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American Interpretation of the Most Favored Nation Clause

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The American Interpretation of the Most Favored Nation Clause*

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A good many articles and a good many books have been written on the most favored nation clause, and nearly all of the authors devote the major part of their labors to the conditional interpretation: the European writers to showing its absurdity and utter lack of justification; the early American writers to condoning it; and the later American writers to condemning it.[1] None of these writers, however, have attempted to show the nature of this apparently aberrant form of the clause, or to explain why it ever came into existence. There is an old proverb which says that where there is much smoke, there is at least a little fire, which is applicable to this problem, for it would seem that nothing as wrong and valueless, as the conditional form of the clause is claimed to be by the European and later American writers, could ever have received the vigorous and faithful support that that form of the clause has received from the American State Department. Before we go into the conditional clauses, however, it would perhaps be well to say a few words about the clause in general.

The most favored nation clause is the collective term used to designate a group of provisions found in most commercial treaties providing that the nationals of the contracting parties will receive treatment in the territories of the other at least as favorable as that

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[1]The following list is a select bibliography of the clause. It is not exhaustive, but contains all the more valuable treatises: CALWER, DIE MEISTBEGUNSTIGUNG DER VEREINIGTEN STAATEN VON NORDAMERIKA (1902); CAVARETTA, LA CLAUSOLA DELLA NAZIONE LA PIU FAVORITA (1906); CULBERTSON, INTERNATIONAL ECONOMIC POLICIES (1925); GLIER, DIE MEISTBEGUNSTIGUNGSKLAUSEL (1905); HEROD, MOST FAVORED NATION TREATMENT (1901); HERRERA, LA CLAUSULA DE LA NACION MAS FAVORECIDA (1926); *Hornbeck, The Most Favored Nation Clause in Commercial Treaties*, WISCONSIN UNIVERSITY BULLETIN, 1908, ECONOMICS AND POLITICAL SCIENCE No. 6 (2), and in 3 AMERICAN JOURNAL OF INTERNATIONAL LAW 395, 619, 797 (1908); *McClure, A New American Commercial Policy, Columbia University Dissertation*, 1924, No. 173 (1924); SCHRAUT, SYSTEM DER HANDELSVERTRAGE UND DIE MESITBEGUNSTIGUNG (1884); UNITED STATES TARIFF COMMISSION, RECIPROCITY AND COMMERCIAL TREATIES (1919); *Viner, The American Interpretation of the Most Favored Nation Clause*, 32 JOURNAL OF POLITICAL ECONOMY 101 (1923); *Visser, La Clause de la Nation la plus Favorisée dans les Traités de Commerce*, 4 REVUE DE DROIT INTERNATIONAL, II série (1902); VON MELLE, DIE MEISTBEGUNSTIGUNGSKLAUSEL, IN HOLTZENDORFF'S HANDBUCH DES VOLKERRECHTS (1889).

granted to third nations. The chief object of commercial treaties is, naturally, to secure to each of the contracting parties as many advantages from the other as it is possible to get, and so, for the most part, commercial treaties are made up of specific provisions setting out the definite concessions which the parties are willing to make. Along with these special provisions, however, it has been found to be essential to include others which guarantee that the favors secured by the treaty will not be rendered less valuable by the granting of greater favors to another nation. These clauses all tend in the end to prevent discrimination, for if all nations have them in their treaties with each other, the nationals of all foreigu countries must be treated alike in the territory of any one country. There are two forms of these discrimination-preventing clauses: those providing for national treatment, and those providing for most favored nation treatment.

A national treatment clause provides that the nationals of each country shall be treated in the territories of the other just as if they were native citizens; in other words, it promises that there will be no discrimination at all. This is the usual form of clause governing shipping and navigation, and has been used extensively, though sporadically, in most of the other fields covered by commercial treaties.[2] A good example of this form of the clause:[3]

> "No other or higher duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of His Brittanic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels."

A most favored nation clause provides that the nationals of each country will be treated in the territories of the other just as well as the nationals of any foreign country; in other words, it promises that there will be no discrimination among foreigners. This is the usual form of the clause governing tariffs and the importation and exportation of merchandise; though it is also used extensively in other fields as a sort of residuary clause: everything not granted national treat-

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[2]For a fuller discussion, see UNITED STATES TARIFF COMMISSION, HANDBOOK OF COMMERCIAL TREATIES, in the introduction, p. 5; and Culbertson, *op. cit.*, Ch. II.

[3]Treaty, United States—Great Britain, 1815. All treaties to which the United States is a party may be found in MALLOY'S AMERICAN TREATIES, SENATE DOCUMENTS 47–48, *61st Cong. 2nd Sess.*, arranged alphabetically by countries. All other treaties are to be found in DE MARTENS, RECEUIL DES TRAITES, or, after 1921, in the League of Nations Treaty Series.

ment is usually covered by a most favored nation clause. A fairly representative though simple form of the clause:[4]

> "No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed on the importation into the said dominions of any article, the produce or manufacture of the United States, than are or shall be payable on the like articles, being the produce or manufacture of any other foreign country."

As has been said, the most favored nation clause is a sort of residual clause covering all favors not otherwise provided for; but the chief purpose in practice, and the only purpose of any importance, is to govern tariff relations. It may be said safely that ninety-five per cent of the claims made under the clause are for reductions of tariff, and in practically all the works on the clause, only that aspect is given serious consideration. For all practical purposes, then, the most favored nation clause may be characterized as the international governor of tariffs.

From a legal standpoint, the generic term *most favored nation clause* is somewhat misleading, for, as was intimated above, it is not a clause, but a group of provisions. There is no fixed form, and it rarely occurs in even a single treaty in a single definite article. The usual thing is to tack on to a number of articles containing specific concessions, a provision that with respect to the subject matter of that concession the promising nation will not grant greater favors to a third nation; and then to add a *covering* clause, either at the end or beginning of the treaty, providing that *all* favors granted to another country will be granted to the other contracting party. The clause may, therefore, appear in any number of articles in the same treaty: occasionally there is only a covering clause;[5] usually there is a covering clause and from half-a-dozen to a dozen specific clauses; in a treaty like the Versailles treaty the number begins to read like the war debt, for in that treaty there is a specific most favored nation clause in practically every article from Art. 260 to Art. 380.[6] The most usual subjects for the specific clauses are the ordinary ones of commercial intercourse: duties on imports and exports, shipping taxes, and rights of travel and business.[7]

It will be readily seen, therefore, that the variety of forms in which the clause may appear is indeed infinite, since it may be

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[4]United States—Denmark, Treaty of 1826, Art. IV.
[5]United States—Belgium, Treaty of 1875; United States—Japan, Treaty of 1854.
[6]See also, Japan—Greece, Treaty of 1899; Japan—Ecuador, Treaty of 1918.
[7]HORNBECK, *op. cit.*, *supra* note 1, 9.

limited or described in any way the contracting parties desire. As a generalization, it may be said that a limitation attached to a most favored nation clause may consist of any stipulation of which the parties are capable of contracting; but as a practical matter, most limitations are of three classes: either as to subject matter, as to the geographical districts to which they are to apply, or as to the political units to which they are to apply. The clauses limited as to subject matter are the specific clauses we have been discussing above: they form perhaps eighty or ninety per cent of the total body of most favored nation clauses, but they are not especially significant, for their meaning is clear if the contracting parties have been careful enough to express themselves clearly. The clauses limited as to geographical districts are also fairly common: the national treatment clause quoted above is a good example—limited to "His Majesty's ports in Europe"[8]—or the clause in the Louisiana Cession Treaty mentioned hereafter—limited to "ports in the ceded territory."[9] The other class consists of those clauses which except from the operation of the clause, relations with certain peculiarly friendly countries. For instance, Norway and Sweden usually except from their clauses favors granted to Finland or to each other; England excepts favors granted to her dominions; the United States excepts favors granted to Cuba; and most of the South American states except favors granted to each other. But on the whole, though limited clauses comprise nearly ninety per cent of all most favored nation clauses, they are relatively unimportant from a historical or legal standpoint, for each is an individual provision, different from all the others, and depending for its interpretation only on the clearness of its wording.

Another characterization, which divides the clause into two fields, is the characterization as unilateral or reciprocal. This is a simple distinction: if only one party promises not to discriminate, the clause is unilateral; if the promises are mutual, the clause is bilateral or reciprocal. The latter is the regular form; the unilateral clause is exceptional, and its presence indicates a position of hopeless inferiority in the promisor nation. It is either so weak in a military way that it is not able to get any sort of consideration, as were Germany and Austria after the World War; or so weak in an economic way that it makes little difference whether or not it gets any consideration, as were the Barbary States in the seventeenth and eighteenth centuries; or it may be both, as are states like Korea, Siam or Afghanistan. But wherever this form of the clause appears,

[8] *Supra* note 3.
[9] United States—France, Treaty of 1803, Art. VIII. *Infra* note 29.

it is always treated as distinctly irregular, and as an exception to the general practice of the state securing it. In practice it is nearly always unlimited and unconditional, though occasional limited unilateral clauses are found,[10] and at least one conditional unilateral clause has been concluded, between Korea and the United States in 1882.[11]

The third, last, and most important characterization which may be used to divide most favored nation clauses into classes is the distinction between clauses which are conditional and those which are unconditional. In the examples which we have given above, only indefinite or nonconditional clauses have been used—in the express forms the distinction is clearly brought out. An expressly unconditional clause provides that every favor extended by one contracting party to a third party shall be immediately and unconditionally extended to the other party; the expressly conditional form provides that every favor extended by one contracting party shall be extended to the other party "freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional." A typical expressly unconditional clause:[12]

> "Also every favor or immunity which shall be later granted to a third power shall be immediately extended and without condition, and by this very fact, to the other contracting party."

A typical expressly conditional clause:[13]

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

All most favored nation clauses, however, are not either expressly conditional or expressly unconditional. Either through carelessness, or through a desire to compromise between conflicting views as to the wording of the clause, the actual wording of a large number of clauses is left indefinite or ambiguous. They may be divided into two classes, however; one of which is nonconditional, and should always be interpreted as unconditional; and the other of which is equivocal, and may be interpreted as conditional, though with doubtful propriety. The nonconditonal clauses simply state that no higher or other duties will be levied on the products of the contracting

[10]Great Britain—Japan, Treaty of 1854.
[11]United States Tariff Commission, *op. cit. supra* note 1, 392.
[12]United States—Serbia, Treaty of 1881, Art. VI.
[13]United States—France, 1778, Art. II.

parties than on the products of any other foreign country. A good example of this type of clause:[14]

> "No other or higher duties shall be paid by Americans on goods imported into Japan than are fixed by this treaty, nor shall any higher duties be paid by Americans than are levied on the same description of goods if imported in Japanese vessels or the vessels of any other nation."

There seems to be no conceivable reason why this clause should not be interpreted as meaning just exactly what it says. It is very clear —a promise that a certain act will not be done. To attach to such a promise a condition that the act will not be done if the promisee nation is willing to pay for the immunity as occasion arises in the future would seem to be utterly unreasonable and opposed to all honor and good faith.

The equivocal clauses are those clauses which provide for "most favored nation treatment" or "treatment as favorable as that accorded the most favored nation." As a matter of logic, it will be recognized that these clauses provide for the maintenance of a standard in place of providing for the performance of specific acts. In order properly to interpret the clauses, therefore, it is necessary to determine what is meant by "most favored nation treatment." The key word in the phrase is, of course, "favor." In English, whatever the words which translate it connote in other languages, "favor" carries a meaning of gratuity, of an advantage rendered without compensation. Therefore, if a nation has paid for an advantage received, it has not been favored, and the advantage could not come within the most favored nation clause. That is the American argument.[15] On the other hand, it may be argued that an advantage is a favor, no matter how it is received: that a nation may grant another a favor gratuitously, or for compensation. Therefore, when an advantage has been rendered, the nation has been favored, and the third nation may claim it without rendering compensation. That is the argument of the rest of the world.[16]

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[14]United States—Japan, 1878, Art. II.

[15]*Infra*, p. 26. See also AMERICAN STATE PAPERS, FOREIGN RELATIONS, Vol. V, 150 *et seq.*, 642 *et seq.*, for a fuller statement of these arguments. See also HEROD, *op. cit. supra* note 1, 8–27; HORNBECK, *op. cit. supra* note 1, 31 *et seq.*; VINER, *op. cit. supra* note 1. Of course, all the American writers have developed the subject.

[16]"En appliquant cette clause, il faut donc examiner de quel traitement les interêts de ce troisième état jouissent dans le pays étranger et réclamer le même traitment pour ses propres interêts du même genre. Alors, si ce tiers possède un certain traitement favorisé, il import peu aux autres de quelles concessions ont été accordées en échange. Une autre argument était qu'un avantage accordé à un troisième état en échange d'une autre concession n'était pas une 'favour' mais 'a mere act of reciprocity', et que ceux qui jouissaient par consequent d'un

It would seem that the American side of the argument is much the stronger from the standpoint of strict logic; but the attitude of the American government in so interpreting these clauses, when for two hundred years the rest of the world had been giving them the opposite meaning, does not seem very defensible, especially since this interpretation was used to enable the United States to evade promises which it must have known were made with the opposite interpretation in mind.

A difficult question is raised when one of these indefinite clauses is contained in the same treaty with an expressly conditional or unconditional covering clause. Which will govern? The situation rises in practice only when a nation is claiming a reduction in tariffs under a nonconditional clause dealing with tariff rates, and when there is an expressly conditional covering clause in the same treaty. The situation has been sharply debated several times, and the result has been that the general language controls the specific; since the general clause refers to all favors, while the specific refers only to tariff rates, the former includes the latter, and therefore controls. This seems to be somewhat doubtful, but is clearly the law.[17]

The effect of an unconditional clause is to extend automatically and without compensation every favor granted to another nation, no matter what the circumstances; of a conditional clause, to except from the operation of the clause all favors obtained by granting an equivalent—that is, by bargain or reciprocity agreement—except on the payment of a like consideration. To illustrate: suppose that France and Argentine have a most favored nation agreement. Argentine grants to the United States in return for a reduction of the tariff rate on hides, let us say, a reduction in certain grades of American

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tel avantage n'étaient pas des 'most favored nations.' Cela serait une raison déjà suffisante pour ne pas appliquer la clause en question. Il est presque superflu de démontrer qu'un tel raisonnement n'est qu'un jeu de mots. Il s'agit seulement de savoir, nous l'avons déjà dit, si les interêts, d'un troisième état jouissent dans un certain pays d'un meillieur traitement que ceux d'autres pays. Il est tout à fait indifferent à ces autres états si on appelle 'faveur' ou bien 'reciprocité' le fait dont un troisième état fait dériver son traitement plus avantageuse." VISSER, *op. cit. supra* note 1, 273. See also, GLIER, *op. cit. supra* note 1, 10–17; and SCHRAUT, *op. cit. supra* note 1, 30.

[17] "Der Wortlaut des Art. IX musste es immer als eine Sisiphusarbeit erscheinen lassen, in unseren Vertrag mit der Union die schrankenlöse, unbedingte Meistbegünstigung für die deutsche Einführ in die Vereinigten Staaten hineinzudeuten; und mit Recht konnte der amerikanische Staatssekretär der deutschen Regierung gegenüber sein Bedaueren darüber zum Ausdrück bringen, dassdiese 'dem Art. IX jede Kraft und Wirkung neben dem Art. V abspreche.' . . . Es kann aber trotzdem mit dem besten Willen nicht angezweifelt werden, dass Art. IX mit dem Art. V im Zusammenhang stcht, und dass wir auf Grund des Vertrages vom Jahre 1828 die schrankenlöse Meistbegünstigung von den Vereinigten Staaten nie beanspruchen konnten." GLIER, *op. cit. supra* note 1, 244. See also HORNBECK, *op. cit. supra* note 1, 29, 36–37; VINER, *op. cit. supra* note 1, 114.

steel products. France claims for her steel the benefit of the reduction, under the most favored nation clause. If the clause be construed as conditional, Argentine need grant the reduction in steel only if France renders the same equivalent that the United States has given—a reduction in Argentine hides. Or, if France imports no hides and Argentine decides that the same compensation is not equivalent, France will have to give additional compensation until Argentine considered the transaction equal. But if the clause be unconditional, Argentine will have to extend the favor purchased from the United States to France for nothing, and wait for her compensation until she can claim freely a favor which some other nation has purchased from France. It will be seen that there is an equivalent extended in each case: with the conditional form of the clause it is immediate and specific; with the unconditional form it works out by general averages over long periods of time.

The fact that the words that distinguish the conditional form, "freely, if freely made, or on allowing the same compensation, if conditional" are in the form of a condition, is unfortunate, for it has given a name to that form of the clause which is misleading. A condition is usually a limitation attached to some provision, and the condition in the most favored nation clause has been so considered—as a specialized form of limitation which by reason of its importance was given the dignity of a separate classification. From this conception it follows that the unconditional form is to be regarded as the simple, elemental, basic form of the clause, and that the conditional form is the result of the addition of a conditional limitation to the originally unconditional form of the clause; and from this the conclusion is reached that the conditional form is no more than an aberrant form originally conceived by men untrained in the law of nations and maintained by short-sighted stubborness against all reason. This is actually the attitude of the majority of writers on the clause.

But if the clause be carefully studied, it becomes evident that the words of the so-called condition are not words of limitation at all, but words of description only; that instead of attaching a condition to be satisfied before most favored nation treatment will be granted, they are really distinguishing between two methods of according most favored nation treatment.

Treaties generally, and commercial treaties especially, are business transactions, not deeds of gift. Each of the concessions granted in a commercial treaty is granted for an adequate consideration (provided, of course, there is no duress). The most favored nation clause

is no more than a general promise of a class of favors, and we must, therefore, expect to find consideration for it as well as for any of the simpler favors. That is the purpose of the form of the clause as conditional or unconditional—to provide for the payment of the consideration, and to describe the method of payment. It is no more significant than the clauses of a land contract, or of an ordinary contract of sale,which provide for the amount and the manner of payment of the consideration. If the clause is conditional, payment must be cash down, or C. O. D. If the clause is unconditional, payment is deferred until the nation granting the favor has an opportunity to strike a balance by obtaining another favor from the nation which received the first favor. The conditional clause is comparable to a simple barter, or sale for cash. The unconditional form is analagous to the complicated modern system of a great number of sales on credit among a great number of parties: at the end of each month, or year, or whatever period is set, the settlement is made. The bills of exchange cancel each other, and everyone is paid without the transfer of any appreciable quantity of cash.

It is obvious, therefore, that the clauses are the same in principle: just as a sale is a sale, no matter how the consideration is to be paid, so is a most favored nation clause a most favored nation clause, no matter how the consideration is to be paid. Neither form is more naturally or more purely a most favored nation clause than the other. Of course, it is true that the conditional form is characteristic of a cruder and more primitive state of international economy than is the unconditional, just as a sale by barter is considered to be more characteristic of a savage than of a highly civilized people; but this is not true of the clause itself, for the different forms are the same in principle, no matter what the circumstances in which they appear.

From this it appears at least reasonable to believe that in certain circumstances, the conditional form of the most favored nation clause is the only feasible, or perhaps the only possible, form of the clause to use, just as in certain states of human society, sales by barter or strictly cash are the only feasible or only possible forms of sale. It is equally reasonable to believe that in certain other circumstances, the unconditional form of the clause is the only feasible, or even the only possible, form of the clause to use, just as in modern commerce practically all sales of any size at all are on credit—it is impossible to carry on modern business on a cash basis. Just what are the circumstances under which an unconditional form is desirable, and what are the circumstances under which the conditional form is desirable?

In the first place, it should be said that the unconditional form of the clause is much quicker, more efficient, and satisfactory to all concerned if it will work. The claiming of a favor under the conditional clause necessitates a great deal of negotiation: first, to determine whether or not the favor was gratuitous or for compensation; if so, whether the rendering of the same compensation will be equivalent; if not, what will be a sufficient consideration; and finally the claimant nation must enact the legislation necessary to carry out its part of the bargain. This may take years, and in the meanwhile the original situation may have long since disappeared—in some instances the final settlement has been like paying for a horse which is not only dead, but has gone a long way toward becoming a fossil. The unconditional form, on the other hand, is automatic; in most cases the favor is extended as a matter of course, without even the formality of a request; in any event, it is never more than a very short time before each individual case is settled. The unconditional clause is, therefore, the more desirable whenever it will work, and the question becomes: when does the unconditional form of the clause cease to work fairly? For, of course, there are times and circumstances during which it will not work, just as the modern credit system will break down in some circumstances—as it did in Germany and Russia when their currency inflation bubbles were reaching their greatest size, and most ordinary transactions were carried on by simple barter.

The answer is to be found in the method of operation of the unconditional clause. It works by suspending payment and then, after a considerable period of time, striking a balance for each nation between favors received and favors granted: that is, it proceeds on the theory that during a considerable period of time, each of a group of nations will receive about as many favors as it is required to give. Thus, if ten nations all have most favored nation relations with each other, and each nation grants ten favors in a year, on the average each nation will probably receive ten favors during each year. A balance is thus maintained and everyone is even.

But if there are one or two, or eight or nine, of the nations in the group which are not granting favors at all, but which are continuing to receive all the favors all the other nations are continuing to give, a dangerous situation is inevitable. One or two nations are getting everything and paying nothing, and trouble is sure to follow. This situation is a direct result of the unconditional form of the clause. Another case in which the unconditional form is unsatisfactory is where, in a period of high nationalistic feeling, when there are unsur-

mountable tariff barriers everywhere, and no reductions are being granted by anybody, a nation or group of nations undertakes to compel the other nations to lower their tariffs. The only feasible method of doing this is for the crusading nation to raise its barriers to a prohibitive height, and then offer to lower them if the other nations will do the same. It is substantially the same policy as that which the United States has been pursuing with regard to naval disarmament—a threat to build a big fleet, and then a promise not to do so in return for similar promises from the others. Under an unconditional most favored nation clause system this will not work at all, for it will take the sacrifice of all of the liberal nation's tariff wall to effect the removal of one tariff wall of the conservative nations. The other conservatives will receive the benefit of both reductions and will have given nothing. [Of course, there is a great deal of doubt as to whether in fact they would receive any benefit, since, if they shut out the trade from other countries, they could not for very long continue to take advantage of the removal of the tariff barriers in those other countries, and their supposed advantage would in reality come to mean nothing. But since in practice the aggressive nation would dispense one-tenth of its favors to each of the other nations, and receive one-tenth of its consideration from each of them, the situation is greatly obscured. At any rate legislatures and those who control them do not generally consider the inner workings of the instruments they use, and the real facts are rarely known, so the advantage seems very real. In many cases, of course, it is real; and for the purposes of this paper, it may be taken as always real.]

The result, therefore, would seem to be: where one nation is granting about as many and as valuable favors as any other, the unconditional form is the better; if this is not the case, then the conditional form is the better. The equality in the distribution of favors would come about only when all the nations in the system were pursuing substantially the same policy. Therefore, the general rules would seem to be: where the same policy is being pursued by all the members of the group, the unconditional form is the better; where different policies are being pursued, the unconditional form does not work evenly and tends to produce dissatisfaction; where there is an active conflict between two policies, the unconditional clause does not work at all, and the use of the conditional form of the clause is called for.

The introduction and rise of the conditional form of the clause was due to the actual occurrence in practice of the last of these

situations: an attempt by the United States to break down the impossible tariffs and ironclad monopolies which the mercantile system, then at its height, had established in Europe.[18] For the first two hundred years of its existence the clause was purely unconditional.[19] There had been occasional crude quasi-most favored nation clauses in antiquity,[20] and a few among the commercial cities of the Mediterranean during the Middle Ages,[21] but the clause did not come into any sort of regular use until the seventeenth century, with the rise of the mercantile system, and the bitter competition for trade and colonies that it brought in.[22] All the nations of Europe whose interest in trade had been sufficient to put most favored nation clauses in their treaties were pursuing the same policy: that is, getting all the colonies they could, establishing monopolies in them, and erecting prohibitive barriers against the rest of the world. Consequently, the unconditional form of the clause, since it would operate equally on all of them, was the proper form of the clause for them, and it was the form that was used. Of course, it would be carrying theory to an unreasonable extreme to suppose that there was any such idea actually in the minds of the negotiators of those early treaties. Most probably, since the commercial treaties had really little to do with commerce, but nearly always followed or preceded a war or a royal marriage, or something of the sort, no one thought about the form at all. Consequently, the clause was put into crude forms, differing widely with each treaty, with no purpose except that it should secure against discrimination. The result was that the clauses were all unconditional, or rather, nonconditional, since all the primitive forms of the clause are short and simple. Since all the nations were pursuing the same commercial policy, the unconditional clause worked very well; there being no fault to find with it, there was no attempt to improve upon it, and by 1775 it had become so crystallized, that anything but an unconditional clause was unthinkable.

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[18]CULBERTSON, *op. cit. supra* note 1, Ch. I & II; *Page, The Earlier Commercial Policy of the United States*, (1902), 10 JOURNAL OF POLITICAL ECONOMY 161; RABBENO, THE AMERICAN COMMERCIAL POLICY (1895); TAUSSIG, TARIFF HISTORY OF THE UNITED STATES (1900).

[19]"Wir konnten so vieler handelspolitischer Abmachungen des 18. Jahrhunderts mit der Meistbegünstigungsklausel habhaft werden, dass wir glauben, man dürfe das 18. Jahrhundert das Jahrhundert der unbedingten Meistbegünstingung bezeichnen." GLIER, *op. cit. supra* note 1, 24.

[20]A complete collection of these treaties is to be found in VON SCALA, STAATSVERTRAGE DES ALTERTUMS (1898); a shorter account in WALKER, HISTORY OF THE LAW OF NATIONS (1899); and a good account for the period after Justinian in HEYD, HISTOIRE DE COMMERCE DU LEVANT AU MOYEN-AGE (1886). See also I Kings 20:34.

[21]Cavaretta, *op. cit. supra* note 1, 59.

[22]*Supra* note 19.

When the United States entered the circle of nations, however, it brought with it an entirely new attitude toward commercial and international relations. It was the first of the new nations—nations of large territories, unlimited supplies of agricultural products and raw materials, but of no manufactures to speak of. It, therefore, depended almost entirely on Europe for its manufactured goods. In order to be able to pay for them, of course, American products had to be shipped to the manufacturing countries. These were chiefly raw materials and agricultural products. But the European nations, firmly set in the mercantilist doctrines which ruled at that time, had erected formidable barriers against all sorts of imports, in favor of the monopolies granted in their own colonies. It was extremely hard for the United States to market its products in Europe and extremely hard to get a balance with which to pay for the European manufactures. Its policy, therefore, was to break down these barriers as much as possible—rather a startling object when the present policy of the United States is considered. The only way this could be done was to negotiate reciprocity treaties, to trade reduction for reduction. In that way the walls might be gradually broken down, and American products would stand a fair chance. But we were dealing with eight or ten nations. Not one of them would reduce anything of its own accord, and purchase was the only possibility. If an unconditional form of the most favored nation clause were used, the United States would have to extend to all, the favors she extended to each. If we had wanted to get England's tariff as low as possible, we would have had to give to her as great reductions as we received. If England reduced her tariff to nothing by an agreement with us, we would have to do the same. All the other nations with whom each of us dealt would receive all the favors England or the United States gave each other, and the result would be that neither country would have more favors to grant, and the rest of the world would still have their barriers as high as ever. In practice, however, it would be more likely that the United States would get favors from all the countries, so that the result of the sacrifice of all of our tariff would produce but a ten per cent reduction in the tariffs of each of the other ten nations of the system.

No question arose as to the fairness of the unconditional clause in theory, nor was there any question of discrimination. The clause would not work in the circumstances. The United States wanted favors granted by all, and the rest of the world was content if no favors at all were granted. The only effective policy from an American point of view was useless, for there would be no chance to even

the balance by securing freely favors granted by the European nations among themselves, for there would be no such favors. In short, at the time, the unconditional most favored nation clause was unworkable for the United States.

To meet this situation, it was necessary to devise a way to make each of the European nations pay the full consideration for every favor—so that the United States might compel every nation in most favored nation relationship with it to lower its rates for the United States as the United States lowered its rates for it. The conditional form was the result of this need.

The first of the conditional clauses was put into the treaty of 1778 with France.[23] It was of the typical form which later became known as the standard American conditional clause. It marks the beginning of a new period in the history of the clause as a whole, and furnishes the basis for future divisions, for the remainder of the history of the clause may be divided into periods according to the attitude of the world toward the conditional form of the clause. From 1778 to 1825 the United States alone used the conditional form as a policy; between 1825 and 1860, first the Spanish-American republics and then the great majority of European states adopted the conditional form; after 1860 all the world abandoned the practice of a conditional most favored nation policy, but the United States still defended it in theory; in 1922 even the name was dropped.

During the first period the United States managed to get conditional clauses into its commercial treaties with France, Sweden, Prussia, the Netherlands and the Barbary States; and contended also that all the rest of the nonconditonal clauses she had negotiated were to be construed as conditional.[24] At the same time she pursued the contemplated policy, very much the same sort of policy that is now being pursued with regard to naval disarmament: established a high tariff to show what could be done if necessary, and then offered to lower it to anyone who would reciprocate. There were no startling results, of course, but there seems to be no doubt that the policy was rather successful and did a great deal to advance the cause of liberalism in trade.[25]

After 1820 the Spanish American states began to revolt, and when their governments were set up, the United States was taken more or less as a model. Consequently, a great many American peculiarities

[23] *Supra* page 7 and note 13.

[24] There were six expressly conditional clauses; three equivocal clauses; and four nonconditional clauses, three of them with Great Britain. All of them were construed by the American State Department to be conditional.

[25] *Supra* note 19.

were reproduced in South American governmental matters, among which was the American attitude toward the most favored nation clause. Of course, many of the same reasons for the use of the conditional form of the clause which had induced its adoption by the United States, existed in the case of the South American States, but it seems very doubtful that any of them influenced the South American attitude, for they never appeared to understand the clause, and never defended their policy with regard to it.

With all these nations using the conditional form, and successfully as far as liberalizing tariff restrictions was concerned; and with the rise of sentiment for freer trade in Europe itself, the less conservative countries of Europe began to consider the conditional form of the clause. Beginning about 1835, and spreading very rapidly, the conditional form soon was in the overwhelming majority, all of Europe except the traditionally conservative Great Britain and Scandinavia accepting it.[26] The result of this was, naturally, to put all the nations in the same category again. Instead of the United States being alone in the world, all the world but England and Scandinavia were with her, and even they had begun to adopt a liberal policy.[27] Therefore, the unconditional clause became desirable again. England, who had gone much further than any of the other countries once she got started, had absolute free trade, and was becoming embarrassed by the use of the conditional clause; for with free trade, she had no favors left with which to negotiate, and was not being well treated. She threw all her influence into making the clause unconditional, and since the time was just right for such an attempt, she succeeded. After the first unconditional clause, in the Cobden Treaty between England and France in 1860, a literal flood of unconditional treaties swept the conditional form out of practical existence. The United States still adhered to it, and the more supine of the Spanish American states followed suit, but it was gone in all but name. Even the United States abandoned its practice; for since 1860 at least, the United States has had but a single tariff—which is only another way of granting unconditional most favored nation treatment, since all nations receive the same treatment, whether they pay for the opportunity of being equal or not.

Just before the World War, however, the situation was becoming

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[26]Of seventy-seven European commercial treaties of this period, of sufficient importance to be listed, sixty were conditional. Glier, *op. cit. supra* note 1, Ch. VIII, p. 92–129.

[27]Three of Great Britain's ten treaties are conditional, and Sweden had one such clause, in her treaty with Greece in 1836. Between 1845 and 1850 the traditional British free trade policy beeame fully established.

embarrassing. Since the United States was in fact practicing unconditional most favored nation treatment, the other nations were willing to let well enough alone and ignored the conditional form of the most favored nation clauses in their American treaties. But the United States had been annoying the world for some time with a series of tariff provisions which violated every known form of the most favored nation clause—geographical discriminations, penalty duties, etc.—and further, was beginning to be a formidable commercial rival to many of the European countries. It began to look, therefore, as though someone might turn the conditional form of its clauses against the United States for a change, for during the century preceding, the American State Department had by some remarkable arguments shown that it was possible to deny any or all claims under a conditional clause arbitrarily. Arguments had been developd that would shut out anything. After the War, the United States realized that only circumstances had saved her from annoying results from forms of her clauses, that any nation who felt a little spite could make things embarrassing, and that the circumstances which had formerly protected her were not likely to continue much longer. Therefore, in 1922, the conditional policy was definitely abandoned, and an aggressively unconditional policy inaugurated. A considerable number of new unconditional agreements have been negotiated, and more are in progress of negotiation all the time.[28]

It might seem now that, with no nation on earth supporting the conditional form, it has become extinct and is gone forever; and such is the attitude of most of the writers on the clause. This appears, however, to be a little optimistic. In 1913 it would have seemed incredible that barter should assume the position of importance it did in Germany and Russia in less than ten years; however, we know

[28]The following treaties, all of which were considered by the United States to be conditional, were in force in 1914: Argentine, 1853; Austria, 1829; Belgium, 1875; Bolivia, 1858; China, 1903; Colombia, 1846; Costa Rica, 1851; Congo, 1891; Denmark, 1826; Ethiopia, 1903; Great Britain, 1815; Egypt, 1884; Greece, 1837; Hanseatic Republics, 1827; Honduras, 1864; Italy, 1871; Japan, 1911; Ottoman Empire, 1830; Paraguay, 1859; Persia, 1856; Portugal, 1910; Prussia, 1828; Sweden and Norway, 1827; Siam, 1856; Tonga, 1886; Tripoli, 1805; and Morocco, 1837. A recognized unconditional treaty, with Serbia in 1881, was also in force, and still is. Two other unconditional treaties, with Switzerland in 1850 and the Orange Free State in 1871, were abrogated, the first by the United States and the second by the absorption of the Orange Free State into the British Empire.

After 1922, the aggressively unconditional policy resulted in three treaties: with Germany and Hungary in June 1924, and with Turkey in August 1923, of which only the German treaty has been ratified to date. There are also nine unconditional most favored nation agreements with various countries concluded by note: with Brazil, Oct. 1923; Czechoslovakia, Oct. 1923; Nicaragua, June 1924; Guatemala, Aug. 1924; Poland, Feb. 1925; Finland, May 1925; Esthonia, Aug. 1925; and Rumania, Feb. 1926.

that it happened. It is at least possible that a time will come in the history of the world when the affairs of nations will be in the same position in which they were in 1780. When that time comes, there may be another period when the conditional form of the clause will be used. It will never be anything more than a temporary expedient, for one of its peculiarities is that, like the honey-bee which is supposed to sting once and die, the conditional clause is destroyed by its own success—its purpose is to make commercial policies uniform, and when those policies are uniform, it cannot exist. The conditional clause is gone now: it may never come back, and if it does it will not stay; but it is not dead—only dormant.

The record of the American State Department in its interpretation of the most favored nation clause and its conduct of the debates over interpretation is nothing to point to with pride, either from the standpoint of legal soundness of the arguments advanced, or from the standpoint of good faith and willingness to fulfill its promises. Its use and defense of the expressly conditional form of the clause is easily explicable and perfectly justified, as we have seen; the actual cases, however, have not dealt with the express clauses—they are so clear and provide so unmistakably for the ends desired that no question could arise. The disputes have all been over indefinite forms of the clause, and the status of tariff provisions framed to discriminate without actually violating the letter of the most favored nation clause.

It seems safe to say that the United States has been in the wrong, if not technically, at least morally, in nearly all the disputes which have been raised over interpretation of an indefinite most favored nation clause. The first, most important, and really the only well contested debate on this subject was that over the eighth article of the Louisiana Cession Treaty of 1803.[29] The text of the clause is as follows:

> Art. VIII: In future and forever after the expiration of the twelve years all ships of France shall be treated upon the footing of the most favored nation in the ports above mentioned.

The ports mentioned were those of Louisiana, and at the end of the twelve years English ships were paying no duties at all in New Orleans, and French ships were paying very high duties—due to a treaty concluded in 1815 with Great Britain which provided for reciprocal national treatment of shipping. France immediately

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[29] *Supra* note 9.

protested, and her claim was denied on the ground that favors granted for an equivalent—reciprocity in this case—did not come within the provisions of the most favored nation clause. This was the first time such a contention had ever been put forward, and France was unprepared; but the question was debated well, and lasted for fourteen years. There is a tremendous amount of correspondence,[30] but the American argument boils down to the definition of the word "favor," which we discussed above, and the French argument comes in the end to the same point. The United States contended that a favor meant an advantage rendered gratuitously without compensation; that a bargain or a sale was not a favor; that the advantage here in question was not a favor, but a bargain or a sale; that therefore England was not favored; and that France could not claim the advantage on the ground that England was being more favored than herself. The French argument also goes to the meaning of "most favored nation treatment." It is perhaps best expressed in M. de Neuville's own words:[31]

> "Is there then but one way of obtaining the right to be so treated? . . . Upon consulting the various treaties entered into with European powers I find in almost all of them a definition of what is meant by being treated upon the footing of the most favored nations and these definitions are so precise that I do not see how any controversies can arise on that point. In most cases relating to the rights and privileges of the most favored nations the parties even go on to explain that the favor shall be free if freely granted to another nation or upon granting the same compensation if the concession be conditional. From which I conclude that a right to be treated upon the footing of the most favored nation may be enjoyed in two ways, either gratuitously or conditionally . . . . The conventional law of nations admits particularly in the United States, that this treatment may be obtained not only gratuitously but conditionally . . . . France has a right to enjoy . . . the treatment of the most favored nation, whether this nation be favored gratuitously or conditionally . . . ."

From a strictly logical point of view, the American interpretation is legally more sound; if not, it is at least equally sound. But the use of such an argument in the circumstances was not very honorable: for the United States knew that for over two hundred years all the nations of the earth had been interpreting such language in a directly opposite manner; and they must have known that when the treaty was concluded, the French negotiators had the opposite interpretation

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[30] AMERICAN STATE PAPERS, FOREIGN RELATIONS, Vol. V., p. 150 *et seq.*, 640 *et seq.*

[31] AMERICAN STATE PAPERS, FOREIGN RELATIONS, V:171.

in mind, and thought that the clause provided for unconditional most favored nation treatment. The State Department seems guilty of a clear breach of faith, either in negotiating a treaty when they knew its wording was deceiving the other party, or in advancing such an argument to get out of a promise contracted in good faith.[32]

In 1831 a claim of Austria was denied,[33] but this seems to have been proper, for the clause was expressly conditional. Several times, when claims were made under expressly conditional clauses, the justice of counter-claims for the equivalent was recognized—for instance, with Colombia in 1826,[34] and with Nicaragua in 1872.[35]

In 1875 the United States and Hawaii agreed to give each other certain reciprocal advantages in the matter of tariff rates, and Hawaii promised not to grant the same advantages to any other nations on any terms.[36] Most of the European nations protested, and quite a number of disputes arose from it. On the Hawaiian side, the most serious dispute was with Great Britain, who claimed under a clause with expressly conditional form.[37] The claim was properly refused when it was for an unconditional extension of the reductions, but Great Britain modified her demands and asked only for the opportunity to get the reductions by paying the same price the United States had paid. This placed Hawaii in a dilemma, since she had then to break either her American Treaty by complying, or her English treaty by refusing. The United States stood pat, but Hawaii was able to compromise with Great Britain, admitting the justice of the British position, but securing enough discriminations to satisfy the United States. Though the United States was within her legal rights safely enough, her conduct in inducing Hawaii to break her contract with Great Britain cannot be looked on as very ethical.

The United States itself became involved directly in a number of

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[32]CULBERTSON, *op. cit. supra* note 1, 65; HEROD, *op. cit. supra* note 1, 8–27; HORNBECK, *op. cit. supra* note 1, 31; VISSER, *op. cit. supra* note 1, 273.

[33]House Ex. Doc. No. 176, 22nd Cong., 2nd Sess.

[34]House Ex. Doc. No. 144, 19th Cong., 1st Sess. See also, 5 MOORE, DIGEST OF INTERNATIONAL LAW (1906), 260.

[35]FOREIGN RELATIONS OF THE UNITED STATES, 1873, p. 743.

[36]Art. I: For and in consideration of the rights and privileges granted by his Majesty in the next succeeding article of this convention and as an equivalent therefor the United States of America hereby agrees to admit all the articles named in the following schedule, the same being the growth and produce of the Hawaiian Islands into the ports of the United States free of duty.

Art. II: identical, *mutatis mutandis*.

Art. V: It is agreed, on the part of his Hawaiian Majesty that so long as this treaty remains in force, he will not grant any favor . . . nor make any treaty by which any other nation shall obtain the same privileges relative to admission of articles free of duty hereby secured to the United States.

[37]Great Britain—Hawaii, Treaty of 1851, Arts. III and IV.

disputes over the discriminations made by this Hawaiian reciprocity agreement, among which are the only two cases in which the question of the interpretation of the most favored nation clause has been before the Supreme Court. Most of the European nations immediately demanded for their nations the favors we had granted to Hawaii, which were mainly the abolition of duty on sugar. The United States denied them all on the grounds, first, that the favors were granted for a consideration and were not to be extended except for consideration; and second, that since part of the consideration was "love and affection" (that is, geographical and political propinquity), no other nation could hope to render an equivalent, and therefore the reductions would not be extended to any other nation.[38] Since none of the other nations were willing to extend the equivalent, this last statement is pure *dictum*; but even as *dictum*, it is absolutely indefensible, since it would totally destroy all the effect and benefit of the clause if a nation could say that not even by rendering all the equivalent in its power could another nation hope to extend a favor granted to a third.

The two cases referred to above are *Bartram v. Robertson*,[39] and *Whitney v. Robertson*,[40] in both of which the American reduction on Hawaiian sugar was claimed, in the first for Danish sugar from St. Croix, and in the second for sugar from San Domingo. The decision in the *Bartram* case seems to be correct, for there is an expressly conditional clause in the treaty relied on, and Denmark had not offered the requisite equivalent. In the *Whitney* case, however, the treaty relied on contained no expressly conditional clause, but only a nonconditional clause promising that no higher duties would be levied on Dominican products than on the products of any other country. The Supreme Court denied the claim on the broad ground that no advantages obtained by an equivalent came within the provisions of any form of the most favored nation clause, relying on *Bartram v. Robertson*. But since that case had been decided on, and was justifiable on, the ground only that a conditional clause controlled a nonconditional clause in the same treaty, the holding that it made no difference whether a conditional clause was present or not, was not only indefensible from the standpoint of principle, but ignored the basis of the decision which the same court had made in the *Bartram* case only two years before.

The final dispute over this phase of the interpretation of the clause

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[38] 5 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 263.
[39] 122 U. S. 116, 7 Sup. Ct. 1115 (1886).
[40] 124 U. S. 190, 8 Sup. Ct. 456 (1887).

occurred in 1898 with Switzerland, over the clauses in her treaty of 1850.[41] They were four in number, the first of which provided for most favored nation treatment as defined in the subsequent articles, and the rest of which defined most favored nation treatment as unconditional. The United States refused to recognize even such a clause as unconditional, and was not going to allow the claim, until the Swiss Government was able to show from the record of the negotiations leading up to the treaty, that both sides had intended the treaty to be unconditional. But the United States, though yielding, immediately abrogated the treaty.

Another questionable decision arose from this case, for when Switzerland obtained these reductions freely under her unconditional clause, other nations claimed the favor given Switzerland, under their conditional clauses. The United States admitted that technically they were perhaps right, but that this Swiss case was an exception—the first favor the United States had ever freely to grant—and that therefore it should be considered such an exception that no most favored nation claims could be advanced on it.[42] This seems to be equivalent to saying that when a nation is so careful not to give anything away as the United States had been, when something is given away, it must be treated as an act of God.

The attitude of the United States in interpreting the clause as not applying to cases in which there have been attempts to discriminate in fact without actually violating the letter of the clause, is no more commendable. There are several forms of these discriminations, and the United States has been guilty of using and defending all of them, especially the two most flagrant: geographical discriminations, and penalty duties.

The substance of a geographical discrimination is that it provides a certain rate of duties from all ports and countries within a certain district, and another rate for the rest of the world.[43] Norway tried such a plan in 1828,[44] her navigation law of that year providing one tonnage tax for European ports outside the Mediterranean, another for Mediterranean ports, and a third for the rest of the world, the duties increasing with the distance. The United States protested that both American navigation and American products, which would have to be shipped in vessels paying higher taxes, were being dis-

[41] 5 MOORE, DIGEST (1906), 283. See also HORNBECK, *op. cit. supra* note 1, 33; UNITED STATES TARIFF COMMISSION, *op. cit. supra* note 1, 428; VINER, *op. cit. supra* note 1, 120.

[42] *Supra* note 41.

[43] CULBERTSON, *op. cit. supra* note 1, 76.

[44] FOREIGN RELATIONS, UNITED STATES, 1887, 1038–1053.

criminated against, and, after some debate, Norway recognized that the United States' contention was sound, and repealed the offending provision. Eight years later England imposed a duty on rice at one rate from Africa, and at a much greater rate from the rest of the world. The United States again protested, and it was again conceded that the United States was right.[45] In 1880, however, the United States established two districts for the payment of the tonnage tax, from one of which, including North and Central America, the rate was to be three cents a ton, and from the rest of the world, six cents a ton.[46] Practically all the nations of the world protested against this, but the United States absolutely denied that there was any discrimination, since all vessels coming from a single port, no matter what the nationality, would be treated alike. The absolute untenability of this quibble is apparent without argument, but the United States adhered to it, and refused any relief. The State Department did, it is true, recognize that since Norway had in exactly the same circumstances and under the same treaty, conceded the same position to the United States which she was now demanding from the United States, it was in honor bound to give in to Norway at least. The Commissioner of Navigation, who alone had the authority to lower the tax, was not interested in the honor of the State Department, and refused to modify it.[47]

The provisions for penalty duties prescribe an increase of duties on products from countries which refuse to do some positive act in favor of the United States.[48] The Tariff Act of 1890 contains a good example of this form of discrimination: it provides that the duties on certain products shall be reduced, but shall be maintained on the products of any country whose tariff level the President deems mutually unequal and unreasonable; and the substance of which is that the President may authorize discriminations against countries which have too high a tariff level, even though there is no hint of discrimination against the United States.[49] In short, the act provided that in case the American government disapproved of the domestic fiscal policy of a country, it could consider itself relieved from the obligations of the most favored nation clause. Of course, there was a good legal argument to justify the contention: the possession of

[45]House Ex. Doc. No. 278, 28th Cong., 1st Sess. HEROD, *op. cit. supra*, note 1, 70.

[46]Act of June 24, 1884, Sec. 14.

[47]Opinions of the Attorneys General, 18:260 and 18:382. Also House Ex. Doc. No. 74, 50th Cong., 2nd Sess.

[48]CULBERTSON, *op. cit. supra* note 1, 79 *et seq.*; HORNBECK, *op. cit. supra* note 1, 87; MCCLURE, *op. cit. supra* note 1, 144; VISSER, *op. cit. supra* note 1, 276.

[49]Tariff Act of 1890, Sec. 3.

what the President considered a reasonable tariff (ours was one of the most unreasonable on earth at the time) was a condition attached to the favor of receiving the reduction; the United States was willing to grant the favor on compliance with the condition, just as it was always willing to grant favors purchased for a consideration on the extension of a like consideration. Colombia and Haiti, whose internal condition required high tariffs for revenue, were proscribed; they protested vigorously, but were denied.[50] The fact was that half a dozen nations were receiving more favorable tariff treatment than these two countries, and had received it freely, without either consideration or negotiation on their part. How such a favor could be withheld from Colombia or Haiti, therefore, with either a conditional or an unconditional clause, is impossible to understand. The United States did not attempt to explain it: Colombia and Haiti were too small to cause any trouble in any event.

Germany was held up with about the same sort of gun—a provision that salt would be admitted duty free from countries which admitted American salt free.[51] Germany had a small tax on salt exactly equal to her domestic excise tax on German produced and consumed salt. We demanded that she repeal this tax or be discriminated against here: practically a demand that she purchase equal treatment in our ports by discriminating against her own industries. We had to argue to sustain this contention, but the German claim was denied. The transaction was, of course, in flagrant violation of the most favored nation clause, and has never been defended, even in the United States.[52]

Countervailing duties on bounty-fed products—that is, the imposition on products from countries which paid bounties on such products of a duty exactly equal to and countervailing the bounty—seem also to be within the operation of the most favored nation clause, since they clearly provide for different rates of tariff from different countries, depending entirely on the domestic and internal policy of that country. But since bounties are generally highly undesirable, and since countervailing duties seem to be the only feasible means of stopping such dumping, there is a practical justifi-

[50]Herrera, who was Minister to the United States from Colombia, devotes a whole chapter to this incident. See also CULBERTSON, *op. cit. supra* note 1, 76; MCCLURE, *op. cit. supra* note 1, 182; UNITED STATES TARIFF COMMISSION, *op. cit. supra* note 1, 422.

[51]Tariff Act of 1894, Paragraph 608, Free List.

[52]CULBERTSON, *op. cit. supra* note 1, 79; HORNBECK, *op. cit. supra* note 1, 87; MCCLURE, *op. cit. supra* note 1, 144; UNITED STATES TARIFF COMMISSION, *op. cit. supra*, note 1, 428; VINER, *op. cit. supra* note 1, 118; VISSER, *op. cit. supra* note 1, 276. See also Mr. Olney's opinion; 21 Opinions of the Attorneys General, 80, 82.

cation for them. Many other nations have defended their use, especially Great Britain, on grounds of practical necessity.[53]

Two other forms of discrimination—minute classification in tariff schedules, so that the goods from one country fall into one class, and essentially the same product from another country into another; and the imposition of prohibitions on the importation of certain articles, supposedly on sanitary grounds, but really to stifle competition—are equally reprehensible, but they cannot very well be reached by the most favored nation clause, since there is absolutely no discrimination on the face of the provisions. The discrimination is furnished by extrinsic circumstances. But the attitude of the United States toward these provisions has been very good. Of course it has used them a little, but not nearly to the extent Europe has, for the European nations seem to confine their discriminations and violations of the clause to the more subtle and elusive methods.

On the whole it may be said that, though the original introduction of the conditional form was justified, the American interpretations of conditional clauses, and indeed its interpretation of the clause under any circumstances, has been marked too often by bad faith, and by a tendency to evade any promise whatever on the subject. A more liberal policy has been evidenced since 1923, however, and it is to be hoped that the change is permanent. It is also to be hoped that the United States may adhere to the World Court, whose jurisdiction of such disputes would go a long way toward preventing any future discriminations, and keeping the United States from any temptation to rely on its great strength to the disadvantage of smaller nations.

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[53]CULBERTSON, *op. cit. supra* note 1, 73; VISSER, *op. cit. supra* note 1, 167. See also KAUFMAN, WELTZUCKERINDUSTRIE (1904); *Sheaperd*, 8 JOURNAL OF COMPARATIVE LEGISLATION, (N. S.) 231 (1901). A report of a conference on the subject is to be found in the Blue Book (Great Britain), C. 5577 (1888).