists as well; the independent funcations of the member states are numerous: economic functions, on the other hand, are exclusively handled by the EC; both functionally, are independent. The process of harmonization of the laws of the member states in the EC, the recently achieved agreement in fiscal policy and direct elections to parliament further indicate substantive functions executed by the EC. Some functions, such as the prosecution of violations of the antitrust articles require mutual participation by the EC and the member states. If it is of any consequence, the

self image of the EC further reinforces this federal function; the French delegation described the Assembly's right to participate in the amendment to the European Coal and Steel Community Treaty as a "genuine federal legislative power" 31. Finally Community Law (dealt with independently) provides the strongest functional evidence of a federal principle at work.

Are the European Communities an "international organisation"?

Clearly if the EC can be classified as such, the prior MFN obligations of the members are not excluded because it accepts that the status of its members has not fundamentally changed: they remain states. In its codification of the Question of Treaties concluded between states and international organisations the ILC defined an "international organisation" for the purposes of the Draft Articles in Draft Article 1(1):

"International organization means an intergovernmental organisation" 32.

This in fact had been borrowed from the prior definition contained in the 1969 United Nations Conference on the Law of Treaties. The commentary to this definition is sparse. Certainly the Special Rapporteur on succession of states considered that this definition covered the Treaty of Rome:

"EEC appears without doubt to remain on the plane of intergovernmental organisation"33.

The writer's objections to this are recorded elsewhere in the paper.[34] It is not so much that this comment is inaccurate but rather that the consequences that normally flow from having said this are not necessarily applicable to the EC.

The relevance and incidentally the explanation of concluding a group to be an international organisation is in terms of the international legal personality one attributes to it. The international personality of an international organisation ultimately is traced back to the personality of states from which it is derived; thus the international personality of a state is described as original because it precedes that of the international organ-

31. - Supra Footnote 9 p 60
32. - Yearbook 1974 Vol. II Part I p 142
33. - Yearbook 1972 Vol. II p 18
34. - at p122

isation and because states represent the original subjects of international law; the international personality of an international organisation is consequently labelled "derivative". Mosler includes in his analysis of the personality of the state "necessary" international personality: necessary legal persons and "those with regard to whom the international legal system performs if functions to achieve order and justice" 35.

A hierarchy is implied by this definition: original personality is considered of the "highest order", derivative is considered "second class". The consequence of this latter classification is that its international personality is limited and possesses no inherent rights because they may be dismantled by the state parties creating them.

The EC on this criterion are such an international organisation, because they were created by international treaties and may be dismantled by the states creating it. Does it follow therefore that the EC are a second class legal persons with no inherent rights and only limited international personality? Clearly on this criterion they have no inherent rights because none of their rights would survive if the member states agreed to dismantle them, or if one member decided to withdraw, the EC would have no rights against that ex member. Again, it is true that their international personality is limited, but in another sense from that envisaged: it is limited to the economic field. However, if one ignores the legal possibility of withdrawal by member states and focus on the balance of power created by the three treaties while they continue to be in force, then a right of existence, and hence original personality may be said to have evolved out of its derivative personality. The question then becomes how many elements of legal personality do the EC exhibit in order to classify them as having full personality. The fact that the EC has policy making functions, that it is independent from the member states, that it may assert its interests against them, all point to an international personality of the "highest order". The intensity of integration

35. - Supra Footnote 9 p 23

achieved, albeit in the economic sphere, and limited to Europe, further indicates that the EC may be classified as an international organisation.

The Supranational Concept:

The difficulty of classifying the EC within a familiar concept, indicated in the preceding discussion, has existed since its inception. To a limited degree, those traditional concepts have yielded in an effort to accommodate it; a lingering suspicion however, that the marriage of these two was unsuitable provoked a search to find a new classification in which the monster may be contained. This new classification is the supranational state.

It is no accident that the phrase emerged initially from the context of the creation of the EC in 1949. Its emergence is symtomatic of the fact that a unique organisation was being established for which traditional theory was suspected to be inadequate. In an effort to conceptualize this reality, Robert Schuman described the High Authority of the European Coal and Steel Community "the first example of an independent supranational organisation[36]. The West German Government in 1957 described the European Economic Community as a "supranational community equipped with sovereign powers" 37.

Two problems are posed by the concept of a supranational state. The first is one of definition. It is neither a state nor an international organisation, yet some of its ingredients appear identical in type to those two. Its institutions are independent from those of the member states, and it may bind them by majority vote; this is indeed the case of the EC. However, these characteristics are typical of a normal international organisation. The extent of functions powers and jurisdiction of a supranational state, however, is greater than that of a typical international organisation, and indeed, this distinguishes the EC from such organisations - but this distinction is one of quantity, not quality.

36. - Supra Footnote 9 p 30
37. - ibid

Unique features of a supranational state do exist, however, distinguishing it from a typical international organisation. The law produced by a supranational state binds natural and legal persons directly and independently of the participation of the member state. Further, the existence of a judiciary within the organisation (before whom private parties have standing) and the existence of a representative assembly have no parallels in an international organisation - and of course, all three ingredients exist in the EC. In fact, these ingredients are traditionally linked with the state and not the international organisation.

Thus one may conclude that the EC represents a supranational state - indeed, it is hard to conceive of any other conclusion since the concept was tailormade to fit the European Communities. The temptation at this stage is to ask the rather childish but necessary question; so what? Certainly it describes the European Communities but labelling the EC as a supranational body and its law as supranational law adds nothing to its relationship to national or international law or the MFN principle. It has features of both an international organisation and a state. Can it be treated as a state for some purposes? In relation to our discussion, does classification as a supranational state mean that the treatment granted by one member to another within that supranational state exclude a non member from claiming such treatment pursuant to a MFN treaty, because in this regard a supranational state may be regarded as a state? Or are such advantages entitled to be claimed within a supranational state because the reality of the member states persists? The supranational concept holds no immediate answer, precisely because it is a novel creation. If the determination of its impact on MFN treaties can only be pursued by analogy to a similar structure, such as a federal state, this would appear to negate any independent contribution the supranational concept could offer to its effect on MFN treaties. The difficulty of assessing the impact of a supranational state on prior MFN

treaties entered into by its members is that the concept itself suggests the creation of a structure "on top" of the member states while apparently leaving those member states essentially intact - a difficult idea because it appears to create something without leaving a corresponding gap in its creators. On the strength of the latter characteristic, it would appear that the prior MFN treaty obligations of the members persist; such a pragmatic approach, in emphasising the persistence of the member states as states, correspondingly accords little weight to the supranational state. The creation of the latter does not, of itself, exclude the prior MFN obligations of its members because, by definition, it cannot be considered a state; the same territory cannot be governed by two "states". Can the new relationship between member states of this supranational organisation in itself serve as a basis on which MFN rights of non members are excluded? It is doubtful. The nearest analogy of the relationship is that between the federal and state governments, resulting in the "federal clauses" or where a territory is internally self governing but the mother state represents it internationally - hence the 'Commonwealth clauses'. The existence of 'community clauses' may indicate that a similar type of relationship has been created between the members and the community. Certainly those clauses indicate that a great deal of flexibility can exist when it comes to the issue of international personality, on which the supranational state, if it is to command independent recognition, must rely heavily. In fact, community clauses reverse "federal clauses": in the latter, the international personality of the federal state is undivided, whereas internally the constitutional powers are divided between the states. Community clauses, on the other hand, exist because a member state can only enter into a commercial agreement subject to the approval of the EC, and protects it if appropriate implementing legislation is not introduced. The analogy with federal or Commonwealth clauses reveals that the relationship between the community and member states in the supranational state is in fact the reverse

of that existing in those regimes. It attests, if anything, to the continuing dominance of the member states at the expense of the supranational structure. For the analogy to hold good, it would be the Community which, when entering an international agreement, which would introduce a "member state clause"; however, the community negotiates in its own name, again making the analogies unreal.

Equally clearly, the argument that the rights granted by one member to another are excluded from the MFN principle because, both being members of a supranational state, cannot be regarded as being granted to "another country" or a "foreign country" simply begs the question, and in any event could not be implied in the absence of an express stipulation in the MFN treaty that a foreign country excludes members of a supranational group. The British practice maintained in the preferential system by an express definition of "foreign country" or "any country or territory not under the sovereignty protection suzerainty or mandate of His Majesty" 38. The continued political independence of the member states renders such an implied limitation on MFN treaties impossible.

Certainly no implied "supranational state exception" at present exists. Hay predicted that the MFN principle may eventually take account of the supranational state:

"Beyond elaborating new techniques, supranational organisations contribute in another sense; their extensive practise, like that of states, becomes the source of international law. This contribution may be in the application of refashioning of existing rules and concepts of international law - for instance, the most favoured nation clause" 39.

To date, however, state practise does not support such an implied exceptions. Perhaps the attitude of the EC that the Treaty of Rome does exclude the operation of the MFN principle, and the acceptance by states of this attitude, is indicative of the future trend.

38. - Schwarzenberger BYBIL 1945 p 109 : The MFN Clause in British State Practise
39. - Supra Footnote 9 p 302

The Law of the European Communities:

The law produced by a national state is characterized as national law. The law operating between states is consequently labelled international law. Federal states are regulated by federal law. Certain simple conclusions can be drawn from this: the genre of law produced by a body is, by definition, typical of itself. Equally true, that state may be characterized as such by the law that binds its individuals; the two are inextricably linked. This is conspicuously true of the EC; its classification admits more than one possibility and this is reflected in, and because, of its law. The very fact that one can speak of a "European Communities law" suggests a degree of independence from both the national law of the member states and from international law, perhaps creating a new order of law peculiar to itself. The significance of the conclusion one reaches about the nature of its law should not be underestimated; as stated above, it symbolizes the characterization one ultimately settles on the EC - at the very least gives an insight into the character of this group, which in turn leads to a more precise appreciation of the relationship of the EC and the MFN principle.

First of all one should describe what "Community law" is. Its ingredients are varied, and may be listed hierarchically. Foremost of its components is the founding treaties, chief among them the Treaty of Rome 1958; the treaties establish the permissible scope of the EC's action. The treaties not only include the basic text but the lists, annexes, protocols and supplementary protocols. Secondary Community legislation, on the other hand, comprises the bulk of law implementing this Treaty, the most important being acts promulgated by Community decisions; Article 189 specially describes them as "regulations", "directives" and "decisions", though internal regulations of the institutions could equally be so labelled. Another example of secondary community law is an international agreement concluded by the community. This is the foundation of "community

Law". Now one must assess the character of the legal regime established by this law.

For the initial characterization of this law one should perhaps initially defer to the views of the institution most intimately involved with community law - the Court of Justice of the European Community, created by Article 164 of the EEC Treaty. A national court derives its mandate from the national legal order to apply the laws of that nation; by analogy, and it is a valid one, the Court of Justice derives its mandate from Article 164 of the EEC Treaty to maintain observance of "community law" and the law accepted in the EC. Its attitude to the relationship of community law to national and international law is particularly important because in the immediate context, their decisions will dominate the formulation of that relationship, especially in the application of international law where no competing pronouncements dilute its impact. (The Permanent Court of International Justice is limited to states, excluding the EC).

Since the founding treaties are, whatever else, international treaties, one would expect that international law naturally would regulate their operation. If a dispute arose between two member states, it follows that international law should form the basis of its solution. However, the characterization of the treaty as international does not necessarily dictate the nature of its law:

"It all depends on the contents of the treaty. A treaty is in fact only a form of procedure which may serve to do a great many different things. For example, a number of states have been created by treaties which thus have generated public law" 40.

The Court of Justice has supported this flexibility in characterization where the relationship of community law and international law has arisen. In the Dairy Products Case, the Court of Justice rejected the submission of the Belgian Government that community law could be regulated by the principles of international law:

40. - Common Market Law Review 1970 Vol. VII p 168 - Pescatore

"The EEC Treaty establishes a new legal order which regulates the powers, rights and duties of the subjects to whom it applies as well as the necessary procedure for determining and adjudicating upon any possible violation" 41.

The novelty of community law was amplified upon in Costa v E.N.E.L.:

"It represented a special legal order...derived from autonomous sources" - the nature of which is "pe culiar" and "original" 42.

Community law excluded international law because it provided a procedure, as pointed out in the Dairy Products Case, for regulating violations - a feature not contemplated by the international principle. However, the Van Duyn Case[43] offers an example where international law overrode the express provisions of the EEC Treaty which appeared to conflict with the former:

"It is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between member states..." 44.

Clearly then international law can apply between member states; the internal order of the community can be regarded as belonging to the international sphere, where states are still states.

The Radio Tubes Case is particularly pertinent to the present discussion since it involved an inconsistent right held by Italy from the GATT previous to joining the EEC. The Court invoked the principles of international law in relinquishing the previous right in favour of the subsequent obligation.

"In fact, in matters which it regulates the EEC Treaty overrides the Conventions made prior to its coming into force, including the agreements arrived at within the framework of GATT" 45.

In the Third International Fruit Company Case[46], the Court considered the position where a EC provision conflicted

41. - 1965 CMLR 72
42. - No. 6/64 July 15 189-204 p 197
43. - No. 41/74
44. - ibid, considerations 21-23
45. - 1962 CMLR 203
46. - 1972 Rec 1227 21-24/72; 12 CMLR 1975 77

with an obligation of international law. It held that the compatibility of the former would be considered on the basis of the rule of international law; the rule must be

(a) binding on the community

(b) capable of creating rights of which interested parties may avail themselves of in a court of law.

Only then will the Court be prepared to declare a Community Act invalid - and further, only if the conflict has been raised in a national court and reached the Court through Article 177.

Thus, international law can be applied directly within the community legal order; since the relationship between international law and community law is monist, transformation is not required. This has repercussions on its relationship with the national law of the member states. Most member states are dualist; they maintain that international law and national law are separate; the former is a part of the latter only through transformation. This throws into sharp relief the nature of community law; as pointed out by the Court in Costs v E.N.E.L. 47.

"By contrast with ordinary international treaties the EEC Treaty has created its own legal system which on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply" 48.

Thus, community law forms an integral part of national law; the problem is, however, that most member state adhere to the dualist concept, but community law itself is monist in its attitude to international law; this creates the possibility that the national law of member states will automatically incorporate international law to the extent that it exists in the application to the member state of community law. The only alternative would be to exclude the international element in community law; practically this may be possible: conceptually it is impermissible. Thus, in dualist states,

47. - Supra Footnote 42 p 198
48. - ibid

international law would automatically be incorporated into national law where it is included in community law.

The fact that the relationship between community and international law is monist, and that principles of international law are invoked as an aid to interpretation of disputes (such as the interpretation of the text, having regard to its origin and purpose) between members does not lead to the conclusion that the internal structure of the community operates on the international plane - any more than the internal structure of a state, which incorporates customary international law makes the internal law of that state international law. It is true that international law participates in community law in a different manner from it participation in national law, whether monist or dualist; this stems from the fact that the Treaties are international treaties. The founding treaties ultimately can only be revised by a subsequent treaty. Article 220 alludes to the power of members to make supplementary agreements peripheral to the main community activities, alien to the community process. As such, the preceding represent areas where international law operates in community law. In more important ways, however, community law differs from international law, in type and degree. The founding treaties are treaties of international law. But the obligations imposed by those treaties take them beyond classification as merely an international treaty, representing nothing less than the "constitution of a system of institutions which are capable of making decisions and what is most important, legislating";[49] unlike a traditional international treaty, the EC contain within themselves a system of legislative self regulation; this is the product of a living organism. A manifestation of this "living organism" quality is reflected in the method of interpretation employed; an international treaty is interpreted essentially from a static standpoint, with a tendency to look back and gauge the parties' intentions when they made the concessions. The founding treaties, on the

49. - CMLR 1970 7 p 172 - Pescatore

other hand, are interpreted dynamically; the text of the words of the Treaties are approached in the light of the common objectives of the Treaty. The interpretation of the texts is influenced by a vision of the future, rather than maintaining an equilibrium reached in the past. Community law differs again in its impact from international law: primarily, the latter speaks to states; community law, on the other hand, goes beyond this and touches the rights and obligations of every individual within it. As pointed out by the Court of Justice in the "Van Gend en Loos" Case:

"The object of the EEC is to establish a common market the operation of which directly affects the subjects of the community... it intended to create rights which are part of their juridical property" 50.

Philisophically, community law differs from international law. The latter developed as a response to the "want of solidarity" typifying the international community; it is a law of conflicts, equalibrium and coordination. As Pescatore comments:

"Community law is more that that; it is a law of solidarity and integration...international law exists within a society which is weakly organised and profoundly heterogeneous in the political, legislative and judicial fields...community law...operates within a far more solidly built structure...it permits the formation of a political will, the creation of a common body of legislation, the management of common interests, the regulation of disputes on the basis of a compulsory jurisdiction exercised by a tribunal endowed with general competence" 51.

The significance of this analysis of community law is in its contribution to characterization of the EC. Hay sees in community law the strongest evidence that the EC is based on a federal principle:

"Community law has several aspects, including international law aspects but...much of internal community law is truly federal law" 52.

Article 177 (EEC Treaty) provides the clearest example of

50. - 26/62 Feb 5 1963 RCJEC
51. - 1970 CMLR 7 p 170
52. - Supra Footnote 9 p 76

the Court of Justice operating in a federal context; by this, it has exclusive jurisdiction to be the final arbiter of community law.

Pescatore agrees with Hay that the law of the EC represents the strongest evidence of a federal principle operating in the EC:

"The introduction of the principles of solidarity...takes us to the boundaries of federalism...The most satisfactory term to define it within the coordinates of current concepts would be that of federalism of an international, and not of a public, law type. What brings community law into the categories of federalism is the principle of profound solidarity...and also the method of proceeding by the marking out of competences and by the recourse of institutional schemes. But what gives this federalism its international character is the fact that the members of this new union, apart from the peoples of Europe, are six states which have not renounced their political personality" 53.

Classification of the EC and the MFN Principle:

Before leaving the conceptual world and stepping on to the meeting ground of the EC and the MFN principle, it is important to pause and consider the implications of classification of the EC on the MFN principle, because much of that relationship depends on its classification.

The EC represents a new force in international law, one whose structure poses unique problems for the MFN principle because the principle evolved from a world composed of nation states. From this focus of attention sprang its interpretation of an association of states - the customs union exception. Two points should be made about this exception. The first relates to its relevance to the principle itself in the light of the ILC's view that it does not represent a rule of customary international law. Unless therefore the exception is specified in

53. - 1970 CMLR 7 p 183

an MFN treaty, in which case it applies anyway, it provides no answers to the problems created where an association of states emerge such as the EC because (and this is the second point) though the latter more than adquately clothes the customs union, it is such a loose fitting garment that one suspects that another body may be more suitable. The European Communities are a customs union, and as such, certain consequences are prescribed in their relationship with the MFN principle if the MFN treaty of one of its members contained a customs union exception. But the validity of these conclusions is qualified because the EC is also a lot more than simply a customs union; this possibility threatens to alter its relationship, as a customs union, with the MFN principle. It is apparent that the classification of the EC has an enormous impact on the application of the MFN principle. Clearly the principle is excluded if a state party to an MFN treaty merges with another state and a new state may be said to have emerged. This exclusion stems from within the MFN principle itself: the favours are no longer being granted from one state to another. Though the EC are in specific respects identical to a federal state, the continuing political independence of the member states must ultimately exclude the possibility of regarding it as a traditional state. To the proposition that the EC represented a new entity analogous to a state, the Special Rapporteur commented:

"Since the states participating in such unions usually continued as independent and sovereign states, this view is difficult to accept" 54.

This then forms the basis of the view that MFN treaties continue to catch favours granted within a customs union, because no new entity has been created. This point is, however, that the EC are a lot more than merely a customs union, as indicated by precisely the very criteria invoked by the Special Rapporteur. It is true that the member states are "independent and sovereign" but as has been shown, not independent or sovereign in economic matters. They all pursue generally independent foreign policies

54. - Yearbook 1975 Vol. II p 16

(though increasinly, an attempt is being made to harmonize these) but while bound by the Treaty of Rome, they are anything but independent in their external commercial policy - indeed, the obligations accepted under the Treaty imposes internal obligations as well. Member states are sovereign in that they retain the power to withdraw from the EC, but while the EC binds them, sovereign power in commercial matters, if sovereignty be accepted as a power concept, rests with the communities and not with the member states. With this more precise definition of the terms, the issue becomes whether the MFN principle is excluded by the formation of an association of states where certain sovereign powers have been transferred from the original states. The temptation is to demand full statehood on the part of the EC before this is conceded, and this indeed is the response of the MFN principle at present. The limited nature of the EC as a state is harshly punished in this reaction; its statelike features - its exclusive control of the territory's commercial policy, the federal nature of its law, its limited sovereignty - are dismissed because they do not take the EC to full statehood. This response appears to accept a degree of inaccuracy in order to achieve overall the right answer, for it also implies that the member states are left fundamentally unaltered by the Treaty of Rome; considering their abdication of involvement in commercial matters, they themselves may be regarded as "limited" states - albeit less limited a state that the EC are. The conceptual discussion all points to a fundamental division being created between the member states and the EC which the MFN principle, if it responds traditionally from within itself, will not recognise. One should also bear in mind that it is precisely in the areas dealt with in the MFN treaties in question (i.e. trade and tariff matters) that the member states have abdicated their right to act in i.e. precisely in the areas the EC exercises sovereign power. A similar problem arises if one concludes that the EC are a supranational state: are the favours granted by one member of such a state to another able to be claimed by a beneficiary under an MFN clause? For much the same reasons indicated previously, it would appear that the answer is in the affirmative, because, as traditionally understood, the member states are still states. It is debatable however whether

the MFN principle should persist in ignoring the existence of this association. Given the growing trend to supranationalism today, there is a danger that the MFN principle will get out of touch with the reality that is the supranational state, especially if, in practise, states accept the denial of their MFN rights when a supranational state is brought into being. The MFN principle evolved within a particular reality, inhabited exclusively by states; where that reality changes however, principle must come into line with that change if it is to retain its meaning. Hay indicates the direction such a change could take:

"For prospective treaties, the most favoured nation clause may then reassert itself on the multi state regional basis in the form of a most favoured region clause" 55.

This then is an indication of how the MFN clause could adapt to the reality of the supranational state.

This chapter has given an indication of what the EC are. At various stages of the inquiry, the consequences of a particular feature of the EC on the MFN principle have been suggested. In the next chapter, this relationship - the combined effect of these features making up the EC on the MFN principle - is examined in more detail. The relationship of the EC to the MFN principle is examined specifically in the following areas:

- where the MFN agreement incorporates an express customs union exception: what are the consequences of such an exception in relation to the extensive favours granted with a group involving the extent of integration existing in the EC? This is illustrated by the experience of the EC in GATT.
- where no such customs union exception is included in the MFN agreement.

The answers given in the determination of these questions will be based on existing principles of international law as conceived today. The novelty of the EC, however, does allow a degree of flexibility in the answers arrived at in the application of these principles. This possibility is therefore explored.

55. - "The EEC and the Most Favoured Nation Clause" 1962 23 U.P.H.L. Rev p 684

The conclusion arrived at from this inquiry is that under present international law, the extensive favours granted by one member to another within a regional group as the EC are not excluded from the operation of the MFN principle, and that the existence of an express customs union exception only alters this result to a limited degree. The refusal of the ILC to include a Draft Artcile excluding favours granted within such regional groups, on the basis of 'progressive development' therefore takes on added significance, since 'progressive development' emerges as the only basis on which such an exception could be created. If good reasons exist why such favours should be excluded, the ILC's refusal to include such an exception would appear to require re-evaluation. This question is taken up in Chapter 6.

CHAPTER 5

The European Communities and the MFN principle:

The meeting ground on which the MFN clause and the E.C. confronted each other was the GATT.[1] The record of that meeting throws some light on the practical aspects of the relationship we are examining: it provides an expose of the relationship of the two, directly bringing the E.C. face to face with the MFN principle, and specifically the "customs union exception". Its significance lies beyond this however, in that the GATT is the framework under which over 80% of the world's trade is conducted. It is not proposed to give a detailed description of the GATT beyond describing the gist of it, except in relation to its relevance to the E.C. and the MFN principle.

J.J. Allen described the GATT adequately for our purposes:

"The General Agreement on Tariffs and Trade is a multilateral agreement whose members, called 'contracting parties' include all of the free world's major trading nations . The agreement consists of a schedule of tariff commitments, a group of common rules of trade and an organisation to promote negotiations to settle disputes and to administer the provisions of the GATT".[2]

K.W. Dam describes the substance of the Agreement:

"The cornerstone of the General Agreement is the most favoured nation clause of Article I. That clause constitutes an undertaking by each contracting party to refrain from discriminating with respect to such matters as tariffs and quantitative restrictions; any concession accorded one contracting party must be accorded to every other contracting party. Certain exceptions to this most favoured nation undertaking are set forth in the General Agreement. Perhaps the most significant is that in Article XXIV stating the conditions

1. - General Agreement on Tariffs and Trade 1947
2. - European Regional Communities (1961) p.213 - J.J Allen

under which the contracting parties may become members of customs unions and free trade areas. From one point of view, there could be no clearer denial of most favoured nation treatment than an agreement by two countries to eliminate all tariffs barriers between them while maintaining existing barriers toward third countries. Yet such an agreement would create nothing other than a free trade area which assuming it conforms to certain standards set forth in Article XXIV, is exempt from most favoured national obligation of Article 1"[3]

Later, the same writer explains:

"The General Agreement has two grand designs: that free trade be promoted through multilateral tariff negotiation, and that discrimination be eliminated by means of the most favoured national principle ... customs unions and free trade areas produced a conflict between these two goals. Such regional groupings seemed to be movements toward free trade to the extent that tariffs were lowered between member countries, but they also seemed to involve discrimination against non-members".[4]

The GATT provides an insight into the relationship being examined in that the most favoured nation clause, the customs unions exception, and the European Communities were brought into cont act with each other. It is best to begin the record of this meeting at the beginning. Curzon points out the initial difficulty the prospective member states of the EEC faced:

"But every European Country was also a contracting party to GATT and as such bound by the most favoured nation clause. Tariff reductions within GATT meant passing on all concessions to the USA whether it reciprocated or not. The Europeans saw no need for such generosity and therefore turned to the only GATT conform way out of reducing tariffs among themselves without reducing them vis-a-vis the United States, viz the customs union and free trade area solution." [5]

3. - University of Chicago Law Review 1963 VOL.3 p.615
4. - ibid p. 622
5. - Multilateral Commercial Diplomacy p. 272

Curzon attributes great weight to the influence the member states' obligations under GATT had on the final outcome of the Treaty of Rome:

"That Europe went the whole way to a Customs Union and a Free Trade area is not the least due to the knowledge that breaches of the most favoured nation clause had to be GATT conforming".[6]

The obligations of member states likewise shaped the substantial provisions of the Treaty:

"Indeed, the Treaty of Rome had been written with GATT rules in mind." [7]

I. Frank agrees:

"Throughout the (Spaak) report, however, there is a concern about GATT requirements, and the Treaty itself includes an explicit assurance that rights and obligations resulting from prior agreements with third countries shall not be affected by the provisions of the Treaty."[8]

One may have thought that the 'prior agreements' envisaged by Article 234 would naturally include MFN treaties entered into by member states before joining the E.C. Article 234 admits two interpretations however; Usenko echoes the hostile view:

"The somewhat obscure formulation of Article 234 cannot conceal its meaning which lies in obliging every party to the Treaty to deny third countries the extension, in accordance with previously concluded agreements, of the same privileges as are enjoyed by members of the bloc." [9]

Flory, speaking in the context of GATT, reaches a different conclusion:

6. - ibid p.95
7. - ibid p.276
8. - The European Common Market p. 99
9. - Yearbook 1973 Vol 2. p. 110

"How can the member states of EEC reconcile the commitments resulting from them from the signing of the Treaty of Rome with the obligations which they had assured previously by signing multilateral agreements such as GATT? Under Article 234 of the Treaty of Rome, the principle of fidelity to prior agreements should pre-dominate. By submitting the Treaty of Rome for consideration by GATT and exhibiting a conciliatory attitude towards the Contracting Parties, the six have respected that principle."[10]

The history of the submission of the Treaty of Rome to the GATT vindicates Usenko's view: it is true that the member states did not withdraw from the GATT; it is submitted however that fidelity to prior commitments involves a little more than merely submitting the Treaty if the end result of doing that is, in substance, to deny third countries the extension in accordance with previously concluded agreements of the same privileges as are enjoyed by members of the bloc, as in fact happened (substance, here, consists of the promise to extend) - It is true that the Treaty of Rome was designed to comply with the provisions of the GATT - but not Article 1, establishing MFN treatment for the Contracting Parties, but Article XXIV establishing a customs union - which, of course, excludes the prior MFN commitments made by the member states to the contracting parties. As pointed out by Dam:

"The Treaty of Rome, signed in March 1957, provided not only for the elimination of intermember trade barriers and establishment of a common external commercial policy, but also for the elimination of restrictions on movement of capital and labour and for co-ordination of certain internal economic policies. While the EEC thus went far beyond traditional free trade and customs union projects, it nonetheless had to pass muster under Article XXIV"[11]

The Treaty of Rome was first submitted to the Contracting Parties to the GATT in 1957, presented as embodying a "customs union" which, under Article XXIV, excepted the treatment member

10. - ibid p.110
11. - University of Chicago Law Review Vol 30 p.641

states accorded one another from being claimed by another non-member Contracting Party. It is not proposed to pursue the course of its consideration by the Contracting Parties in detail, because the validity of the EC as a customs union was not conclusively settled. The fact remains, however, that the Treaty was accepted in practise by the contracting parties as a customs union, through not definitely rejecting it. In practical terms, this informal acceptance by the Contracting Parties is basic to the relationship being examined.

Article XXIV sets out the basic test of a customs union or an interim agreement leading to the formation of a customs union:

"Duties and other regulations of commerce shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable" - paragraph 5(a)

Restrictions are removed when "duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories, in products originating in such territories."

The general definition is:

"A customs union shall be understood to mean the substitution of a single customs territory for 2 or more customs territories so that (i) duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the unions, and (ii) substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union."[12]

The four problem areas raised by the Treaty in relation to the provisions of the GATT were the common external tariff, quantitative restrictions, agriculture and the association of overseas territories.

12. - Basic Instruments and Selected Documents of GATT Vol. 4 p. 43

In respect of the provision regulating inter member trade, much of the controversy can be traced back to the ambiguity of the rules themselves rather than the EEC case, vindicating R. W. Dam's oft quoted observation:

"If a single adjective were to be chosen to describe Article XXIV, that adjective would be "deceptive". First the standards established are deceptively concrete and precise; any attempt to apply the standards to a specific situation reveals ambiguities which, to use an irresistible metaphor, go to the heart of the matter. Second, while the rule appears to be carefully conceived, the principles enunciated make little economic sense." [13]

Legally, however, the EEC case in respect of associated territories was much weaker; under article 33 paragraph 3, the overseas territories of the signatories of the Treaty were included within the common market, thereby gaining tariff free, quota free access to the entire EEC market, while the competitors with those associated territories faced the old, and perhaps higher, tariffs. The arrangement appeared simply an extension of an existing preferential commercial agreement, and hence a violation of the MFN clause of Article 1: the EEC's answer that such arrangements constituted a free trade area under Article XXIV 8 (d) had little force, appearing merely a legalistic afterthought.

The legality of the Treaty of Rome as a customs union under Article XXIV was never finally decided; the arrangement was accepted by the Contracting Parties subject to the "sympathetic consideration" by each member state to a contracting party's representations under the consultation procedure provided by Article XXIV. The legal questions were shelved, as the intersessional committee recommended:

"it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility

13. - Supra Footnote 3 p.619

of the Rome Treaty with Article XXIV"[14]

Thus, by a tacit waiver, the Treaty of Rome was accepted by the Contracting Parties to the GATT, and the legal issues remained undecided. This may be contrasted with the submission of the European Coal and Steel community, neither a customs union nor a free trade area which, for political reasons, received the blessing of the GATT by an express waiver. Certain very definite results showed from this de facto acceptance by the GATT of the EEC as a customs union.

"As members of a customs union, the States of the Community are exempt by Article XXIV of the GATT from the obligation to extend most favoured nation treatment not only with regard to the abolition of internal tariffs within the union, but for quantitative restrictions as well."[15]

Thus the issue within the sphere of GATT is apparently settled: the advantages accorded between members of the EC cannot be claimed by a non-member contracting party under Article 1 of the GATT. In terms of volume, GATT covers 84% of the world's trade.

Presumably a commercial favour granted by a member state to another non-member contracting party may still be claimed by the other contracting parties, since they are not favours granted within the customs union, and the normal GATT regime would apply. The situation, however, is not so clear cut as the judgment of the Court of the European Communities in the "Third International Fruit Company Case"[16] indicates: the court held that the obligations of GATT have generally shifted to the Community itself, mentioning that the transfer of powers has been recognised by the other contracting parties to GATT. As provided under Article 116, though the individual membership of the member states persists in GATT, they can only proceed "by common action"; in practical voting and representational terms, the member states have no power of independent action in Community matters - and it is hard to conceive

14. - GATT, Basic Instruments 7th Supplement p. 70 1958
15. - R. Everling - CMLR 4 1966 p. 146
16. - International Fruit Company & Others v Irodulitschop voor Groeten en Fruit Dec 12 1972. Rec. 1219-1241

of a GATT matter that is not also a "Community" matter. The court spelt out the impact of the Treaty in this area:

"In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, lays down common rules, whatever form these may take, acting individually or even collectively, to contract obligations towards non-member states affecting these rules. To the extent that such common rules come into being, the Community alone is in a position to assume and carry out contractual obligationstowards non-member states affecting the whole sphere of application of the Community legal system".[17]

Clearly in the field of GATT there are such common rules: it would appear, therefore, that the individual states no longer have the right to participate individually in GATT. The possibility this inquiry started with is therefore largely academic because an individual member state will not grant any favours under GATT, but if, in breach of its treaty obligation a state did accord a commercial favour to a contracting party outside the union, since as far as the GATT is concerned that contracting party is still formally a member, it would appear that favour would be processed by Article 1. Militating against this however, is the recognition by the contracting parties that the GATT obligations have shifted to the EC.

The lessons of the GATT experience, for our discussion are prescribed by the provisions of the General Agreement itself. Its significance lies chiefly in the fact that the bulk of the world's trade is conducted under its rules - or rather, its exceptions. One has merely to look at the multitude of customs unions and free trade agreements (E.C. Community of West African States, NAFTA, the Andean Pact, EFTA, LAFTA, COMECON) to appreciate that the great proportion of world trade now flows under discriminatory conditions. It shows that by a rough and ready approach, the EC is acceptably close enough to a traditional customs union,[18] in the Contracting Parties' recognition of the transfer of commerce powers from

17. - ERTA Case no 22/70 1971 Rec 263-296.
18. - Wohlfarth, commenting on this point, observes: "Though there are some opinions to the contrary, I think that the majority view is that the EEC is an organisation which is established and functions in conformity with the GATT rules" BTICL Special Publication No. 7 (1965) p 3

the member states to the EC, it is apparent that the EC operates, and is treated accordingly, on a higher level than merely that of a customs union: no such recognition would normally flow from the creation of a mere customs union. The principal limitation of the GATT in shedding light on the relationship of the EC and the MFN clause is that the former only came into contact with the latter very indirectly by courtesy of Article XXIV - which is an exception to it. Compliance with this exception (because the exception was provided) emerged as the principal focus of the submissions. Admittedly this settles the issue in respect of GATT and its contracting parties. It leaves unanswered the relationship of the EC and states having MFN treaties with member states who are not parties to the GATT, of which there are still 60 such states. May they claim the favours granted by one member to another, in the absence of an express customs union exception? The same issues, and hence the same anwers, are applicable in the context of MFN treaties concluded by states who subsequently withdrew from the GATT, and indeed, MFN treaties where neither party is a contracting party.

Everling answers the first question in the negative:

"Nor are member states outside GATT, to which a member state may have granted most favoured nation treatment in a trade agreement entitled to the rights which the member states grant each other. For these rights are an integral part of a closed system based on reciprocal commitments and run by common institutions; they cannot by their very nature be exercised separately" 19.

It is difficult to see exactly why the framework of a closed system within which rights are granted on a reciprocal basis should in itself exclude non members from claiming those favours in the absence of a 'customs union exception' being inserted in the original MFN treaty, in the absence of a customary rule of international law allowing an implied exception to the rule. As has already been pointed out, the Special

19. - W. Everling : CMLR 4 1966 p 147 : the context indicates that the "closed system" is a reference to EC and not to GATT; the "member states" are members of the EC, not members of GATT.

Rapporteur concluded in 1975 that no such rule had evolved. If the establishment of a closed system does not of itself exclude favours granted within it from being claimed under a MFN clause, and this must follow from the Special Rapporteur's conclusion, where else can the basis for excluding these rights from being processed under a MFN treaty be found? Certainly the presence of "common institutions" cannot of itself form such a basis. Does, then, the fact that the rights created within a closed system are created on a reciprocal basis in itself exclude the operation of the MFN treaty a member has with a non member? Schwarzenberger appears to agree with the rationale of this view - certainly in regard to open conventions.

"If the convention is an open one, there is much to be said for the view that the beneficiary should not claim the benefits of such a convention without sharing the burdens connected with it, or at least that it should claim the fulfilment of MFN obligations only in so far as it accords itself in fact to the other state the benefits which it claims" 20.

In the light of Draft Article 15, establishing the irrelevance of the fact that the granting state has treated the "third" member state gratuitously or against compensation, this can hardly serve as a basis on which to exclude those rights. In any event, as pointed out by Everling, the EC is a closed system; Schwarzenberger's comment is not, therefore, applicable to it. It would appear so far that no satisfactory basis can be found for excluding customs union favours from being claimed under a MFN treaty with a non member. In this regard, it should be noted that the omission of the Special Rapporteur to codify a customs union exception becomes immediately relevant: had a Draft Article been included, as embodying a rule of customary law (in which case the same result would be achieved anyway) or based on progressive development, the respect that the Draft Articles command would have lent considerable support to the claimed exception, and in particular, the reasons behind it; the absence, on the other hand of such general approval leaves them rather naked and

20. - The MFN standard in British State Practise 1945 BYBIL p 109 Footnote 5

unpersuasive in their own right.

The fact that the GATT did specifically include a "customs union exception" in Article XXIV to the MFN principle and that so many states subscribe to the GATT could provide the basis for recognising this exception beyond the confines of the General Agreement. The Special Rapporteur considered this possibility, thinking aloud:

"Does GATT possess such a "radiation effect" which would impose upon non parties the rule of Article XXIV as one which passed into the general corpus of international law on its acceptance by a communis opinio juris? " 21.

Inherent in his rejection of the emergence of such a rule of customary law was the rejection of this view of GATT:

"The General Agreement, however important, is one agreement among many" 22.

Thus the provisions of GATT leave unaltered the relationship being examined: the issue of the EC and the MFN principle remains to be decided on independent grounds.

Another possible ground for excluding customs union rights from being claimed by a non member has been advanced by a distinguished group of European economists in a report produced for the Institut fur Weltwirtschaft; they noted:

"Let us emphasise straight away, however, that the creation of the EC did in no way infringe on, or violate the principle of most favoured nation treatment, as expressed in the GATT. Nothing in the philosophical content and historical analysis of that principle can be construed as a presumption against the elimination of tariffs among a group of countries willing to surrender and merge certain significant aspects of their national sovereignty. The parallels often drawn with the creation of the United States of America or of modern Germany are quite legitimate"23.

If the authors meant the emphasis of the EC's friendship with the MFN principle to be on "as expressed in the GATT" then clearly this is correct but only because it was accepted, in practise, as a customs union under Article XXIV as an exception

21. - Yearbook 1975 Vol. II p 16
22. - ibid
23. - Economic Policy for the Europeon Community : The Way Forward p 19

to the MFN principle. Unfortunately, the subsequent comments made indicate that a wider meaning is intended; the claim appears to be that the MFN principle itself, independently of the GATT, has an inbuilt exception in the situation envisaged. Certainly this is true in regard to the creation of a new state, but the EC, as admitted in the quote, is only a parallel to this; it cannot be regarded in traditional terms as a state. If the situation envisaged by the authors is a reference to a customs union, then such a conclusion clearly conflicts with those of the Special Rapporteur, who concluded that in terms of philosophical content, the principle did not admit such an exception, and historically, state practice was not uniform enough nor did it reflect the emergence of a communis opinio juris. The Special Rapporteur drew a contrary presumption from a superficial look at the MFN principle :

"The presumption obviously militates against such an exception. If states promise each other most favoured nation treatment, they are supposed to carry out their promise. They may limit such promise, but if they do not, they have to bear the consequences".24.

If the 'philosophical content' of the rule necessarily results in excluding customs union benefits, the question must be asked - what philosophical content? The most likely content is that of the ejusdem generis rule, closely allied to the views of Pescatore:

"There is no common measure between a treaty designed simply to facilitate trade and the much more ambitious and fundamental objective of a treaty designed to bring about economic integration in the form of a free trade area a customs union or an economic union" 25.

The Special Rapporteur regarded this view an unjustified extension of the ejusdem generis rule, and undoubtedly he is correct; the rule limits the claims a beneficiary may make under a MFN treaty to the same subject matter: the favours granted to a third state must relate to the same subject matter as the

24. - Yearbook 1975 Vol. II p 16
25. - Annuaire de l'Institut de droit International 1969 Vol. 53 p 209

original MFN treaty before the beneficiary may claim them. The principle does not of itself require identity in degree of friendliness between the granting state and the third state and the beneficiary. Similarly the nature of the treaties under which the rights are created need not necessarily correspond. As the Special Rapporteur emphasised:

"Bluntly, if the most favoured nation clause promises MFN treatment solely for fish such treatment cannot be claimed under the same clause for meat" 26.

As pointed out previously, a certain inconsistency surfaces if this is applied to the "frontier traffic exception": there the rule resulted in an exception chiefly in reliance on the context of the treaties (whether states were contiguous or not) and not the subject matter of the treaties themselves: surely on this criterion the context of the creation of a customs union could likewise exclude rights granted from being claimed by those outside the bloc?

Accepting though, the Special Rapporteur's view of the ejusdem generis rule, this would appear to be a convincing argument that the philosophical content of the MFN principle does not support a customs union exception. This assumes throughtout however that it is a customs union that is being referred to; the reference to the "surrender and merger" of certain significant aspects of their national sovereignty coupled with the analogy with the federal states of the United States of America and Germany indicates another basis on which the rights granted within the bloc should be excluded from the operation of the MFN treaty - namely, the new entity argument. The basis for excluding rights claimed under an MFN treaty when two previously independent states have merged stems from the fact that the granting state is no longer according a favour to another state because the two states are now one. The MFN principle is founded on the concept of one state granting a favour to another state as the standard the beneficiary may

26. - Yearbook of the ILC 1973 Vol. 2 p 108

claim. The uniting of two states therefore does not terminate the MFN treaty; rather it excludes from its operation the favours granted by one member of the state to another. If the authors view in the European Communities a creation analogous to the USA, then the philosophical content of the principle may exclude those rights from being claimed by a beneficiary. As has been shown, the EC does contain definite elements which are analogous to a federal state. As the EC itself pointed out:

"These responsibilities extend to fields which, by their nature, go beyond the obligations generally undertaken within a customs union; they include, to mention only one sort of commitment, a community legal system in which community law is pre-eminent and directly applicable within member states under the surveillance of the Court of Justice of the communities" 27.

To this extent the federal analogy drawn by the authors is correct; what is more doubtful however, is the apparent equation they assume exists on the operation of the MFN principle between the creation of a federal state and the creation of an entity that is only analogous to a federal state. It is by no means certain whether at present this can be equated; this question is examined shortly. It would appear however that the degree of integration achieved within the bloc is crucial if the analogy with a federal state is to hold good; this is only indirectly relevant on Pescatore's interpretation of the ejusdem generis rule - in fact he lumps all three degrees of integration together - free trade area, customs union and economic union. This is surprising; one would have thought that varying degrees of integration would affect the lack of common measure between the MFN treaty and the customs union, free trade area or economic union treaty. Of course, as far as the Special Rapporteur is concerned, the degrees of integration achieved are irrelevant as far as the ejusdem generis rule is concerned.

The New Entity Agreement:

The new entity argument raised by the

27. - Report of the ILC 1978 p 449

authors warrants careful consideration, however, because it represents perhaps the most forceful basis on which it is claimed that MFN rights may be excluded. The similarity between an association of states as customs unions, common markets or economic unions, and a uniting of states constitutes the basis of the argument; if, as it is accepted, a granting state enters into a union with another state, the rights accorded by that state to the other member cannot be claimed by a beneficiary state under a prior MFN treaty, the valid analogy between such a full union and a partial union, such as the customs union, common market or economic union raises the possibility that in the latter cases, the rights accorded by one member to another are not caught by the prior MFN treaties a member has with third states. Considering the source of this argument, it would appear that the degree of integration achieved within the union becomes all important; if the analogy is with a union of states, implying full integration, logically it should follow that the more integration a mere association exhibits, the more compelling becomes the analogy and hence, the possibility of excluding prior MFN obligations. But it is important that it is only an analogy being drawn; the argument does not strive to see the association as a state, but similar to a state. In the case of the EC, it is not argued that this bloc represents a federal state but is similar to a federal state. The analogy is again invoked if one concentrates on the rationale for excluding prior MFN obligations where two states grant each other favours within a union; they are exlcuded, not because the original MFN treaty itself is abrogated, but because the trigger mechanism established by the treaty itself giving the beneficiary a right to claim equal treatment is not activated by the grant of a right by one member to another for precisely the reason that by virtue of the union, this can no longer be considered to be a grant by one state to another - since the two are now one. The customs union, common market or economic union analogy is drawn because in precisely the field envisaged by the original MFN treaty, the two or more members are one state. The new entity argument seeks recognition

of this degree of unity in excluding prior MFN treaties since the unity of the members operates in precisely the areas the treaties set up the standard of the granting state's treatment of a third most favoured nation; can a member of a customs or other union still seriously be regarded as such a "third" state?

The European Communities are particularly susceptible to this type of treatment. In addition, however, the extensive nature of the rights conferred in this bloc give rise to a different type of recognition called for - again limited, but in a different sense -on which prior MFN obligations could be excluded. The reference point is again where two states have united, but instead of drawing an analogy between this situation and a partial union of states, this perspective looks at the EC as a state itself. It accepts that the spheres it operates in are limited, principally commercial, but calls for recognition as a state in the areas it operates as a state and supplements this gap between it and a fully fledged state by invoking the presence of the EC in these other fields - a power limited only because at present they are immature and inchoate. Can the inchoate nature of the EC as a state, as opposed to a fully fledged state, serve as an adequate basis on which MFN obligations by the members may be excluded - accepting that the verdict entered on the EC has a corresponding effect on the nature of the member state?

The Rights which would be excluded:

Before considering whether the establishment of the EC, in particular the Treaty of Rome, precludes the application of MFN obligations entered into by the member states, it is worthwhile to consider initially precisely what these rights are. It should also be noted that it is only treaties including the MFN principle as the applicable standard that are threatened by the advent of the EC; those securing "national treatment" as the standard applicable clearly

persist after the Treaty of Rome - indeed, that treaty may augment the standard.

Any MFN treaty a third states has with a member state is subject to the ejusdem generis rule; therefore, that beneficiary may only claim the advantages the granting state accords a member third state within the subject matter, in this instance, also provided for under the EEC Treaty. The individual subject matters covered by the prior MFN treaties dictate what rights may be initially claimed; what the beneficiary is entitled to, however, depends on the identity between this and the subject matter of the favour granted by the granting state and the "third" member state, and the latter is specified in the Treaty of Rome. Therefore, the Treaty of Rome itself delineates what rights a beneficiary state is entitled to - and hence, the extent of rights threatened by exclusion. The rights involved therefore are rights relating to the free movement of workers, capital and services, the right of establishment of companies, on taxes and patent rights. If one accepts that the customs union exception is not a rule of customary international law - which, in light of the Special Rapporteur's conclusion, is not hard to do - then also the tariff and quota provisions regulating inter member trade as well may be claimed by a third state with a suitable MFN treaty. The language of Article 234 paragraphs 1 and 3, standing on its own, justifies such a conclusion: all EEC rights are lumped together. The German Government interpreted this to mean in 1957 that all EEC rights are excepted from the MFN clause; two early decisions of theCouncil, on the other hand, revealed that they considered the language of the EEC Treaty inadequate to prevent the extension of EC trade benefits to third states under MFN treaty 28 -hence the requirement of an EEC clause to prevent this happening in any trade agreements a member state may wish to enter.

This represents then the extent of rights that could be claimed under prior MFN commitments by member states; it represents a frightening potential liability on the part of the EC if MFN clauses are not excluded. Up till now it has been assumed that the question becomes crucial only where no customs

28. 1961 Official Journal of the European Communities 1273

union exception has been inserted in the MFN treaty; likewise, the EC is said to be protected against contracting parties to the GATT because of Article XXIV. Certainly this settles the equestion in relation to tariff and quota restrictions since they are naturally the subject matter of the "customs union exception". However, the presence of a "customs union exception" would not of itself exclude all the other non trade provisions of the Treaty of Rome, which it would appear could be claimed by Contracting Parties to the GATT as well. The contrasting inclusion in the Netherlands FCN Treaty Artcile XXII (3) with the USA of a "regional agreement" exception, and the German Treaty with El Salvador of 1952 including a "supranational community" exception reinforce the view that a customs union exception alone is insufficient to exclude subjects apart from trade matters. Finally, it should be pointed out that a beneficiary may still claim from the granting state the favours it accord another member state outside the areas covered by the Treaty of Rome, and this applies regardless of the impact one attributes to that Treaty on the MFN treaties. Outside the areas covered by the Treaty, the normal regime applies; it cannot be regarded that those rights, when granted by one member to another, are excluded, by infection, because of the association of the granting state and third state in other areas. The MFN rights threatened by the EC are strictly limited to the areas covered by the Treaty.

If the customs union exception, express or implied is inadequate, under what exception can the EC exclude MFN rights from being claimed? The basis of this exception is the new entity argument. Its basic outline has already been described. This now needs to be put in the context of international law, since obviously the exclusion of MFN treaties to rights created with the bloc can only stand if supported by a proper legal foundation. What, then, is that legal foundation?

In matters related to trade (tariffs and quotas) clearly the MFN principle is excluded in respect of contracting parties to the GATT by Article XXIV; this still leaves unresolved the

position of non contracting parties and matters unrelated to trade. The basis of the argument is that the Treaty of Rome creates a new economic entity as reflected by Article 234 of the Treaty of Rome, which by itself constitutes an exception to the MFN principle. But the justification of such an exception must be found by reference to an analogous principle of international law; the new economic entity argument seeks it justification by reference to the existence of an implied exception in the case of customs union: essentially it is an extension of that exception. The problem is, that the existence of the latter exception has been expressly denied by the Special Rapporteur. If the Special Rapporteur's stand on the implied customs unions exception is correct (and it is submitted that it is) then tariff and quota rights accorded by the members to each other within the union are not protected against a claim by a non contracting party with a MFN treaty with a member. In essence, the EC now argues for an implied economic union exception, which would exclude all the rights the members states accord each other from being claimed by previous MFN treaty partners. The justification of such a view is that the exception is an extension, by analogy, of the implied customs union exception. The demise of the latter at the hands of the Special Rapporteur as representing a rule of customary law is not necessarily fatal to the validity of the new exception claimed, since it was argued that it existed by analogy only in the first place: both being based on the consequences of the emergence of a new economic entity, the manifestation of this view as an economic union exception must be put to the test as well; the issue raised by the implied customs union exception are resurrected in the new context. It must be conceded, however, that the Special Rapporteur's rejection of the implied customs union exception, in so far as the same issues are raised in judging the validity of an implied economic nion exception, does indeed cast a black cloud over the validity of the latter. The original objections to allowing the implied customs union exception are equally applicable against the extension of it to incorporate the economic union exception.

Prima facie, the MFN principle does not appear to admit an implied economic union exception, as the new economic entity argument would argue in favour of, for the simple reason that states do not extend benefits to other economic entities but to other political entities i.e. states; a beneficiary state may expect the bargained for concessions from its treaty partner regardless-indeed dependent-on the latter's economic associations. From this first principle, an impled economic union exception appears an unlikely proposition; the fact is that the member states of the EC have remained separate political entities.

Hay confirms this pessimism:

"First, as a matter of treaty interpretation, an extension of the customs union exception to cover the EEC (in fact a new exception) cannot be implied. The defect with respect to the implied customs union exception was perhaps cured by the emergence of a rule of customary international law recognising such exceptions. No such customary rule of international law exists with regard to the acceptance of an implied economic union exception, or alternatively, with regard to an implied extension of a customs union exception" 29.

In view of the Special Rapporteur's stand on impled customs unions, the defect referred to clearly has not been cured. But the alternative formulation of the economic union exception does reveal that its basis may lie in an extension of an express customs union exception, and since these abound, the validity of extending that exception to an economic union must be considered despite the conclusion of the Special Rapporteur on the implied customs union exception.

The validity of the implied customs union exception as an extension of an express cusoms union may be tested by whether the latter will admit an extension in favour of a "regional clause" - an analogous concept. On this Schwarzenberger states:

"In the absence of an express reservation, a state can demand under the MFN standard the benefits of exclusive preferential treaties, bilateral or multilateral, between the promisor and

29. - P. Hay : University of Pittsburgh Law Review Vol. 23 1963 p 679

third states..." 30.

By analogy, therefore, it would appear unlikely that an extension of a customs union exception could be construed in favour of an economic union exception if those granted within a regional preferential system are susceptible to being processed under a MFN clause, especially since a customs union exception relates to movement of goods; if an extension of it cannot be construed in favour of a regional exception limited to the movement of goods, it is difficult to see how it could be extended in favour of an economic union exception relating to the wider fields such as the free flow of capital and the right of establishment of companies envisaged by the Treaty of Rome. Further, claiming an implied exception, whether it be economic union, customs union or common market ones, represents prima facie a breach of the rule that bargained for advantages should not be denied a treaty partner through the unilateral action of the other - except, it would appear , where such unilateral action leads to the formation of a new state. Thus as a matter of treaty interpretation it would appear doubtful whether an extension of the customs union exception can be implied in favour of an economic union.

Being an economic union leads to another ground (independent of treaty interpretation) on which MFN obligations are claimed to be excluded - namely that the EC represents a new entity which of itself excludes the operation of the MFN principle. The argument does not go do far as to claim that the EC is a federal state, but rather that the balance struck between the EC and the member states is akin to that existing in a federal state and consequently, on the basis of this association, the rights granted by one member to another cannot be claimed by a non member because the relationship between the two member states is outside that envisaged by the MFN principle itself and also from an extension of the rule that the principle is excluded where two states merge into a full union.

As already pointed out, the Special Rapporteur cited three related factors why MFN rights could not be excluded in respect

30. - The MFN Standard in British State Practise 1945 BIIL p 109

of the EEC, militating against viewing the EC as a new entity 31: The member states remained "independent and sovereign" because the EC was not politically united. Such a traditional response seems to indicate that the new entity argument could not succeed, no matter how extensive the degree of integration in other fields, unless it was accompanied by political union. This appears a strange response in that the essence of the submission that the EC represents a new entity lay in accepting that the spheres the EC operated in were admittedly limited - being mainly economic - but within those spheres, the EC operate in exactly the same manner as a Federal state, and to this extent should be treated as such. Since the MFN treaties covered precisely the EC operate exclusively in, the argument goes, the same regime applicable to a full union of states should also apply.

But even if one accepts the criteria invoked by the Special Rapporteur, their application to the EC does not nessarily endorse his conclusion. They are only justified by a strict interpretation of the concept of sovereignty; the conclusion that the member states are, after membership, still "independent" and "sovereign" is open to the objection that in certain specified fields, mainly commercial policy, the member states are anything by independent while they remain bound by the Treaty of Rome. It is the EC which have exclusive competence to deal in the commercial sphere. It is true that the member states have retained their national administrations, for example, for the purpose of collecting customs duties - but while the Treaty of Rome continues to bind them, they cannot be regarded as "independent" in commercial matters. By the layman's understanding of the word, the member states are not "independent" in commercial matters. They are independent, it is true in a residual sense, in that they have retained the power, by withdrawing from the Treaty of Rome-which they are perfectly entitled to do- to regain the right to deal in the commercial sphere. The member states are certainly independent in all spheres outside those envisaged by the Treaty of Rome but in commercial matters, they exercise only a residual type of independence. This distinction

31. -Yearbook of the ILC 1975 Vol. 2 p 17

RX ST STEWART, I.G. The relationship between the most favoured nation clause...

between power and right dominates the issue of sovereignty as well. As already pointed out, if sovereignty be regarded as a power concept, and hence divisible, one can accept that in the commercial spheres the EC exercise sovereign powers; this goes against the Special Rapporteur's conclusion that the member states have retained their sovereignty . Such a view is only correct if one regards sovereignty as a quality which cannot be lent out or divided; on this view, clearly the member states are the only units exercising sovereign powers since they retain the right to dismantle the EC, thereby ending any powers it exercises. Hay explains this viewpoint:

"Even in areas where the EEC institutions exercise exclusive competence for instance in matters of commercial policy... their competence is based on a delegation and not a transfer of sovereign powers from the member states. This difference is illustrated by the fact that they can dissolve the community by mutual agreement" 32.

On this strict interpretation of "independence" and "sovereignty" the Special Rapporteur's conclusions are quite justified. Ultimately, it is the absence of political union within the EC that justifies such a conclusion, though again, this absence needs to be qualified. A degree of political union is envisaged by the Treaty of Rome, elevated now by the advent of direct elections to the Strasbourg Parliament. However at present, the limited powers exercised by that body, coupled with the continuing domination of European politics at the national level, justifies the conclusion that politically the member states are not united.

It may be wondered whether in fact the strict approach adopted by the Special Rapporteur was warranted 'on the facts' of the EC. The extensive classification undergone in relation to the EC revealed that an alternative interpretation of such concepts as "independence" and "sovereignty" was available, and nowhere more appropriate than its application to the EC if such established concepts are to take account of the novel conditions

32. - P. Hay Supra Footnote 29 p 681

created by the EC. If the more flexible approach to the concept of sovereignty had been adopted, recognition of the exclusive control the EC have over the limited fields it exists in could have followed; the consequences of creating a new state particularly in its impact on the MFN principle, could have been accepted in the spheres that the EC does operate exactly as a state, particularly since these spheres correspond precisely to those where the member states no longer can act. If a degree of inaccuracy flows from this limited recognition, because the member states persist to be states in all other spheres, surely a degree of inaccuracy is likewise introduced by viewing the position of the member states as intact in all fields in light of the reality brought about by the Treaty of Rome? This, indeed, was the reaction of the EC to the Draft Articles in their present form. They stated:

"In view of the requirements of regional integration as encountered by the Community, the Community would like to point out once again to the International Law Commission that, in their overall conception, the Draft Articles are directed exclusively at states and appear to ignore integrated groups of states or groups in the process of integration...One should not underestimate the fact that, while the trend towards regional integration affects the application of the clause, it also goes hand in hand with a transfer of its application from the state to the regional level" 33.

Specifically in relation to Draft Articles 15 and 16, the EC pointed out:

"The proposed wording does not take into account the fact that the state members of the Community have relinquished all powers in the field of trade policy to the Community, and, as individual countries, no longer have the necessary means of fulfilling bilateral commitments in these areas. They no longer have individual customs tariffs" 34.

Thus adherence to a traditional approach ignores the fundamental changes brought about by the Treaty, indicating

33. - Report of the ILC 1978 p 448
34. - ibid p 449

perhaps that a more flexible approach recognising apportionment between member states and the Community may have been more appropriate. Since the trend today in the world is towards regional integration, the unsuitability of concepts created in a world that knew only sovereign states could have provided a ground for progressive codification. 35.

A further point should be noted in the Special Rapporteur's treatment of the relationship: he laid great stress on the fact that in treaty matters, the EC appeared to remain on the plane of intergovernmental organisations (i.e. the EC did not succeed to the treaties of the member states) as accepted by the ILC in preparing its Draft Articles on state succession.

It is significant that the ILC on succession of states, while concluding ultimately that the Treaty of Rome remained on the "intergovernmental plane" recognised that a problem was posed by the EC:

"While the EEC is not commonly viewed as a union of states, it is at the same time not generally regarded as being simply a regional international organisation. The direct effects in the national law of the member states of regulatory and judicial powers vested in the Community organs gives to the EEC, it is said, a semblance of quasi federal association of states" 36.

These comments certainly appear to qualify the significance of the conclusion that in treaty matters the EC remained purely on the "governmental plane" to the new entity argument since it recognises that the EC are more than simply a regional international organisation. The Special Rapporteur on MFN clauses appears to have ignored this recognition by the ILC in evaluating the relevance of the treaty succession conclusion to the argument presented - that the EC represented a new entity. He appears to have concluded: because the EEC does not succeed to treaties, it cannot be considered a new entity when really the ILC's comments only supported the conclusion: the EC may be a new entity, but in treaty matters it remains on the intergovernmental plane.

35. - This question is dealt with more fully in Chapter 6 under "Regional Integration and the ILC".
36. - Yearbook 1972 Vol. 2 p 18

It is of course significant to one's determination of whether a new entity has been created whether it presents itself as a unified entity with respect to third parties. Hay defines the issue in relation to the MFN principle:

"It is the Community, rather than the individual member states, which will negotiate trade agreements... Representation of the members by the union may well take place with regard to agreements to be negotiated after the inception of the Community, if the members so stipulate but does not, by itself, permit any conclusions with regard to the effect of agreements antedating the Community. The problem then is simply whether the fact of economic association alone, however close, yet falling short of political union, results in a new entity to which the MFN clause does not apply or to put it more strongly, which terminates in part previously existing agreements of the participants. The language of the applicable EEC treaty provision itself (Article 234 paragraph 3) does not go this far; while recongising the existence of prior commitments, the member states agree that concessions made by them to each other under the EEC treaty form "an integral part of the establishment of the Community". The continued existence of treaties is thus recognised, while the formation of a new entity, it is argued, excepts certain areas from the application of those treaties" 37.

On this point it should be noted that the Netherlands delegate argued before the Legal Committee of the General Assembly of the United Nations that a rule should be established which provided for succession by a community of states such as the EC to member states' obligations only in regard to treaty obligations now governed by that community. The ILC declined to include such a draft article despite the logical appeal and considerable support the submission enjoyed on the grounds that a "succession of states means the replacement of one state by another in the responsibility for the international relations of territory. Replacement seems to contemplate complete replacement and not partial transfer or conferment of powers to conclude

37. - P. Hay Supra Footnote 29 p 681

treaties" 38. This is true enough , but does not appear to answer the question of why the principles of succession cannot apply in respect of a partial transfer of conferment of powers; the principles themselves would not appear to automatically exclude such a possibility.

The important point, however, and one recognised by the Court of Justice in the ERTA case [39] is that since the Community itself can be bound by agreements which previously bound the member states only, the Community does in practice succeed its members in respect of particular treaties, the most conspicuous example being the GATT. This goes against the Special Rapporteur's conclusion that the Treaty of Rome remains on an intergovernmental level, and indeed would appear to except the rights granted from one member to another from being claimed by a beneficiary state under an MFN treaty because now the EC itself is the "granting state"; the standard is the nation that the EC deals with, which obviously excludes the rights granted by one member to another. The EC has in fact entered into an accord with Lebanon incorporating MFN treatment, [40] and in 1970, concluded an MFN treaty with Yugoslavia. [41] It is inconceivable that a member state would now conclude a MFN treaty in areas covered by the EC. This fact indicates an element of succession in the EC to the bilateral MFN treaties of the member states. The exclusion of MFN rights held by non member states under treaties with member states appears the logical consequence of concluding that the EC succeed to the member states' MFN treaties where the latter covers the same subject matter. A legal foundation for denying the rights that a beneficiary state bargained for must be found however; that legal foundation can only be that of a change of circumstances. Sauvignon concludes that the creation of a customs union does not exclude the operation of the MFN principle on this ground:

"even if we suppose that the establishment of a multilateral preferential system consitutes a fundamental change in the circumstances and that this change had not been envisaged

38. - Yearbook 1972 Vol. 2 p 18
39. - No. 22/70 1971 Rec 263-296
40. - Costonis 5 - Common Market Law Review p 426
41. - "The European Communities' Policy to Eastern Europe" Chatham House p 20

by the parties to the treaty providing for the most favoured nation treatment, the clausula would still not come into play; it cannot be invoked by a state when the state itself brought about the changed circumstances...It rests entirely with the granting state to refuse to accede to the multilateral agreement establishing the preferential system" 42.

Hay agrees with this conclusion, isolating the specific flaw of the change of circumstances argument in its application to customs union:

"It seems untenable to maintain that, absent political union among the participants, the changed circumstances of one of the parties should justify a modification by implication. This follows from the general rule that any recognition of the effect of changed circumstances requires more than the voluntary and unilateral change of circumstances by one of the treaty partners" 43.

This emphasises the role played by political union; in fact the regime under scrutiny produces many of the features traditionally flowing from a political union of states, such as the creation of institutions whose decisions are directly binding on the member states, and results in a body of law that is directly applicable on the individuals of the member states. It is clear that this conclusion is justified only on a strict interpretation of the concept of political union. Even on this interpretation, it seems an oversimplification to assert that political union is absent from the EC when in fact a degree of political union does exist in the form of direct elections to the European Parliament. The net effect of the EC, considering the fundamental changes brought about by the Treaty of Rome, would appear initially to support a 'change of circumstances' approach. To reject this description in part because the changes brought about were voluntary and unilateral, but allow a change of circumstance when a full union is achieved - though likewise the latter may have been voluntary and unilateral, appears inconsistent.

42. - Yearbook 1975 Vol. 2 p 17
43. - Hay - Supra Footnote 29 p 681

Conclusion:

The preceding argument reveals that the EC pose problems for the MFN principle. These problems stem largely from the unique nature of the EC which the MFN principle, geared basically to regulating the relationship of states, has found difficult to come to terms with. From whatever angle one approaches the problems, the answers provided appear incomplete. Two broad solutions present themselves. The problems could be resolved in favour of the MFN principle; that is to say, recognise the novel features of the EC, but maintain that, ultimately, these novel features have no impact on the principle because the principle is a demanding taskmaster - the creation of a state-like structure, or a limited federal structure or a supranational structure is insufficient to exclude the operation of the MFN principle for the simple reason that, whatever else they are, the EC cannot be regarded as a state. The principle exacts an onerous standard before it is prepared to step outside; merely to display statelike features in certain fields is inadequate because the identity of the granting state and the third state, activating the MFN clause, generally persists. The preceding discussion has shown that, however, unjustified this may be, the MFN clause does not in itself admit recognition of the fact that in relation to the subject matter being claimed by the beneficiary state, the relationship of the granting state and third state within the union has altered radically as a result of both being members of the EC. The second approach is simply to admit this reality in the areas affected by the EC, and exclude the operation of the principle on this ground. The weakness of this approach, however logical it may appear, is that it lacks legal foundation. The relationship of the EC and the MFN principle must therefore be governed by the first approach indicated, because that is the result reached by the application of the legal rules. The conclusion must be, therefore, that the creation of the EC does not in itself exclude the operation of the MFN principle and consequently, the rights accorded by one member to another member may be legally claimed

by a non member beneficiary state under a MFN treaty with a member. Clearly the Contracting Parties to the GATT are prevented from claiming from the member states the rights in respect to trade and the movement of goods that one member grants another, due to the customs union exception contained in Article XXIV of the General Agreement. This however, represents the limit of the rights excluded from the operation of the MFN principle: all the other rights granted by one member to another under the Treaty of Rome (the free flow of capital, workers and services, the right of establishment of companies, on taxes, patent rights) may therefore legally be claimed by the Contracting Parties. These non trade rights may likewise be claimed by a beneficiary state under an MFN treaty with a member state where the treaty is expressly subject to a customs union exception.[44] Clearly were such an exception is not expressly stipulated, a beneficiary not a party to GATT could legally claim all the rights accorded by the granting member state to another, in light of the Special Rapporteur's denial of an implied customs union exception. It would appear, therefor, that no legal foundation existed for the EC's declaration that the rights accorded from one member to another will not be extended to non member MFN parties.

44. - This would apply whether the beneficiary state is a member of GATT or not.

Regional Integration and the International Law Commission:

The problems created by the operation of the MFN principle in the context of supranational groups such as the EC brings into question the refusal of the ILC to include a Draft Article dealing with this issue directly. There are, it is submitted, two separate issues involved in this question.

- whether the Draft Articles should be extended to include MFN treaties to which supranational groups as the EC are parties, thereby making the rules contained in those Draft Articles applicable to such treaties. At present, because the Draft Articles are limited to states, such treaties are excluded.
- whether the Draft Articles should incorporate the customs union exception on the basis of "progressive development".

The ILC decided to include neither, apart from a provisional article dealing with the latter. (Article 23 bis). The very fact that legally such favours may be claimed by a beneficiary who is not a member of the group under an MFN treaty could be regarded a lending a degree of urgency to such intervention. This brings us to the determination of the second question posed on p 97 . If the legal position will not admit such an exception (which, as shown, is the case) are there grounds justifying the inclusion of such an exception on the basis of "progressive development"? On this, the Special Rapporteur in 1975 commented:

" The expression of such need would involve a value judgment as to the desirability of establishing customs unions. Whether the formation of such groupings is desirable or not leads us from the field of law to that of economics, which the Commission may not wish to enter" 1.

This seems unsatisfactory. The desirability of customs union would appear to be secondary to the fact that they exist, and in ever increasing numbers; it is to this reality that any rule should direct itself. The explanation of the ILC's refusal to

1. - Yearbook of the ILC 1975 Vol. 2 p 19

include an Article, forwarded in 1978, seems more in point:

"The Commission, bearing in mind the inconclusiveness of the comments made thereon..." 2.

Likewise, this appears an inadequate explanation of the ILC's refusal to include such an exception. As was pointed out in the Sixth Committee:

"It was unsatisfactory for the Commission to have failed to include a specific article on the customs union exception because of the alleged "inconclusiveness of the comments" to which reference was made in paragraph 58 of the report. It was only fair to point out that the majority of intergovernmental organisations which had submitted written comments were favourable to the inclusion of a specific exception for customs unions and free trade areas" 3.

There are broader objections, however, to the ILC's refusal to include a Draft Article on customs unions. As the Commission stated in paragraph 63 of the introductory commentary to the Report:

"It wished to take into consideration all modern developments which may have a bearing upon the codification or progressive development of rules pertaining to the operation of the clause" 4.

The trend toward regional integration in the world, is if anything, the most significant modern development in relation to the operation of the MFN clause. As was observed in the Sixth Committee:

"Many developing countries, as well as developed countries, were members of customs unions or free trade areas, and it would clearly be unacceptable if states participating in such ventures in regional integration were obliged to extend to third states the advantages which they accorded to each other as an essential condition of their membership of such an association...such associations existed everywhere in both the developed and the developing world" 5.

2. - Yearbook of the ILC 1978 Vol. 1 p 21
3. - Report of the Sixth Committee 1978 p 22 U.N.Document A/33/419
4. - Yearbook of the ILC 1978 Vol. 1 p 23
5. - Supra Footnote 3

The EC argued in much the same vein against the realization of this legal right of a beneficiary to claim such favours:

"If such an exemption did not exist, it would be necessary to create it; otherwise, states would never be able to decide to establish such systems. Without it, all the advantages arising from systems of economic integration would have to be shared with all the third states to which member states were bound by treaties containing the most favoured nation clause. It is for this reason that the customary rule has been established and international law should acknowledge it, even if the rule and current practise did not already exist" 6.

These arguments become all the more compelling in light of Article 12 of the Charter of Economic Rights and Duties of States which expressly endorses the right of all states to participate in subregional, regional and interregional cooperation in the pursuit of their economic and social developments. In light of this right "it was therefore incomprehensible...that the Commission should have failed to take a positive decision on that matter" 7. Certainly the legal right of a beneficiary to claim the favours granted within a system of regional cooperation such as a customs or economic union, as the EC's comments indicate, hamper the realization of the right provided under article 12, and potentially render its realization impossible. On this point, it was later pointed out in the Sixth Committee:

"There was nothing in the draft articles that went against the sovereign right of states to form themselves into regional or subregional economic groupings in accordance with the Charter of Economic Rights and Duties of States. The Commission had acknowledged that right of states and had taken a deliberate and reasoned decision regarding the application of the most favoured nation clause. The question was not whether states could form themselves into economic groupings but rather whether or not the most favoured nation clause system applied in those circumstances. The Commission has answered in the affirmative" 8.

6. - Yearbook of the ILC 1978 Vol. 1 p 451
7. - Report of the Sixth Committee 1978 p 22
8. - ibid p 25

It should be pointed out that the Commission in fact expressly denied in para. 58 of the Report, that such an answer followed from their silence on the matter. In light of the finding by the Special Rapporteur in 1975 that the customs union exception did not represent a rule of customary law, it is submitted that the conclusion "The Commission has answered in the affirmative" is in fact correct. It is submitted, however, that the justification of the ILC's position, argued by this representative, in separating the right expressed in Article 12 and the operation of the MFN clause, is unsatisfactory in two respects. The first is that the ILC expressly stated its intention, in paragraph 63 of the Report, to examine the operation of MFN clause in the context of its relationship with "modern developments which may have a bearing...to the operation of the clause". The right expressed in article 12 would appear, therefore, to be highly relevant to the determination of its relationship to modern developments. The relationship between Article 12 and the operation of the MFN principle in such groups cannot be regarded as separate issues, as the Representative in the Sixth Committee suggests, because the latter has a very direct impact on the realization of the right proved in article 12: the process of integration becomes impossible if non members of the group may claim the benefits accorded by members of the group to each other, in the exercise of their legal rights. And, as shown, the widespread existence of customs union exceptions in MFN treaties only affords protection to a limited type of favours - specifically trade and tariffs. It is unrealistic, therefore, to view the issues as separate, and in any event, inconsistent with the express desire of the ILC to take into account the relationship of the MFN clause to modern developments. The trend to regional integration is perhaps the most significant of such modern developments sanctioned under article 12 of the Charter of Economic Rights and Duties of States; the legal position of beneficiary states under MFN clause at present is out of step with this development. It is the fact of this

development, rather than its desirability, that a Draft Article on customs union exceptions should address itself to. One representative in the Sixth Committee commented:

"A state bound by such a clause might be prevented from becoming a member of a customs union...This would be an unfortunate result for such associations were regarded as instruments of trade liberalization and economic development" 9.

This does not appear to be totally accurate; as the Special Rapporteur indicated in 1975, customs unions do not necessarily liberalize world trade but rather the trade of its members. Certainly they are accepted now as instruments of economic development, as reflected in Article 12 of the Charter of Economic Rights and Duties of States. If the Draft Articles are to take account of modern developments, they should, it is submitted at least be consistent with this development recognised in Article 12, rather than, by leaving matters as they stand at present, act as a potential restriction of this development.

This, however, leads on to the final objection to the ILC's refusal to include the EC, or any regional group similar to it, in the scope of the Draft Articles. Sir Francis Vallat argued persuasively:

"EEC in fact existed, and was now the largest trading entity in the world. The problem was therefore a substantial one and could not be ignored, for it would be pointless to elaborate a set of articles that bore no relation to reality...The treaties negotiated and concluded with states by EEC were certainly governed by international law. The Commission, as a body concerned with the codification and progressive development of international law, could not afford to ignore new problems that arose in the sphere of international law. Moreover, the treaties concluded by EEC were binding on its member states...That was the factual and the legal reality. If the International Law Commission chose to place EEC and similar organisations outside the scope of the draft, it would deprive the future instrument on the most favoured nation clause of much of its impact in matters of trade"10.

9. - Report of the Sixth Committee 1978 p 23
10.- Yearbook of the ILC Vol. 1 1978 p 43

If, therefore, the Draft Articles are to speak meaningfully to the future, their exclusion of such regional groups as the EC is surprising. This would be true if the EC were the only regional group in existence, since it accounts for over 25% of the world's trade. But as already pointed out, regional integration is being pursued all over the world, and if anything, this trend is intensifying. As the position in relation to the EC has already been settled in practise, the utility of such a Draft Article would be reaped by new members joining the EC, other regional groups and future experiments in regional integration, and not directly by the present members of the EC.

If, in the future, a substantial number of MFN treaties are to include regional groups as the EC (and the present treaty relations of the EC indicates that this will be so) the utility of the present Draft Articles for the future would appear greatly impaired because they exclude from their scope such groups.

This fact would appear a strong argument in favour of including within the scope of the draft Articles MFN treaties entered into by supra national or regional groups, and this could be achieved without necessarily having to decide the more inflammable issue of the customs union exception.

It could be argued that if this development is progressing in any event, inclusion of such a draft Article is unnecessary. This, it is submitted, nevertheless does not resolve the question of the proper relationship of the draft Articles to this development. Moreover, inclusion of such a draft Article specifying a customs union exception would conform with state practise on the subject. The reality is that whenever a customs union or regional group has been created, the member states of such unions have not extended the benefits granted to each other to non-member MFN treaty partners. It was said in the Sixth Committee:

"No one had been able to cite a single case where the treatment which states members of a customs union granted each other had been claimed to apply to a state beneficiary of the most favoured-nation clause".[11]

11. - Report of the Sixth Committee 1978 p. 22

This in fact is not accurate; as already pointed out, the Soviet bloc countries did claim the favours which member states of the EC granted to one another under MFN treaties. What is true, however, is that there is no case in which such a claim has been granted by members of a custom union. It is fundamental to the process of integration that such favours are not extended to non members. The legal position at present supports such an extension. As long as regional groups exist, the favours granted within them will not be extended to non members. The mere fact of this practise, especially if pursued in violation of the treaty partners' rights, is an inadequate basis on which to include it - it would create "in effect, a statutory interference with a private contract" 12. Sir Francis Vallat however argued that safeguarding the interests of the non member may in itself be an unsound ground on which not to intervene:

"The general experience had been that states with most favoured nation clauses had not wished such clauses to constitute obstacles to states intending to joining a customs union or other similar associations of states" 13.

The objections to including a regional group such as the EC from the provisions of the Draft Articles may be summarised as follows:

- the Convention on the Law of Treaties, to which the present Draft Articles were designed to supplement, had been limited to states
- the fact that the study of the treaty relations between states and international organisations was being conducted as an independent topic by the ILC
- uncertain ty, stemming from its novelty, as to what exactly the EC was; some members considered it an international organisation, others a limited federation, others a "supranational state", some a "confederation"; how, therefore, was such a group's inclusion to be defined?

Again, Sir Francis Vallat led the attack against the last objection:

12. - Yearbook of the ILC 1978 Vol 1 p 130 per Mr Quentin Baxter
13. - ibid p 126

"The fact that a juridical phenomenon was new did not relieve the Commission of its duty to deal with it. Indeed, if it took the view that it must look backwards rather than to the present, then its work would be obsolete before it had even started" 14.

It is submitted that on balance, the arguments in favour of including regional groups in the Draft Articles outweighed those against it. The desire to maintain a degree of symmetry with the Convention on the Law of Treaties can only be relative to the strength of the arguments for including such regional groups. In any event, as the Commission itself pointed out in its introductory commentary, the present articles are intended to constitute an autonomous set concerning the legal rules relating to most favoured nation clause; they are not intended to form an "annex to the Vienna Convention" 15. Likewise, the second objection assumes that such regional groups as the EC are international organisations and will be covered by the independent study; as the widely divergent views on what the EC were revealed in the 1978 discussion of the ILC, this is by no means certain; the Special Rapporteur himself stated of the EEC:

"Nor was it an international organisation properly speaking" 16.

The trend of the world is increasingly to conduct it economic relations on a regional level, and not a state level; it is a trend which once started, is likely to intensify. In their present form, it is certain that the Draft Articles will have no relevance to MFN treaties involving such groups. The certainty of this limited impact, it is submitted, is a persuasive argument in favour of including such groups, outweighing the more technical objections to such an extension. Moreover, inclusion of such groups could have been achieved without taking a stand on the customs union exception. It is strange, therefore, that of the two issues involved in this question, a provisional draft article should have been produced on the more controversial topic of the customs union exception. The principal objection to inclusion of

14. - ibid p 53
15. - Report of the ILC 1978 p 22
16. - Yearbook of the ILC 1978 Vol. 1 p 40

this exception was to "avoid institutinalizing discrimination"17; against this it can be argued that in light of state practise in this respect, such discrimination is likely to result in any event, whatever the Draft Articles provide for. Moreover, the silence of the Draft Articles on this exception leaves the problem of bilateral MFN treaties of countries forming such a union unresolved and remain to be determined by customary international law "with all the uncertainty that implied" 18. If, as the majority of members felt, a beneficiary may legally claim the favours granted by members of a customs union under bilateral MFN treaties, such a legal right can only prove a source of friction if in practice, this right is not, in the overwhelming members of cases claimed, and certainly never granted. This practice suggests that perhaps the customs union should have been codified. Against this is the fact that even in light of this practice, the existence of a legal right is relevant to the determination of compensation due to the beneficiary when denied favours granted by the member of a union to another when legally entitled to such favours. To abrogate this right purely in the interests of the convenience of prospective members of customs unions seems unbalanced. In any event, the main problem was a political one: whichever position the ILC adopted, it was bound to displease one side. Hence it adopted a neutral stand, and offended the supporters of the exception. Given the inevitability of the political unacceptability of whichever position it adopted, perhaps the ILC could have disregarded the political consequences of their position. The discussions reveal, however, a fundamental divergence of views on this exception; the inclusion of a provisional article on the customs union exception, with the Draft Articles remaining silent, perhaps accurately reflects the division of views.

17. - ibid p 128 per Mr Tsuruoka
18. - ibid p 53 per Sir Francis Vallat

The Most Favoured Nation clause and the International Law Commission:

The ILC completed its Draft Articles on the MFN clause in 1978. One may wonder, in retrospect, whether the involvement of the ILC in this topic was justified, considering that, though the topic consists of a mixture of the two, the economic aspects of the principle proved more compelling than its legal aspects. To evaluate the propriety of the ILC's involvement, it is necessary to return to the reasons (why and how) it got involved in the first place.

Attention was first focused on the MFN clause by the ILC itself in 1964 as a byproduct of its discussion on the law of treaties - specifically, in response to a proposal made by Mr Junenez de Arechaga that the MFN clause should be an exception to the Draft Articles on stipulations in favour of third parties. It was agreed that MFN clauses represented such an extensive topic that a study of them could not be conducted within the general codification of treaty law - combined with a feeling that it represented a separate topic in any event. In part due to the context in which it arose, it is clear that the ILC at this stage clearly regarded the MFN clause as predominantly a legal question, related to the question of treaties - apart from Sir Humphrey Waldock's warnings about customs unions and the GATT. Thus the possibility of studying it as a separate topic had already been mooted within the ILC itself, becoming a reality after several representatives in the Sixth Committee at the 21st Session of the General Assembly called for a study of it. Both organs acting on each other contributed to its birth. However, when it was decided finally to study it, non legal considerations surfaced in explanation:

"In view of the more manageable scope of the topic, of the interest expressed in it, and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law" 19.

This has the traditional ingredients of a suitable topic;

19. - Yearbook 1967 Vol. II p 369

the scope of it appeared manageable and able to be codified, and interest on the political level of the United Nations had been expressed. However, the ILC here appears almost to recognise that the legal aspects of the clause are subsidiary to the context that it operates in - recognising that its economic aspects constitute its main thrust.

It would appear, however, that the study gained its own momentum. The Draft Articles produced in 1978 go well beyond "clarification of its legal aspects" that "might be of assistance to UNCITRAL". They represent a full fledged code on the MFN clause. In its report in 1976, it stated:

"The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations without, however, entering fields outside its functions" 20.

The Commission contacted several organisations and interested agencies which had practical experience with the MFN principle, such as UNCTAD and GATT. Later the Commission defined its position more precisely:

"The Commission has attempted to maintain the line which it set for itself between law and economics, so as not to try to resolve questions of a technical economic nature...which belong to fields specifically entrusted to other international organsiations. On the other hand...it wished to take into consideration all modern developments which may have a bearing upon the codification or progressive development of rules to the operation of the clause" 21.

Thus the Special Rapporteur trod a line that became increasingly fine between legitimate interests of the ILC as a body, and those properly belonging to another United Nations body. The frequency with which the Special Rapporteur become embroiled in this delicate balancing act is indicative perhaps that the ILC

20. - 1976 Yearbook Vol II Part II p 5
21. - ibid p 7

was not the appropriate body responsible for producing the definitive statement on the MFN clause. The problem was that having committed itself to codifying the MFN clause, it became apparent that the most meaningful contribution that could be made depended largely on a politico-economic verdict which, once made, would determine its legal manifestation. As far as the legal aspects of the MFN rule are concerned, clearly the ILC was eminently qualified to rule, and it did so with characteristic competence. For two reasons, however, this produces a limited judgment. The first stems from the nature of the legal aspects of the MFN clause itself; as indicated in Draft Article 7, the MFN principle is not a rule of customary international law; the rules regulating it therefore apply one when a MFN promise has been made. This invariably will be contained in a treaty. Clearly, therefore, much of the law regulating the MFN's operation will be provided by the 1969 Vienna Convention on the Law of Treaties. But accepting the Special Rapporteur's claim that the MFN acticles constitute an autonomous set of legal rules, and not an "annex" to that Convention, 22 the MFN Draft Articles are limited in another sense; they have very limited substantial impact, by the nature of the MFN principle itself; not only are the parties free to decide whether they will grant MFN treatment, but also they are totally free to determine the terms of the promise and, having made the commitment, left free to determine the substance of the promise entered into. In all these crucial areas, the Draft Articles remain silent - by the nature of the MFN principle itself. In this aspect, they are more limited than an ordinary treaty which itself sets out the substance of the promises made. The legal rules of the MFN clause necessarily operate at the edges of that clause. They are, moreover, limited in another sense: Mr Jagota pointed out:

"The Draft Articles...laid down only residual rules, in other words, rules that would apply where the parties did not agree...on different provisions concerning the application of the clause, as provided by Article 26 of the draft...it was thus

22. - Report of the ILC 1978 p 22

recognised that if any problem arose which called for special treatment or consideration, the parties were free...to deal with the problem as they saw fit" 23.

The second objection to the ILC's involvment is, ironically enough, that the rules for the operation of the MFN principle are ripe for a collected definitive pronouncement involving a strong flavouring of progressive development - but that the ILC was not the appropriate organ to do this. By far the most important function of the MFN principle is in its influence on international trading patterns - and all that flows from that. To the extent that it also operates in other fields, the ILC's involvement was justified; had it limited itself to the purely legal aspects of the principle, however, it ran the risk of producing a meaningless document. It attempted, therefore, to incorporate within its code answers to the "burning" problems that the principle was involved in. The problem is that these problems were essentially economic issues or, at the very least, required a great deal of economic judgement. The two most conspicuous examples of this type of judgment are the "customs union exception" and the "developing nations exception". About the latter the Special Rapporteur commented:

"In discussing the question of the operation of the most favoured nation clause in trade relations between states at different levels of economic development, the Commission was aware that it could not enter into fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organisation of international trade. Nevertheless, it recognised that the operation of the clause in the sphere of economic relations with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic...The Commission found this field is not one which affords an opportunity for codification of international law because the requirements for this process...namely extensive state practise, precedents and doctrine are not easily discernible. The Commission

23. - Yearbook of the ILC 1978 Vol. 1 p 43

has therefore attempted to enter into the field of progressive development and has adopted Article 21" 24.

This judgment is essentially a political-economic one; it may seem somewhat surprising therefore that a legal body made it. The ILC, however, was not the babe in the economic woods they may have been assumed to be, working in close cooperation with UNCTAD. Admittedly, the consequences of Article 23 and 30, in actually helping developing nations, are limited; certainly such a statement will help them in allowing developed countries to grant preferential treatment without fear of that being claimed by a developed beneficiary state. In any event, its judgment is justified if one considers the possible harm a failure to stipulate such an exception may have had on developing nations. It had to take a stand, therefore, once it was involved in codifying the MFN principle; it does highlight the question of whether the ILC should have got involved in the first place. In any event, what is clear is that the ILC in this instance did get involved in a field outside the strictly legal - an economic matter.

The 'customs union exception' is another example. The Commission considered that this did not represent a rule of customary international law. It had to face the question of whether the customs unions exception constituted a candidate for progressive development. On this the Special Rapporteur confessed:

"The expression of such need would involve a value judgment as to the desirability of establishing customs unions etc. Whether the formation of such groups is desirable or not leads us from the field of law to that of economics which the Commission may not wish to enter" 25.

The Special Rapporteur and the Commission ultimately declined to take a stand; the Draft Articles themselves consequently remained silent on the customs union issue. The Special Rapporteur's reasons for this attitude in 1975 varied. Certainly he viewed the economic issues as "formidable"; as an economic issue, the

24. - Yearbook 1976 Vol. II Part II p 9
25. - Yearbook 1975 Vol. II p 19

customs union issued posed unique problems, in that economists could not agree whether they were a "good thing" for the liberalization of world trade, and perhaps more significant, the degree of consensus that did exist suggested that it was impossible to predict whether the creation of customs unions would have an expansionary or contractionary effect on overall world trade; this depended entirely on the economies of the individual countries forming the customs union. In both these respects, the economic desirability of unions remained unsettled. Had it been established that customs unions clearly were desirable, this would have been relevant to the determination of the question whether an exception from the operation of the MFN principle should be included on the basis of "progressive development". The Special Rapporteur felt unable to arrive at such a conclusion. Was this indecision a product of the ILC's relative lack of expertise in an economic field? It is submitted that the answer to this question must be in the negative: as far as his refusal to take a stand can be related to economic questions, this decision stemmed from the nature of the topic itself: it did not lend itself, for the reasons suggested above, to clear cut answers, and certainly not to the creation of general rules.

In any event, the refusal to take a stand one way or the other stemmed ultimately from political, and not economic considerations. Mr Quentin Baxter described the dilemma confronting the ILC on this issue:

"The Commission was in effect being asked to pronounce for or against customs unions, and the latent anxiety of the minds of most members was that the draft would be put to the torch by whichever side its answer displeased" 26.

This then was the principal problem raised by the customs union exception, and indeed proved to be the principal problem created by the whole Draft Articles on the MFN clause. Whatever position the ILC adopted in relation to the customs union exception, it was foreseeable that a substantial number of states would oppose it. In recognition of this inherent political conflict

26. - Yearbook of the ILC 1978 Vol. p 130

the ILC adopted a neutral stand in 1978 while providing a provisional Draft Article (Article 23 bis) suggesting the form a customs union exception could take if agreed to by states:

"The silence of the Draft Articles could not be interpreted as an implicit recognition of the existence or non existence of such a rule, but should rather be interpreted to mean that the ultimate decision is one to be taken by the states to which this draft is submitted, at the final stage of the codification of this topic" 27.

In light of the political conflict likely to be engendered by this issue whatever position the ILC adopted, it is difficult to see what alternative was open to it. Given the inevitability of political conflict on this issue, it would appear that the omission of a Draft Article on the customs union exception was not significant in determining whether such an exception will be included in a Convention on the Draft Articles, or to the more immediate question of whether a conference considering the Draft Articles will be held at all. Moreover, it is quite clear that the likelihood of political conflict over this issue existed whatever organ of the United Nations considered the question. 28. In no respects therefore can the problems generated by the customs union exception be traced back to the fact that the ILC is predominantly a legal, and not an economic body.

What significance, therefore, can be attached to the omission of the ILC to include a Draft Article on the customs union exception? Perhaps the most important statement to emerge from its treatment of the issue is that the customs union exception does not represent a rule of customary law. This clearly was the view of both Mr Ustor in 1975, and Mr Ushakov in 1978, and was confirmed by an overwhelming majority of the members of the Commission. This statement must be accepted as high authority for the proposition that the customs union exception is not a rule of customary

27. - Report of the ILC 1978 p 21
28. - The importance of this should not be underestimated; as was pointed out in the Sixth Committee:
"It was regrettable that the absence of any exemption covering customs unions among developed countries seemed to have led such countries to an almost total rejection of the Draft Articles" - Report of the Sixth Committe 1978 p 25

law, 29 and the fact that the introductory commentary 1978 is at pains to negate such an inference being drawn from the silence of the Draft Articles on this issue does not alter the very explicit statements made in 1978 by the overwhelming majority of members that such a rule did not exist. The explanation for the statement made in paragraph 58 of the introductory commentary to the Draft Articles, it is submitted, lies in the emphasis being made that this issue is a political one to be determined by states rather than reflecting the ILC's position on this issue.

The Special Rapporteur in 1975 certainly thought it adequate to "leave matters where they are"30, minimising the significance of the omission to include a customs union exception, because most countries expressly include a customs union exception, and because of Article XXIV of GATT. In 1976, some members of the ILC considered "this omission an implicit recognition of the fact...that its adoption in the future is not desirable" 31.

Will such an interpretation be placed on the omission to include a customs union exception on the basis of progressive development? To some extent, this will inevitably follow from the Special Rapporteur's conclusion "that there is no compelling evidence as to the desirability of substituting a general rule"31. It would appear difficult, however, in light of the sharply divergent views expressed by members of the ILC in 1978 to extract any conclusion on whether the ILC considered adoption of such an exception desirable or not. If the silence of the Draft Articles on the issue cannot be interpreted as an "implicit recognition of the existence or non existence of such a rule", it would appear difficult to argue that such silence implied that such a rule was undesirable. The widespread incorporation of

29. - As the North Sea Continental Shelf Cases (ICJ Reports 1969 p 13) illustrate, the International Court of Justice, though referring to the comments of Governments, international organisations, the General Assembly and the codification conferences in its determination of whether a rule contained in a convention represents customary international law, it relies heavily on the views of the ILC:
"The status of the rule in the convention therefore depends mainly on the processes that led the Commission to propess it...ibid p 38 para 62
30. - Yearbook of the ILC 1975 Vol. 2 p 19
31. - Yearbook of the ILC 1976 Vol. 2 Part 2 p 47
32. - supra Footnote 29

express customs union exceptions in MFN treaties certainly reduces the significance of an omission to codify the exception. This may be one practical reason why the ILC was not prepared to intervene, in addition to the other difficulties, whereas in regard to developing nations - another economic sphere - it felt compelled to do so on the basis of progressive development. Possibly the difficulty of defining a customs union exception, as revealed in the GATT, had its influence. More important, however, was the general consensus of opinion on the issue of the economic needs of developing nations, in contrast to the sharply divided views on customs unions; the adoption of the one and not of the other reflected the degree of consensus that existed on the economic questions. Equally important, and partly connected to the economic question is the overwhelming support developing nations command in the political arena, in contrast again with the growing suspicion with which regionals groups are views - in itself largely a product of the EEC experience. Here, therefore, the instinct of the ILC to identify regional groups with the example of the EC influenced its ultimate conclusion on the customs union exception; it was this association that proved crucial to is verdict that customs unions were not necessarily a "good thing" for international trade without seriously looking at the question of the impact of a developing nations customs union. The Special Rapporteur was only prepared to recognise a specific exception to the MFN rule in their favour:

"Thus the Special Rapporteur's choice is not to propose to create customs and other unions exceptions to the general rule. This he submits with one reservation; the matter will be reviewed in the course of the further study on the functioning of the clauses in relation to the developing countries" 33.

Obviously it became involved because the topic itself demanded attention to this aspect; to this extent, therefore, its involvement was inevitable. Certainly this involvement is an inadequate reason for not embarking on the codification of the MFN rule itself. Equally clearly, it does not mean that the ILC should not get involved in economic matters in general, or any non legal sphere for that matter. It would obviously be going

33. - 1975 Yearbook Vol II p 20

too far, on this basis, to claim that the ILC should never have embarked on the study of the MFN principle simply because this inevitably led it into areas beyond the strictly legal; as the study of the MFN rule indicates, it proved impossible to codify these legal rules in isolation from the context it operated in - in particular its economic aspects. Should the ILC therefore, have refrained from embarking on the study of the MFN clause because it contains a strong flavour of economics? The answer to this, it is submitted, must be in the negative. This is so for two reasons.

The first is that, though the economic issues determine the formulation of the legal rules in the most controversial and important areas of its operation (i.e. customs unions, developing nations) the MFN principle operates in an extensive range of areas that are exclusively legal. Likewise, one cannot disregard the significance of formulating the legal rules even in the economic sphere. Ramcharan indeed cites the MFN clause as a "traditional area of international law" 34, and certainly this verdict is endorsed in the 1971 Secretariat Survey of International Law. As such, it is completely natural that it should be the ILC which conducts the codification of its principles. Despite the strategic significance of the economic issues, it was appropriate that the ILC should lead the study because, on balance, the legal issues dominated the overall topic. If the picture of a legal body pronouncing on economic issues is an absurd one, the picture of any of the bodies such as ECOSOC, GATT, UNCTAD or UNCITRAL producing the complete Draft Articles that were produced, is an even more absurd one. One has to admit that the leadership of the ILC, working in conjunction with the other organisations having practical experience of the clause, was entirely appropriate - and indeed, inevitable. In this instance, therefore, the principal objection to the ILC getting involved in the economic sphere - namely that other bodies are already heavily involved in it, and its involvement, hence, may be diplomatically inexpedient -

34. - "The International Law Commission" 1977 B.G. Ramcharan

is inapplicable. The risk of duplication did not exist here because no other body had, or could have undertaken, a general study of it; the MFN principle is a "natural" topic for the ILC to take up. Perhaps the prestige accorded to is pronouncements on the economic Draft Articles will be somewhat reduced because they are not a product of "economic experts". Ago cites another practical reason against the ILC's involvement in this sphere:

"It would be unwise to take up the study, however interesting it might be, of questions such as the law relating to economic development...which require highly specialized knowledge and for which other bodies might be better qualified" 35.

In fact, the main problems experienced in the MFN study were more political than economic issues. The above criticism applies regardless of the context the economic aspect has arisen in - whether the topic is predominantly a traditional "economic" one or a legal one; it affects handling of economic issues whenever they arise. Most of the arguments against involvement are more compelling in relation to a field that is predominantly an economic one and less so where that aspect arises incidentally in pursuit of legal issues. It can be argued convincingly, as Ustor does, citing its success in a technical field such as the Law of the Sea, that the ILC does have the intellectual and practical ability to enter the economic sphere 36. This conclusion is supported in regard to the MFN codification; in any event, resort may be had to agencies with specialised expertise.

On the conceptual level, to view the ILC as limited to considering purely the legal aspects of a topic is to misunderstand the ILC itself, for that is neither how it sees its role, nor does it accord with what its role is supposed to be. Accept- that the main thrust of its interest and competence are essentially those of international law, it is clear that the mandate it operates under (37) is not only sufficiently broad and flexible to include non legal issues, but it contains an express commond

35. - Yearbook 1973 Vol 1 p 166
36. - ibid p 163
37. - Article 1 of the Statute of the International Law Commission states: per Briggs:
"The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification" - "The International Law Commission"

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to create law that is very much of this world . As Ramcharan points out:

"The duties include suggesting modifications and changes in the law to bring it into line with the needs of present day international society and suggesting new law where none existed before, or where the law had been unclear hitherto" 38.

Far from codifying in a legal goldfish pond, the ILC has developed in accordance with this general mandate to involve itself in the secular world:

"The Commission's basic approach is an emperical or pragmatic one. It seeks to ascertain rules which are likely to be useful to states in the conduct of their relations, bears in mind what rules and formulations states are likely to agree to and, on the basis of its appreciations on these two questions, it proceeds to examine and deal with each topic...Apart from topics assigned to it by the General Assembly, it has concerned itself principally with the main chapters of international law, adapting them and extending them to present conditions and needs" 39.

Given this broad mandate, it was quite natural and proper for the ILC to enter an "alien" field such as economics in dealing with the MFN clause; the width of its mandate likewise legitimized any political judgments it found it necessary to make. However, it may be a mistake to continue to accept the distinction between law and economics and regarding the latter as "alien" in light of the fast growing body of economic law. It would appear from the 1971 Secretarial Survey that at present the dominant view of the ILC is that it should not generally enter this field - though many supported this move. In any event, such a verdict can hardly be considered applicable to treatment of an economic issue when it presents itself as a byproduct of the legal ones. The growing affinity between law and economics does show that in this situation the ILC should have no hesitation in resolving the economic issues - if they can - as they arise.

38. - "The International Law Commission 1977 p 1
39. - ibid p 3 : as revealed by the customs union issue, the likelihood of a rule being politically unacceptable to enough states acts as a very real influence on the decisions of the ILC as to whether a rule is adopted by the ILC or not.

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