

# Emerging Dimensions in International Trade Law and the Desirability of a Non-Tariff Commercial Treaty with the EEC

*Treaties are like roses and young girls. They last while they last.*—A 1963 statement attributed to Charles de Gaulle; *The Washington Post*, November 11, 1970, p. A19.

The purpose of this commentary is to review the most basic, central historical and present-day purposes of non-tariff commercial treaties and to suggest a framework broader and hopefully more effective than the traditional bilateral form of commercial treaties which would better orientate non-tariff commercial treaty relations between the USA and its trade partners to more modern international political and legal realities.

Outside of some specialized primary research carried on by the American Bar Association Committee on Commercial Treaties in 1964–65,<sup>1</sup> little or no analysis of this country's bilateral commercial treaty system has appeared during the past decade in published literature.<sup>2</sup>

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<sup>1</sup>1965 Proceedings, Section of International and Comparative Law, American Bar Association, at 215–223 (1965).

<sup>2</sup>However, the following governmental materials did appear in the 1950s and in the early 1960s:

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. B, Treaty of Friendship, Establishment and Navigation between the United States and Luxembourg, Sen. Exec. Rep. No. 7, 87th Cong., 2d Sess. (Sept. 18, 1962).

Sen. Exec. Doc. B, Message of the President transmitting the Treaty of Friendship, Establishment and Navigation with Luxembourg, 87th Cong., 2d Sess. (1962).

Sen. Exec. Doc. L, Message of the President transmitting the Treaty of Amity and Economic Relations between the United States and the Republic of Viet-Nam, 87th Cong., 1st Sess. (1961).

Sen. Exec. Doc. J, Message of the President transmitting the Treaty of Friendship, Commerce and Navigation with Belgium, with protocol, 87th Cong., 1st Sess. (1961).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. J and L, Commercial

Clearly, though, the time for review, reappraisal and possible reform has come, when one considers the events of the 1960s and early 1970s in the realm of international trade relations. Protectionist tendencies have flourished.<sup>3</sup> expropriations and economic anomalies have attracted some-

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Treaties with Belgium and Viet-Nam, Sen. Exec. Rep. No. 9, 87th Cong., 1st Sess. (Aug. 28, 1961).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. F and G, Treaty of Friendship and Commerce with Pakistan and Convention of Establishment with France, Sen. Exec. Rep. No. 12, 86th Cong., 2d Sess. (June 27, 1960).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. A, Treaty of Amity, Economic Relations and Consular Rights with the Sultan of Muscat and Oman, Sen. Exec. Rep. No. 1, 86th Cong., 1st Sess. (April 22, 1959).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. D, Treaty of Friendship, Commerce and Navigation between the United States and Korea, Sen. Exec. Rep. No. 5, 85th Cong., 1st Sess. (July 10, 1957).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. J and K, Commercial Treaties with Iran, Nicaragua and the Netherlands, Sen. Exec. Rep. No. 9, 84th Cong., 2d Sess. (July 18, 1956).

*Hearings* on Exec. E, Treaty of Amity, Economic Relations and Consular Rights with Iran; on Exec. G, Treaty of Friendship, Commerce and Navigation with Nicaragua; and on Exec. H, Treaty of Friendship, Commerce and Navigation with the Netherlands, before the Sen. Comm. on Foreign Relations, 84th Cong., 2d Sess. (July 3, 1956).

Sen. Comm. on Foreign Relations, Rep. to accompany Exec. E, Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Sen. Exec. Rep. No. 10, 84th Cong., 1st Sess. (1955).

Sen. Comm. on Foreign Relations, Rep. to accompany Execs. R. (82nd Cong., 1st Sess.), H. I, J (82d Cong., 2d Sess.) and C, N, O (83d Cong., 1st Sess.), Commercial Treaties with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan, Sen. Exec. Rep. No. 5, 83d Cong., 1st Sess. (July 17, 1953).

*Hearings* on Execs. R (82d Cong., 1st Sess.), F, H, I, J (82d Cong., 2d Sess.), C, N, O (83d Cong., 1st Sess.), Commercial Treaties with states listed *supra*, before a Subcomm. of the Sen. Comm. on Foreign Relations, 83d Cong., 1st Sess. (July 13, 1953).

<sup>3</sup>See H. R. 20, the Trade Bill of 1971, Title II, 92d Cong., 1st Sess. (1971); S. 4, Trade Bill of 1971, Title II, 92d Cong., 1st Sess. (1971); and H. R. 18970, Trade Bill of 1970, Title II, 91st Cong., 2d Sess. (1970).

Title II of the bills, if enacted, would impose import quotas on certain textile and non-rubber footwear articles.

The American Bar Association, at the February 8, 1971 Mid-year Meeting of its House of Delegates, adopted the following resolution which is essentially based upon the conflict of the proposed quota legislation with Article XI of the GATT:

*Be it resolved*, that the American Bar Association urges the President and the Congress of the United States to recognize the conflict which appears to exist between the import quota provisions of proposed legislation such as H. R. 18970 (91st Congress) and existing obligations of the United States under the General Agreement on Tariffs and Trade (GATT) and, if such conflict is found to exist in fact, to evaluate carefully the impact of such proposed import quota legislation upon the international obligations of the United States under the GATT; . . . .

The text of the GATT appears at 61 Stat. Pts. 5 & 6, TIAS 1700, T.D. 51802, 55 U.N.T.S. 194 (1947); and in J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 800, *et seq.*, Appendix A (1969) and 4 Bevan, T.O.I.A. 639 (G.P.O., Dept. of State Publ. 8521, 1970).

For analyses of the basic obligation against the institution of quantitative restrictions, or import quotas, see Jackson, *supra*, § 13.3 at 314, *et seq.*, also § 13.2 at 308-14, and see Coerper, *Congressional Quota Legislation in the Light of U.S. Legal Obligations Under Article XI of the GATT*, 5 INT'L LAWYER 249 (1971).

times agitated commentary,<sup>4</sup> and micro-economic structures have been formed and altered by the burgeoning of multinational companies of many nationalities and subsidiary domiciles.<sup>5</sup>

### Primary Concepts and Purposes of Non-Tariff Commercial Treaties

Historically, commercial treaties of many different genres have developed around the two central precepts of National Treatment and Most-Favored-Nation (MFN) treatment. Many different specified substantive subjects<sup>6</sup> have been governed jointly and severally by the two precepts

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While the multilateral GATT, with American accession via executive agreement (Protocol of Provisional Application) and implementing Congressional trade and tariff legislation, directly outlaws non-exempted import quotas, the bilateral Treaty of Friendship, Commerce and Navigation Between the United States and Japan—Article XIV, April 2, 1953, 4 U.S.T. 2063, 2074-75 (effective October 30, 1953)—requires only non-discriminatory most-favored-nation treatment in the event a contracting party elects to impose import quotas. The most pertinent portions of Article XIV of the Japanese FCN treaty are the following:

Article XIV. 1. Each Party shall accord most-favored-nation treatment to products of the other Party, . . . in connection with importation and exportation.

2. Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, *all third countries* is similarly restricted or prohibited. [Emphasis added]

3. If either Party imposes quantitative restrictions on the importation or exportation of any product in which the other Party has an important interest:

(a) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and

(b) If it makes allotment to any third country, it shall afford such other Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

Of course it has been largely Japanese textile imports which have given rise to the domestic protectionist import quota bills cited above.

<sup>4</sup>See e.g., Javits Hits Chile's Take-Over Plans, N.Y. Times, February 2, 1971, at 49 (City ed.); Chile's Threatened U.S. Property Seizure May Drain Federal Insurance [Overseas Private Investment Corporation] Unit's Funds, Wall Street Journal (Eastern Edition), February 2, 1971, at 6.

See also Eder, *Expropriation: Hicklenlooper and Hereafter*, 4 INT'L LAWYER 611 (1970), and a retort, Furnish, *Eder's Hicklenlooper: Some Clarifications Regarding Peru and Other Matters*, 5 INT'L LAWYER 348 (1971), and a Reply by Eder, *Id.* at 354.

<sup>5</sup>The economic hegemony of the multinational corporation has been documented and analyzed in so many different places that mere reference to the subject tends now to sound a trifle hackneyed. For some Congressional cognizance, however, see Report of the Subcommittee on Foreign Economic Policy of the Joint Economic Committee, 90th Cong., 1st Sess., The Future of U.S. Foreign Trade Policy, "The Multinational Corporation Represents a New Factor in National Trade Policies" 11-12 (Joint Comm. Print, 1967).

<sup>6</sup>The Tariff Commission gave an early list of substantive subjects covered by American bilateral commercial treaties in the following manner:

. . . Commercial treaties, however, contain provisions on a wide variety of other subjects, such as conditions of residence, travel and trade; immigration and emigration; police protection and civil rights; admission of diplomatic and consular officials, their rights and activities; vehicles and instruments of communication and transportation;

in American commercial treaty relations, but identification of the conceptual bases for such treaty provisions is more helpful to the present commentary than would be a lengthy review of those substantive subjects.

In "a pioneer work, the first of its kind," the Tariff Commission in 1922 indicated without elaboration that the primary purpose of commercial treaties was "to protect the rights and interests of nations and individuals participating in commercial and industrial development on an international scale."<sup>7</sup>

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navigation, quarantine and harbor regulations, and dues relating thereto; conditions for importation, exportation, transit, transfer and warehousing; tariffs and customs laws; protection to patents, trade-marks, copyrights and other industrial property rights; possession and disposal of, or succession to, real and personal property; payment of taxes; rights of commercial, industrial or financial associations; exemption from military service, municipal functions, forced loans and extraordinary levies; treatment of commercial travelers and their samples; bounties and drawbacks, internal duties and local dues; treatment of vessels seeking refuge from damage or shipwreck; salvage operations and dues; coasting trade and port-to-port trade with foreign cargoes; extraterritorial jurisdiction; freedom of religion and right of burial; and numerous other rights, privileges, interests or conditions affecting citizens and corporations of one country residing and operating in the other. In other words, provisions in commercial treaties may be as wide and diversified as the objects, interests, activities and instruments of commerce and industry in all their phases, . . .

UNITED STATES TARIFF COMMISSION, HANDBOOK OF COMMERCIAL TREATIES 11 (G.P.O., 1922).

R. WILSON, U. S. COMMERCIAL TREATIES AND INTERNATIONAL LAW, *passim* (1960), analyzes the following list of nine selected FCN treaty subjects, devoting a chapter to each: Entry, Work, Property-protection, Natural Resources, Internal Taxation, Companies, Judicial Remedies, Religion and Military Service.

H. Hawkins and A. Lowenfeld, *Rights of Businessmen Abroad—Under Trade Agreements and Commercial Treaties* 13–30 (Int'l Chamb. Comm., 1960), summarizes the following twenty-three selected topics generally covered by commercial treaties:

1. Customs Treatment of Goods, 2. Quantitative Import Restrictions and Tariff Quotas, 3. Export Duties and Restrictions, 4. Internal Taxes and Regulations on Goods, 5. Transfer of Payments for Goods, 6. Organization or Control of Local Companies, 7. Leasing or Ownership of Real Property, 8. Taxation of Nationals or Companies, 9. Expropriation of Property, 10. Transfer of Invested Capital and Earnings, 11. Customs Treatment of Nationals and Companies, 12. Protection of Industrial Property (Trade Marks, Patents, Copyrights), 13. Exploitation of Mineral Resources, 14. State-trading Practices, 15. Restrictive Business Practices, 16. Subsidies, 17. Treatment of Commercial Travelers, 18. Freedom of Transit, 19. Customs Penalties, 20. Right of Appeal from Administrative Decisions, 21. Hardship from Customs Changes, 22. Arbitration of Private Disputes, 23. Regional Associations.

*Id.* at 36–51 presents a very useful analytical chart which cross-matches the 23 subjects listed above with relevant article numbers of most commercial agreements, including the GATT, in force as of early 1960.

<sup>7</sup>UNITED STATES TARIFF COMMISSION, HANDBOOK OF COMMERCIAL TREATIES 9 (G.P.O., 1922). *Id.* at 10 reminds one, however, that certain basic rights and privileges may of course exist independently, or in lieu of treaty obligations:

. . . . The fact that no treaty exists between two nations therefore does not mean that the citizens of the one have no rights whatever in the other. Moreover, a comparison of treaties shows at a glance that some are much more complete and detailed than others in specifying the rights and privileges assured to citizens of the contracting States in the countries concerned. This does not mean that citizens of States having less complete

Subsequent authorities have called attention to the fact that most present-day commercial treaties concluded after World War II of course have expressly been made applicable also to private companies and associations as well as to states and their individual nationals.<sup>8</sup> Thus, protection of citizens and of business entities doing business abroad has come to be an expressed primary purpose of United States commercial treaties.<sup>9</sup>

Another basic purpose may however be postulated, indeed shown. The other purpose may be said to be international norm-setting, for want of a better description, and such norm-setting tends in turn to serve the primary purpose of commercial treaties. Suggestions hereinbelow cast this second major purpose as 'international treatment.'

Some recent developments giving rise to the newly broadened 'international treatment' dimension in trade, and arguably also in commercial treaty relations, are the recent United Nations (Vienna) Convention on the Law of Treaties<sup>10</sup> (the "Treaty on Treaties") and the 1958 (United Na-

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treaties with a given country necessarily have fewer rights in that country than other foreigners whose home States have more extensive or more detailed treaties with the country in question. . . . [N]umerous rights and privileges are assured to aliens . . . by domestic legislation through national or municipal laws. . . .

<sup>8</sup>See, e.g., R. WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW 182-208, Chapter VII (1960) with respect to "Companies" provisions in commercial treaties, especially in post-World War II FCN treaties.

<sup>9</sup>For an empirical study indicating that some American companies which do experience discrimination or putative violations of establishment or national treatment provisions within the USA-France Convention of Establishment (which follows the usual Friendship, Commerce and Navigation (FCN) bilateral treaty typology) also do not place much faith in, or efforts under, treaty provisions or in available Department of State administrative channels for possible relief under the treaty, see Report of the Committee on Commercial Treaties, 1965 Proceedings, Section of International and Comparative Law, American Bar Association, 215, 218-23 (1965).

<sup>10</sup>The text of the Vienna Convention on the Law of Treaties (drafted and submitted in 1969 for multilateral adoption, following some fifteen years of drafting and revision within the International Law Commission, by the United Nations Conference on the Law of Treaties) appears in U. N. Doc. A/CONF.39/27, May 23, 1969. The text also is reprinted at 4 INT'L LAWYER, 172-203 (1969), and the International Law Commission's Draft Articles and Commentary, U.N. Doc. A/6309/Rev. 1, are reprinted at 61 AM. J. INT'L L. 255-463 (1967).

The preamble to the Vienna Convention makes clear, *inter alia*, the premise that the convention's codification of treaty law will facilitate the importance of treaties as a source of declared international legal norms:

. . . . *Recognizing* the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

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*Believing* that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations. . . .

tions) Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>11</sup> the latter of which was approved by the United States Senate in October of 1968<sup>12</sup> and implemented by amendments to the Federal Arbitration Act in July of 1970.<sup>13</sup> Both multilateral developments are novel strides in the realm of substantive and procedural international trade law, particularly the Convention on the Law of Treaties which has not as yet been adopted by the United States.<sup>14</sup>

But another development in international trade law and organization which has broadened, or at least altered, de facto trade patterns is the European Economic Community (EEC) itself, which now, having attained a customs union, is rather sporadically approaching such integrative groundwork as monetary union<sup>15</sup> under the Rome Treaty.

<sup>11</sup>June 10, 1958, T.I.A.S. 6997, 330 U.N.T.S. 3 (effective Dec. 29, 1970).

<sup>12</sup>Sen. Comm. on Foreign Relations, Convention on Foreign Arbitral Awards, Sen. Exec. Rep. No. 10, 90th Cong., 2d Sess. (Sept. 27, 1968). Page 1 of the Report points out that "The convention applies only in those cases where the persons involved have voluntarily accepted arbitration." The convention also is applicable only when a rendering or respondent nation has reciprocally assumed the obligations of the convention, and when a strictly commercial legal issue under federal law (so as to exclude matters of sister state local jurisdiction or concern) exists. See also Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAWYER, 720, 737-39 (1970), and Sen. Exec. Doc. E, Message of the President of the U.S. Transmitting the [United Nations] Convention on Recognition and Enforcement of Foreign Arbitral Awards Adopted at New York on June 10, 1958, 90th Cong., 2d Sess. (April 24, 1968).

<sup>13</sup>Pub. L. No. 91-368, approved July 31, 1970, 84 Stat. 692, 9 U.S.C. §§ 201-208 (1970).

Legislative history is contained in Sen. Rep. No. 91-702, Comm. on Foreign Relations, to accompany S. 3274 to implement the Convention, 91st Cong., 1st Sess. (Feb. 13, 1970) and in H.R. Rep. No. 1181, 91st Cong., 1st Sess. (June 11, 1970).

See FORTUNE, November, 1970, at 49, which noted American adoption and opined that American accession might encourage major Latin American states to accede; at the time, the only other signatories in the Western Hemisphere were Ecuador, Trinidad and Tobago.

<sup>14</sup>The Vienna Convention was signed on behalf of the United States on April 24, 1970. Department of State Press Release No. 131, LXII DEP'T STATE BULL. No. 1612, at 639-40 (May 15, 1970).

<sup>15</sup>See e.g., The Six Off Dead Center . . . , Editorial N.Y. Times (City ed.), Feb. 11, 1971, at 44, which mentions a 1980 goal for EEC monetary union and a single currency, and which reports the following:

By mid-1972 the governors [of central banks of the Six] are to offer a plan for a stabilization fund that could be the basis for a kind of European Community federal reserve system.

The European Community is again moving forward, albeit slowly, toward the goal envisioned by its architects: the goal that fired the imagination and enthusiasm of a whole generation of Western Europeans after World War II.

But see N.Y. Times (City ed.), May 6, 1971, at 1, reporting that 5 Central Banks [West Germany, Switzerland, Belgium, Austria and the Netherlands] In Europe Cease Dollar Support [exchange]. The situation was described as The Dollar Crisis, N.Y. Times (City ed.), May 6, 1971, at 42 and likened to the 1969 upward revaluation of the German Mark. Cf. other, later reports that EEC relationships do already have their certain effects on the handling of the currency value fluctuations: Common Market Divisions Impede Solution of Crisis—Differences Over Effects of a Party Shift on the Group's [French] Farm Policy and

The United States presently has in force with all EEC states six separate but nearly identical bilateral commercial treaties of Friendship, Commerce and Navigation (often referred to as FCN treaties).<sup>16</sup> The thesis that present-day incidence, indeed pre-eminence, of regional trade groupings, and "regionalism" generally,<sup>17</sup> has out-stripped the traditional bilateral commercial treaty concept at least with respect to the European Economic Community has been suggested by others before the time of this writing.<sup>18</sup> An explanation of the desirability of an attempt at formulation and adoption of a single American non-tariff commercial treaty with the EEC follows.

### *Most-Favored-Nation (MFN) Treatment*

Existing FCN treaties with the six EEC nations contain<sup>19</sup> and embody<sup>20</sup> the most-favored-nation [MFN] treatment concept.

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on German Industry Complicate Moves, N.Y. Times (City ed.), May 7, 1971, at 1; Bonn Rules Out Unilateral Move to Revalue Mark—Germany Leaves Open the Possibility of Allowing Currency to 'Float'—Marks and Swiss Francs in London Continue to Trade Above Permissible Level, N.Y. Times (City ed.), May 7, 1971, at 1; and Bonn Unpegs Mark in Relation to Dollar, Common Market Gives Grudging Approval, Wall St. J. (Eastern ed.), May 10, 1971, at 3.

<sup>16</sup>Treaty of Friendship, Establishment and Navigation with *Belgium*, February 21, 1961, 14 U.S.T. 1284, T.I.A.S. 5432 (effective Oct. 3, 1963); Convention of Establishment with *France*, Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. 4625, 401 U.N.T.S. 74 (effective Dec. 21, 1960); Treaty of Friendship, Commerce and Navigation with the *Federal Republic of Germany*, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. 3593, 273 U.N.T.S. 3 (effective July 14, 1956); Treaty of Friendship, Commerce and Navigation with *Italy*, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. 1965, 79 U.N.T.S. 171 (effective July 26, 1949) and Agreement Supplementing the Treaty [of FCN] with *Italy*, Sept. 26, 1951, 12 U.S.T. 131, T.I.A.S. 4685, 404 U.N.T.S. 326 (effective Mar. 2, 1961); Treaty of Friendship, Establishment and Navigation with *Luxembourg*, Feb. 23, 1962, 14 U.S.T. 251, T.I.A.S. 5306, 474 U.N.T.S. 3 (effective Mar. 28, 1963); Treaty of Friendship, Commerce and Navigation with the *Netherlands*, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. 3942, 285 U.N.T.S. 231 (effective Dec. 5, 1957).

<sup>17</sup>*Cf.* I. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 94-110 (1964), Chap. 6, on "The Problem of Regionalism"; and J. EVANS, *U.S. TRADE POLICY—NEW LEGISLATION FOR THE NEXT ROUND*, 82-7 (1967) which, for instance, refers at 84 to "the chasm that the creation of the EEC and EFTA had opened in the Atlantic community."

<sup>18</sup>J. Patton and C. Verrill, 1967 Interim Report of the Committee on Commercial Treaties, Section of International and Comparative Law, American Bar Association, at 10-14, 20, July 1967 (unpublished Report to the American Bar Association); *see also* testimony of Professor E. B. Rostow before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., *Hearings* beginning in 1966 on International Aspects of Antitrust, Part I (1967), at 6.

<sup>19</sup>The FCN Treaty with Germany (full citations to all six treaties are in note 16, *supra*), for example, contains the following typical MFN provisions with respect to certain regulated industries (Article VII in part) and concerning governmental purchasing and contracts (Article XVII):

#### ARTICLE VII.

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2. Each party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, taking and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources. However,

The principle of MFN treatment—the assurance that citizens, companies, products, vessels and other specified objects will be treated by a contracting state at least as favorably as those of any third state with respect to specified types of concessions or guarantees granted to such third states<sup>21</sup>—has been utilized by United States commercial treaty documents at least since the Republic's early days in the eighteenth century.<sup>22</sup> Since 1923, when President Harding and Secretary of State Hughes

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new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals or companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies, in conformity with the applicable laws and regulations, to perform functions necessary for essentially international operations in which they engage.

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4. Nationals and companies of either Party, as well as enterprises controlled by such nationals or companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

#### ARTICLE XVII.

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2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of *any third country*, with respect to: (a) the governmental purchase of supplies; (b) the awarding of concessions and other government contracts; and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges. [italics added]

<sup>20</sup>For instance, the preamble to the FCN treaty with Germany (citations in note 16, *supra*) embraces the general MFN concept in the following language:

The United States of America and the Federal Republic of Germany, desirous of strengthening the bonds of friendship existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded . . .

The other FCN treaties with the other five EEC states embrace the same MFN principle.

<sup>21</sup>See U. S. Tariff Commission, *supra* note 7, at 2.

The United States—Germany FCN treaty (citations in note 16, *supra*) defines MFN treatment thus in Article XXV:

4. The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

<sup>22</sup>*Id.* at 2-7, 15-18. Hawkins and Lowenfeld, *supra* note 6, at 11, points out that the first FCN type of bilateral commercial treaty was adopted in 1778 between the United States and France. The treaty, catalogued in Wilson, *supra* note 6, at 331, Appendix I, was the Treaty of Amity and Commerce with France, Feb. 6, 1778, 18(2) Stat. 203, and contained MFN obligations in rather quaint language in its Article II at 204.

For a general, historical review of the "Most-Favored-Nations Clause," see Y. B. INT'L L. COMM'N—1969 157-181, Agenda Item No. 4, U.N. Doc. A/CN.4/213 (1969).



determined the policy of including the most-favored-nation clause in its unconditional form<sup>23</sup> in commercial treaties with non-Communist nations, the United States has sought to include the commitment in all of its commercial treaties and trade commitments.<sup>24</sup>

An inherent weakness however in the most-favored-nation concept, is that such an agreement of course does not limit the freedom of a contracting party to impose whatever lawful restrictions on trade (for instance on imports) it wishes as against third countries, so that if the MFN agreement is to be observed, then the specified restrictions must of course be placed against all of the party's other trade partners, if the specified trade obstacle is to be invoked against the other state party to the MFN agreement.<sup>25</sup>

As contrasted to MFN treatment, national treatment requires that a contracting party will at the very least treat the other party exactly as it treats its own nationals with respect to rights, privileges, conduct or actions specified or described in the applicable treaty instrument.

### *National Treatment*

The concept of national treatment has been declared to be "the cornerstone of the modern commercial treaty,"<sup>26</sup> and explained as consisting of those provisions which stipulate that one contracting state's "persons [and companies, as provided in most post-World War II treaties] are enabled freely to go about their affairs, without discriminatory burdens or harrassments."<sup>27</sup>

<sup>23</sup>M. Whiteman, 14 DIGEST OF INT'L LAW 751 (G. P. O., 1970), quoting from "Treaty Information," III *Bulletin*, Dept. of State, No. 58, Aug. 3, 1940, note 8 at 96, additionally provides the following discussion of the unconditional form of MFN treatment:

The *unconditional* form of the most-favored-nation clause provides that any advantage, favor, 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. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the *conditional* form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions 'equivalent' to the concessions made by such third countries. . . . [italics added]

For a thorough discussion of the legal effect of MFN treatment clauses, see generally Whiteman, *supra*, at 748-782.

<sup>24</sup>*Id.* at 751-752, citing and quoting from Statement submitted by Under Secretary of State Ball, *Hearings* on the [OECD] before the Sen. Comm. on Foreign Relations, at 245-246, 87th Cong., 1st Sess. (1961).

<sup>25</sup>See *e.g.*, Hawkins and Lowenfeld, *Rights of Businessmen Abroad*, *supra* note 6, at 9.

<sup>26</sup>Patton and Verrill, 1967 Interim Report, *supra* note 18, at 17.

<sup>27</sup>Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 385 (1956).

A national treatment provision in a commercial treaty requires that a contracting state's nationals and companies must be accorded the same, or at least as favorable, treatment as is accorded to a domestic national or company in the host state.<sup>28</sup> National treatment agreements of course may or may not be reciprocal (but usually are) and may contain limitations, depending upon language used in each case.<sup>29</sup>

An example of typical FCN treaty national treatment provisions with an EEC state is the 1959 Convention of Establishment Between the United States and France, and its Article V (engaging in and establishment of businesses),<sup>30</sup> Article III (access to courts, administrative tribunals, and

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<sup>28</sup>The United States-Germany FCN treaty (citations in note 16, *supra*) provides the following definition of national treatment:

ARTICLE XXV. 1. The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

The FCN treaty with France provides a similar definition in Article XIV (citations in note 16, *supra*):

ARTICLE XIV. 1. The term 'national treatment' means treatment accorded to nationals and companies of either High Contracting Party within the territories of the other High Contracting Party upon terms no less favorable than the treatment therein accorded, in like situations, to the nationals and companies, as the case may be, of such other High Contracting Party.

<sup>29</sup>U.S. Tariff Commission, *supra* note 7, at 6.

<sup>30</sup>Article V of the USA-French FCN treaty (citations in note 16, *supra*), the basic national treatment obligation, provides:

ARTICLE V. 1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other High Contracting Party, whether directly or through the intermediary of an agent or of any other natural or juridical person. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and to maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other High Contracting Party and to acquire majority interests in companies of such other High Contracting Party; (c) to control and manage the enterprises which they have established or acquired. Moreover, the enterprises which they control, whether in the form of an individual proprietorship, of a company or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other High Contracting Party.

2. Each High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage or acquire interests in, enterprises engaged in communication, air or water transport, banking involving depository or fiduciary functions, exploitation of the soil or other natural resources, and the production of electricity.

3. Each High Contracting Party undertakes not to intensify, within its territories, existing limitations as regards enterprises belonging to or controlled by nationals and companies of the other High Contracting Party which are already engaged in the activities cited in the preceding paragraph. Moreover, each High contracting Party shall permit, within its territories, transportation, communications and banking companies of the other High Contracting Party to maintain branches and agencies, in conformity with the laws in force, which are necessary to the operations of an essentially international character in which they are engaged.

agencies), Article IV (security of property and guaranties in the event of governmental seizure of expropriation), Article VII (leasing, utilizing and occupying — not ownership in fee — of real property; leasing, acquisition and possession of personal property except ships; and disposition of property), Article VIII (obtaining and maintaining patents, trademarks, trade names and certification marks), Article IX (taxation of certain categories of companies and persons) and Article XIII (denying to any company of which nationals of any third state have a direct or indirect controlling interest, the advantages of the Convention, except for recognition of juridical status and access to the courts).<sup>31</sup> Each of the aforesaid articles provides for national treatment.

### *'International' Treatment: An Emergent Dimension*

Superimposed on the proliferation of treaties, agreements, jurisdictions, organizations, agencies, decisions, opinions, customs, practices and consultations which weave the amorphous fabric of international law and practice, is the potential for a new dimension which could, and very likely will, give rise to new and to clarified existent procedural and substantive concepts in international affairs and law. This new dimension could be reflected, indeed co-optated, by a *de novo* commercial treaty concept which may be called "international treatment."

In this connection, perhaps the most significant recent progression in the incontinuous trend to more well-defined international legal machinery has been the 1969 promulgation and submission, by the United Nations Conference on the Law of Treaties, of the draft Vienna Convention on the Law of Treaties.<sup>32</sup> Of particular importance are its Part III on Observance, Application and Interpretation of Treaties, and its Part V on Invalidity, Termination and Suspension, which would codify the rules of *pacta sunt*

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The counterpart FCN treaty with Germany (citations in note 16, *supra*) parallels the French treaty Article V provisions, *supra*, with only slight variations in formal sentence structure, in paragraphing, and in some adjectives, but it also contains the following additional provisos:

#### ARTICLE VII

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals or companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

<sup>31</sup>United States—France Convention of Establishment (citations in note 16, *supra*). See 1965 Proceedings, *supra* note 1, at 217–218.

<sup>32</sup>*Supra* note 10.

*servanda* (Article 26), *jus cogens* (Articles 53 and 64), and *rebus sic stantibus* (Article 62).

Additionally, the Convention provides, in Article 66(b) and in the Annex, for dispute-settlement procedures consisting of conciliation by a Conciliation Commission<sup>33</sup> and resulting in “recommendations submitted for . . . the parties in order to facilitate an amicable settlement of the dispute.”<sup>34</sup> Article 66 settlement provisions are activated when any party to an unsettled dispute<sup>35</sup> concerning the application or interpretation of any article under Part V except Articles 53 or 64 [*jus cogens*, “treaty . . . void if . . . it conflicts with a preemptory norm of general international law,” goes instead to the I.C.J. under Article 66(a)] sets the procedure in motion by a request to the Secretary-General. Such a request may follow only

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<sup>33</sup>The Annex to the convention (citations in note 10, *supra*) provides that the Conciliation Commission is to be constituted within the United Nations in the following manner:

*ANNEX.* 1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. . . .

2. When a request has been made to the Secretary-General under article 66[(b)], the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. \* \* \*

<sup>34</sup>*Annex* to the Vienna Convention on the Law of Treaties (citations in note 10, *supra*). For a perspective on the significant value of the Conciliation Commission forum and procedure, see Kearney, *The Future Law of Treaties*, 4 INT'L LAWYER 823, 831-834 (1970).

<sup>35</sup>Such as disputes involving claims of treaty invalidity—or suspension or termination thereof—with respect, *inter alia*, to fundamental change of circumstances (*rebus sic stantibus*, Article 62), material breach (Article 60), and various other grounds such as manifest violation of fundamental international law in a state's consent to a treaty (Article 46), error (Article 48), fraud (Article 49), consent (Article 57) and coercion (Articles 51 & 52).

For an examination of Article 46 (on manifest “provisions of fundamental international law regarding competence to conclude treaties”) and its background, see Kearney, *Internal Limitations on External Commitments—Article 46 of the Treaties Convention*, 4 INT'L LAW. 1-21 (1969).

failure to settle the dispute pacifically within 12 months under Article 33 of the United Nations Charter. Article 65 of the Convention on the Law of Treaties requires the 12-month preliminary Charter procedure.

The Treaties Convention, however, if it enters into force upon the prerequisite accession by thirty-five (35) eligible states,<sup>36</sup> will not be retroactive in its coverage or application. Only treaties concluded after the entry into force of the Convention of the Law of Treaties will be subject to its provisions.<sup>37</sup>

Thus a negotiation of new FCN commercial treaties, or at least proper amendments, would be necessary in order to avail the contracting parties of the innovative provisions of the "Treaty on Treaties." Hopefully the United States will give serious and prompt consideration to the Treaties Convention, and be prominent amongst the first thirty-five states to ratify.

### **Some Conclusions on New Uniformities and the Need for a New Type of Commercial Treaty**

The idea of a new non-tariff commercial treaty with the EEC<sup>38</sup> has now come of age, not so much as merely a means of attempting to deal with

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<sup>36</sup>Article 84 of the convention (citations in note 10, *supra*) provides:

*Article 84. Entry into force.* 1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

<sup>37</sup>The 4th Article (citations in note 10, *supra*) reads:

*Article 4. Non-retroactivity of the present Convention.* Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

See also Kearney, *The Future Law of Treaties*, 4 INT'L LAWYER 823, 825 (1970).

<sup>38</sup>E.g., see note 18 and accompanying text, *supra*.

A letter from C. O. Verrill, Jr. (former Chairman of the Committee on Commercial Treaties of the Section of International and Comparative Law, American Bar Association) to the present writer, December 17, 1970, puts some perspective on the subject:

... this trend ['regionalism'] will continue at an accelerated pace in the coming years particularly if the United States adopts the Trade Bill [which would impose import quotas; citations in note 3, *supra*] currently pending before Congress [91st Cong., 2d Sess. and 92d Cong., 1st Sess.]. There seems to be wide agreement that trading markets substantially limited to one country by tariffs and other restrictive devices are not economically attractive. This recognition was certainly one of the factors that influenced adoption of the Rome Treaty.

If, however, the GATT principle flounders because of trade legislation in member countries which is designed to help local industries, I cannot help but foresee a time when trade barriers will pop up everywhere. This will, it seems to me, dictate that regional trading blocs with no internal tariffs, but high external tariffs, quotas, etc., will spring up.

what has been styled "The Problem of Regionalism"<sup>39</sup> nor of being carried along with the relentless but changing tide of regional and sub-regional political relations and economic developments, but rather as a means of seeking greater and more effective realization of commercial treaties' primary purpose of securing the most effective possible protection of nationals and business entities doing business abroad.

Just as the Uniform Customs and Practice for Documentary Credits (adopted by the International Chamber of Commerce)<sup>40</sup> and the domestic Uniform Commercial Code have sought to provide, and have accomplished some uniformity and reliability in certain commercial relations, each in its own manner, so would a single non-tariff commercial treaty with the EEC which would replace the existing six separate, but highly similar, bilateral FCN treaties. As many scholars and practitioners would readily attest, international business and legal planning, programming and decision-making are already highly complicated by the proliferation of existing treaty and international legal standards and mechanisms.

Consolidation of six FCN treaties into one modern instrument would help.

Admittedly, much hard study, analysis, planning and negotiation must precede the attempt at making such a treaty, which would possess the mixed trappings of both a limited multilateral relationship with and between the Community nations and a bilateral instrument with one entity, the EEC.<sup>41</sup>

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This would enable groups of countries to have the 'benefits' of protectionism but at least to a limited degree those of free trade, too.

If all of the foregoing transpires, and admittedly I am speculating, there would be all the more reason for negotiating agreements of friendship, commerce, and navigation with regional trading blocs as opposed to individual nations. . . . In fact, a regional treaty might well preclude the kind of problems that occurred with France, despite the FCN treaty we [Americans] have with that country, when d'Estaing was DeGaulle's Minister of Finance, because of the pressures that could be brought to bear on a dissident country by the Common Market partners.

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. . . [The growth of [the multinational firm] seems to me yet another reason for the expanded concept of a FCN treaty.

<sup>39</sup>See I. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 94-110 (1964).

<sup>40</sup>International Chamber of Commerce, Brochure No. 222 (Nov. 1962 revision).

<sup>41</sup>Indeed, no positive precedent for such a non-tariff treaty seems to exist; although, if multilateralism can be made to work in tariff agreements such as the GATT and the Kennedy and earlier tariff Rounds, why not also for non-tariff commercial agreements? See J. LANG, *THE COMMON MARKET AND COMMON LAW* 30 *et seq.* (1966) and STEIN & NICHOLSON, *AMERICAN ENTERPRISE IN THE COMMON MARKET: A LEGAL PROFILE* 153-96 (1960).

In a January 22, 1968 unpublished Memorandum on Commercial Treaties, submitted to the ABA International Law Section's Committee on Commercial Treaties, Professor Michel Waelbroeck, who presently is on the editorial board of the *JOURNAL OF WORLD TRADE LAW*, offered (pages 1, 2 and 6 respectively) the following observations with respect to Rome Treaty

More specifically, investigations could proceed along the following lines: 1) Political feasibility and desirability. 2) Economic feasibility and desirability. 3) Technical legal feasibility, which can usually be arranged one way or another if the first two points, *supra*, are satisfied. Some desirability is demonstrated in this commentary.

At the same time, assuming that ultimate effectiveness of the Vienna Convention on the Law of Treaties occurs,<sup>42</sup> the prospective advantages of that treaty's substantive and procedural norms with respect to the application and interpretation of treaties, and conciliation of material breach and other disputes thereunder, are perhaps reason alone for the negotiation of a new non-tariff commercial treaty with the Community nations and, for that

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machinery and Community practice relating to the possibility of making a USA-EEC non-tariff FCN treaty:

The Rome Treaty provides that the Community has the power to enter into three different kinds of international agreements: (a) Tariff agreements may be entered into immediately after entry into force of the treaty (Art. 111); (b) Commercial agreements may be concluded after the end of the transitional period, i.e., in principle after January 1, 1970 (Art. 113); (c) Association agreements may be concluded immediately after the entry into force of the treaty (Art. 238).

All these agreements are negotiated by the EEC Commission, (1) after authorization and within the limits of a 'mandate' given by the Council, (2) they are concluded on behalf of the Community by the Council. They are binding upon the Community institutions and upon the member states (Art. 238) [and Articles 110-114].

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While the notion of 'tariff agreements' is pretty clear, the same is not true of commercial and association agreements.

It is commonly believed—although some authors question this limitation—that *commercial agreements* [original italics] may only deal with exchanges of goods, quota restrictions, non-tariff barriers, antidumping duties, export subsidies, etc., and not with capital movements nor with the establishment of foreign individuals or corporations or with the immigration of workers. It is not certain whether commercial agreements may deal with the supply of services or with invisible transactions other than capital movements. These problems of interpretation have not been solved in practice to date, since the treaty provides that commercial agreements may only be entered into by the Community after 1970. Therefore, it is not yet possible to tell whether questions which are generally included in treaties of friendship, commerce and navigation (such as establishment, services, payments, etc.) could be made the subject matter of a commercial treaty.

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*There is nothing in the Rome Treaty preventing the conclusion of a multilateral treaty of friendship, commerce and navigation between the Community and a non-member country.* However, such a treaty would probably have to be concluded according to the "mixed accord procedure," i.e., it would be subjected to ratification by each of the individual member states in addition to approval by the Council; indeed, under present practice, the Community does not appear to have the power to deal with such matters as establishment, services, capital movements and payments in an international treaty without the concurrent participation of the member states. [Emphasis added]

<sup>42</sup>As of the present time, the Vienna Convention, though signed on behalf of the United States in April of 1970 (see note 14, *supra*), has not been referred to the Senate for advice and consent. However, such referral will likely occur during the latter part of 1971.

matter, perhaps with this country's other trade partners, regionally-grouped and otherwise.

Moreover, consolidation in order to achieve some non-proliferation of desiderata, where desirable and feasible, would seem in a sense to be as beneficial to the realm of modern commercial relations as to frightful nuclear weaponry, except that proliferation in the former leads to disunity in some degree, and uncertainty, whereas in the latter to more immediate and serious threats to stability and security.

But the parallel subsists, and the initiative and leadership must come from the United States.