

“RECIPROCITY” TREATIES—FAVORED-
NATION CLAUSES

LETTER TO HON. BOIES PENROSE, CHAIRMAN
OF THE COMMITTEE ON FINANCE, FROM
THE SECRETARY OF STATE, RELATIVE
TO FAVORED-NATION CLAUSES IN
THE TREATIES OF THE UNITED
STATES, PARTICULARLY
RECIPROCITY



PRESENTED BY MR. PENROSE

MAY 16, 1911.—Ordered to be printed

WASHINGTON

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MAY 2, 1911.

The Hon. BOIES PENROSE,
Chairman Committee on Finance,
United States Senate.

SIR: In compliance with your oral request for a statement showing the precedents relating to the construction to be placed on the most-favored-nation clauses in the treaties of the United States, with particular reference to the relation to reciprocity arrangements, I have the honor to inclose herewith a memorandum on this subject prepared by the Bureau of Trade Relations of the department.

The various precedents compiled in the inclosed memorandum show that the policy of the United States Government has been uniform and consistent for a century past. The position of the United States has been so frequently reiterated in diplomatic correspondence that it would seem to be well known to the foreign governments.

Inasmuch, however, as the treaties of the United States are, when duly ratified and put into force, the supreme law of the land, it is of the highest interest to ascertain the decisions of the competent courts. This question of the construction of the most-favored-nation clause has been carefully considered and decided by the Supreme Court of the United States in at least two cases, and quotations from the decisions in these cases are contained in the inclosed memorandum. These decisions support fully the contentions of the Department of State made hitherto on numerous occasions. The decision of the Supreme Court in the case of *Bartram v. Robertson* relates to the most-favored-nation clause with the equivalence feature contained in our treaty of 1826 with Denmark, while the case of *Whitney v. Robertson* relates to the most-favored-nation clause without equivalence feature contained in our treaty of 1867 with the Dominican Republic, which was subsequently terminated. The recent decision by the Court of Customs Appeals relates to the unmodified most-favored-nation clause in our treaty of 1815 with Great Britain. The position of the Government of the United States in this matter would therefore seem to be established definitely and unequivocally.

I have the honor to be, sir, your obedient servant,

P. C. KNOX.

MEMORANDUM FOR THE SECRETARY OF STATE RELATIVE TO THE
CONSTRUCTION OF THE MOST-FAVORED-NATION CLAUSE IN TREA-
TIES OF THE UNITED STATES.

By JOHN BALL OSBORNE.

I beg to submit the following historical statement compiled from the records of the department and reports of court decisions in regard to the position of the United States Government as to the proper

construction, with relation to reciprocity arrangements between the United States and foreign countries, of the provisions in the various commercial conventions of the United States governing reciprocal tariff treatment of imports and exports, commonly designated "the most-favored-nation clause."

This clause occurs, in reciprocal form, in 28 existing treaties of the United States and in unilateral form and without obligation on the part of the United States in 3 existing treaties. In 21 of the treaties containing the reciprocal form the most favored-nation clause is modified and explained by what is commonly called "the equivalence clause," which is usually contained in a separate article sometimes widely removed from the main clause, although in a few instances it is combined in the same article.

The basic clause which in 4 treaties is unaccompanied by the equivalence clause consists of mutual guaranties against the imposition by either party of other or higher duties on imports from or exports to the other party than are imposed on like goods imported from or exported to any other country. The equivalence clause provides that commercial favors granted to third countries shall be enjoyed by the party claiming most-favored-nation treatment, gratuitously, if so granted, or for equivalent compensation if granted for a price.

The obvious purpose of the equivalence clause is to secure identity of treatment under identical or similar circumstances.

The following table contains a complete list (corrected to May 1, 1911) of the treaties in force of the United States containing the most-favored-nation clause respecting tariff treatment of imports and exports, arranged in three groups, namely, those (1) with the equivalence clause; (2) without the equivalence clause, and (3) in unilateral form.

Table indicating provisions in existing conventions of the United States respecting reciprocal tariff treatment of imports and exports.

(1) WITH THE EQUIVALENCE CLAUSE.

Countries.	Concluded.	Articles.
Argentine Republic.....	July 27, 1853	III and IV.
Austria-Hungary.....	Aug. 27, 1829	V and IX.
Belgium.....	Mar. 8, 1875	XII.
Bolivia.....	May 13, 1858	II and VI.
Colombia (New Grenada).....	Dec. 12, 1846	II and V.
Costa Rica.....	July 10, 1851	III and IV.
Denmark.....	Apr. 26, 1826	I and IV.
Hanseatic Republics.....	Dec. 20, 1827	II and IX.
Haiti.....	Nov. 3, 1864	II and XIII.
Honduras.....	July 4, 1864	III and IV.
Italy.....	Feb. 26, 1871	VI and XXIV.
Japan.....	Feb. 21, 1911	XIV.
Liberia.....	Oct. 21, 1862	VI.
Mecklenburg-Schwerin.....	Dec. 9, 1847	VI and VII.
Oldenburg (accession to treaty of commerce and navigation with Hanover of June 10, 1846).....	Mar. 10, 1847	VI and VII.
Paraguay.....	Feb. 4, 1859	III and IV.
Prussia.....	May 1, 1828	V and IX.
Russia.....	Dec. 18, 1832	VI and XI.
Sweden and Norway.....	July 4, 1827	IX and XVII and II of treaty with Sweden, 1783, revived.
Tonga.....	Oct. 2, 1886	II.
Tripoli.....	June 4, 1805	I.

Table indicating provisions in existing conventions of the United States respecting reciprocal tariff treatment of imports and exports—Continued.

(2) WITHOUT THE EQUIVALENCE CLAUSE.

Countries.	Concluded.	Articles.
China.....	Oct. 8, 1903	V.
Ethiopia (Abyssinia).....	Dec. 27, 1903	III.
Great Britain.....	July 3, 1815	II.
Greece.....	Dec. 10-22, 1837.	VIII.
Ottoman Empire.....	May 7, 1830	I.
Persia.....	Dec. 13, 1856	IV.
Servia.....	Oct. 14, 1881	VI.

(3) UNILATERAL CLAUSE.

Egypt.....	Nov. 16, 1884	Sole article and Article I of commercial treaty of Mar. 3, 1884, between Greece and Egypt.
Morocco.....	Sept. 16, 1836	XIV.
Siam.....	May 29, 1856	IX (general language).

While there is considerable variety in the forms of expression of the most-favored-nation clause in the many treaties containing it, the typical phraseology is that of Articles V and IX of our treaty of 1829 with Austria-Hungary, which read as follows:

ARTICLE V.

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 Austria; and no higher or other duties shall be imposed on the importation into the dominions of Austria of any article the produce or manufacture of the United States, than are or shall be payable on the like article, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of the United States, or of the dominions of Austria, to or from the ports of the United States, or to or from the ports of the dominions of Austria, which shall not equally extend to all other nations.

ARTICLE IX.

If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

The language of the above quoted articles is identical with that of Articles V and IX, respectively, of our treaty of 1828 with Prussia, and is substantially repeated, with varying forms of expression, in the other treaties in the list given above.

The construction placed by this Government upon the most-favored-nation clause rests upon numerous precedents extending over a period of about a century, as well as upon decisions of the Supreme Court of the United States. An historical statement of these precedents and court decisions follows.

1817-1823.

The treaty of April 30, 1803, for the cession of Louisiana, provided, in Article VIII that "the ships of France shall be treated upon the footing of the most-favored nations" in the ports of the ceded terri-

tory. By act of Congress of March 3, 1815, the vessels of foreign countries were exempted from discriminating tonnage duties in the ports of the United States, provided that such countries granted reciprocal treatment to American ships in their ports. Great Britain took advantage of this offer of reciprocity and removed her discriminating duties against American shipping. France, however, took no action, with the result that French vessels continued to pay discriminating duties when entering United States ports, while British vessels were exempt. The French minister, in a note to the Department of State, under date of December 15, 1817, claimed that the exemption granted to British shipping should likewise be extended to French shipping by virtue of Article VIII of the treaty of 1803.

Secretary of State John Quincy Adams, in his reply of December 23, 1817 (American State Papers, For. Rel., V, 152-153), defined the position of the United States as follows:

The undersigned is instructed to say that the vessels of France are treated, in the ports of Louisiana, upon the footing of the most-favored nation, and that neither the English nor any other foreign nation enjoys any gratuitous advantage there which is not equally enjoyed by France. But English vessels, by virtue of a conditional compact, are admitted into the ports of the United States, including those of Louisiana, upon payment of the same duties as the vessels of the United States. The condition upon which they enjoy this advantage is, that the vessels of the United States shall be admitted into the ports of Great Britain upon payment of the same duties as are there paid by British vessels.

The eighth article of the treaty of cession stipulates that the ships of France shall be treated upon the footing of the most-favored nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent.

It is obvious that if French vessels should be admitted into ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favored nation, according to the article in question, but upon a footing more favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price.

It is true that the terms of the eighth article are positive and unconditional; but it will readily be perceived that the condition, though not expressed in the article, is inherent in the advantage claimed under it. If British vessels enjoyed, in the ports of Louisiana, any gratuitous favor, undoubtedly French vessels would, by the terms of the article, be entitled to the same.

In a subsequent note, dated March 29, 1821 (American State Papers, For. Rel., V. 163-165), Secretary Adams reiterated this position, as follows:

It is no exception * * * that the vessels of England, Prussia, the Netherlands, and the Hanseatic cities pay in the ports of this union, including those of Louisiana, no other or higher duties than the vessels of the United States. This is not a favor, but a bargain. It was offered to all nations by an act of Congress of March 3, 1815. Its only condition was reciprocity. It was always, and yet is, in the power of France to secure this advantage to her vessels. * * * Great Britain, Prussia, the Netherlands, the Hanseatic cities accepted the proffer and granted the equivalent. Had France seen fit also to accept it, the American Government would have hailed the acceptance, not as a favor, but as equal justice. They were far from anticipating that, instead of this, France would found, upon equal reciprocity, offered to all mankind, a claim to special privileges never granted to any. Special, indeed, would be the favor which should yield to a claim of free gift to one, of that which had been sold at a fair price to another.

* * * what implication could be more violent and unnatural than, by a stipulation to treat the ships of France on the footing of those of the most favored nation in the ports of Louisiana, the United States had disabled themselves forever from purchasing a commercial advantage from any other nation without granting it particularly to France?

Continuing, Secretary Adams, in answer to the claim advanced by the French Minister that on account of the omission of the equivalence clause from Article VIII of the treaty in question the benefits must be extended to France immediately and unconditionally, said:

If, from the uniform use of the explanatory clause in all the preceding treaties, stated in the note as a fact, its omission in the Louisiana treaty could have warranted the inference that no such qualification was intended by it, with much stronger reason may it be concluded that, as the parties had before repeatedly contracted the same engagements, at one time with, and at another time without, the explanatory clause, but always intending the same thing, this variety in the modes of expression was considered by them as altogether immaterial, and that, whether expressed or not, no claims to a favor enjoyed by others could justly be advanced by virtue of any such stipulation without granting the same equivalent with which the advantage had been purchased.

President Monroe, in his annual message to Congress on December 3, 1821 (Richardson, vol. 2, 100-101) in relation to this same case, said, in part, as follows:

By the eighth article of the treaty referred to it is stipulated that after the expiration of 12 years, during which time it was provided by the seventh or preceding article that the vessels of France and Spain should be admitted into the ports of the ceded territory without paying higher duties on merchandise or tonnage on the vessels than such as were paid by citizens of the United States, the ships of France should forever afterwards be placed on the footing of the most-favored nation. By the obvious construction of this article it is presumed that it was intended that no favor should be granted to any power in those ports to which France should not be forthwith entitled, nor should any accommodation be allowed to another power on conditions to which she would not also be entitled on the same conditions. Under this construction no favor or accommodation could be granted to any power to the prejudice of France. By allowing the equivalent allowed by those powers she would always stand in those ports on the footing of the most-favored nation. But if this article should be so construed as that France should enjoy, of right, and without paying the equivalent, all the advantages of such conditions as might be allowed to other powers in return for important concessions made by them, then the whole character of the stipulation would be changed. She would not be placed on the footing of the most-favored nation, but on a footing held by no other nation. She would enjoy all advantages allowed to them in consideration of like advantages allowed to us, free from every and any condition whatever.

Referring to the same question, Mr. Gallatin, United States minister to France, wrote to the Viscount de Chateaubriand, February 27, 1823 (American State Papers, For. Rel., V, 673):

The United States contend that the right to be treated upon the footing of the most-favored nation, when not otherwise defined, and when expressed only in those words, is that, and can only be that, of being entitled to that treatment gratuitously, if such nation enjoys it gratuitously, and on paying the same equivalent, if it has been granted in consideration of an equivalent.

Secretaries Clay and Van Buren adhered to the same interpretation of Article VIII as had been placed upon it by their predecessor in the Department of State.

1825.

Secretary of State Clay, in an instruction to Mr. Poinsett, American Minister to Mexico, while a commercial treaty was under consideration between the United States and Mexico, wrote, March 25, 1825, as follows (American State Papers, For. Rel., VI, 578):

The rule of the most-favored nation may not be, and scarcely ever is, equal in its operation between two contracting parties. It could only be equal if the measure of voluntary concession by each of them to the most favored third power were precisely the same; but as that rarely happens, by referring the citizens of two contracting powers to such a rule the fair competition between them, which ought always to be a primary object, is not secured, but, on the contrary, those who belong to the nation which

has shown the least liberality to other nations are enabled to engross almost the entire commerce and navigation carried on between the two contracting powers. * * * In order to ascertain the quantum of favor which, being granted to the commerce and navigation of one nation, is claimed by another, in virtue of a treaty stipulation and embracing that principle, it is necessary that the claimant should be accurately informed of the actual state of the commercial relations between the nations on which the claim of equal favor is preferred and all the rest of the commercial world. A knowledge of those relations must be sometimes sought after in numerous treaties, statutes, orders, decrees, and other regulations, and is often of very difficult attainment. When acquired, it is not always very easy to distinguish between what was a voluntary grant and that which was a concession by one party for an equivalent yielded by the other. Sometimes the equivalent for the alleged favor proceeding from the one party may be diffused throughout all the stipulations in the treaty by the other, and is to be extracted only after a careful view and comparison of the whole of them. Not infrequently the equivalent may not even be clearly deducible from the instrument itself conveying the supposed favor. Peculiar considerations may lead to the grant of what, on a first impression, might be conceived to be a voluntary favor, but which has really been founded upon a received equivalent; and these considerations may sometimes apply to the entire commerce and navigation of a country, and at others to particular ports only.

1832.

Secretary of State Livingston, in a memorandum to President Jackson, dated January 6, 1832 (MS., report book), said:

A covenant to give privileges granted to the most favored nation only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage.

In 1832 the Austrian Government, invoking Articles V and IX of the treaty of 1829 between the United States and Austria-Hungary, demanded that Austrian wines be admitted into the United States at the reduced tariff rates granted to French wines under the reciprocity treaty between the United States and France of July 4, 1831. Secretary of State Livingston, replying to the representations on this question of the Austrian consul general at New York, said, under date of November 5, 1832 (MS. notes to For. Leg., V, 63), in part, as follows:

* * * The reduction of duties contemplated by the late convention between France and the United States can not either by the letter or the spirit of the treaty with Austria, give to that power any right to a similar reduction of duties on the importation of its wines into the United States. That any two nations should have agreed each to give to the other gratuitously the same advantages which other powers might afterwards purchase for a high consideration, is a possible but certainly not a probable case and one that would require the evidence of very clear and explicit terms to cause it to be believed. * * * It can not, therefore, readily be imagined that either Austria or the United States intended by the article in question to forego the advantages that might severally derive from compacts with other nations for equivalent reductions in the rate of duties on their respective staple articles.

1853.

In 1853 Attorney General Caleb Cushing, in an official opinion respecting the favored-nation clause in our treaty of 1826 with Denmark, said that—

such clauses are not applicable to advantages growing out of treaties containing various articles of reciprocal pact and stipulation; for such advantages are purchased upon consideration, upon mutual and correlative engagements * * * with perfect reciprocal obligation in terms and manner as to the things to be done or suffered. Such treaty benefits are not favors, boons, or concessions. These expressions apply only to things proceeding from the mere will and pleasure of the State granting them, in matters within its own sole jurisdiction, and which the other party, to whom they are proffered, may or may not, in its own good pleasure, accept. (6 Op., 148, Cushing, 1853.)

1854.

During the negotiations between the Governments of the United States and Great Britain which resulted in our reciprocity treaty of 1854 with Canada, Mr. Crampton, the British chargé d'affaires at Washington, under instructions from his Government, wrote to Secretary of State Clayton, as follows:

It has been objected that, if certain agricultural articles (more particularly wheat), the productions of Canada, were to be admitted free of duty into the United States, under a convention with the British Government for a reciprocal free trade between that province and the United States in such productions, the like productions of other nations having "reciprocity treaties" of commerce with the United States must be admitted on the same terms.

To this it may be replied that no nation could claim for itself an advantage, under a convention between Great Britain and the United States, which Great Britain herself had not obtained under that convention. Had any other nation a colony similarly situated, she might then be borne out in claiming that such colony should be equally favored; otherwise not.

A precedent has already been established which involves this principle, and makes a distinction between an inland colony and an independent State. An act passed in the British Parliament in 1825 (the 6th George IV, chap. 114, clause 32), enacts that the same tonnage duties shall be paid on American vessels importing goods into either province of Canada, by the inland waters, as are, or may be for the time being, payable in the United States on British vessels. In the year 1831, the United States passed "an act to regulate foreign trade on the northeast and northwest boundary" (chap. 98, Mar., 1831), remitting all fees on British vessels entering their ports on that boundary; consequently, up to the present moment, no fees are exacted there on either side, whereas they still exist in the Atlantic ports on all foreign vessels. (House Ex. Doc. 64, 31st Cong., 1st sess.)

1878-1879.

The reciprocity convention concluded between the United States and the Hawaiian Islands on January 30, 1875 (effective Sept. 9, 1876), provided, in Article IV, that the Hawaiian Islands should not, so long as the treaty remained in force—

make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States.

Invoking the most-favored-nation clause in Article IV of her treaty with the Hawaiian Islands, Great Britain demanded that the latter should extend, gratuitously, to the United Kingdom the tariff concessions granted in reciprocity to the United States.

The position of the United States Government in this matter was set forth in a note from Mr. Comly, American minister at Honolulu, dated July 1, 1878, to the Hawaiian foreign office, reading in part as follows (For. Rel., 1878, 404):

No treaty in existence at the time this compact was entered into secured to any other nation the privileges as to the admission of certain articles free of duty, which have been guaranteed to the United States by this treaty. These privileges were secured, not through any general treaty rights or stipulations, but by giving certain valuable considerations in a special treaty of reciprocal covenants. The concession of these privileges to the United States can not therefore form any just basis for a claim to like privileges by any other nation, under the parity clause of the ordinary form of treaty. The uttermost that might be conceded under such parity clause would be the claim to purchase the same immunities through special treaty, upon like terms with those agreed upon between the United States and the Hawaiian Islands.

In an instruction dated August 6, 1878 (For. Rel., 1878, 405), Secretary of State Evarts approved the action taken by Minister Comly, in the following words:

The note which you addressed to the minister for foreign affairs, claiming that by the "parity clause of the ordinary form of treaty" other nations were not entitled to

the same privileges as were conceded to the United States by the reciprocity treaty with Hawaii, is in accordance with the views of this department; and that the assurance given by that officer in his reply, that the Government of Hawaii would take care that the integrity of the treaty should not be impaired in any respect, is satisfactory, and it is hoped that this promise may be strictly carried out.

Shortly after the reciprocity treaty with the United States became effective Hawaii increased her import duties on a few articles from 10 per cent to 25 per cent ad valorem. Upon receiving a promise from the Hawaiian Government that these rates would be restored to the former rate of 10 per cent ad valorem, Great Britain withdrew her contention in regard to most-favored-nation treatment, and thereby tacitly admitted that the preferential tariff reductions granted by Hawaii to the United States in exchange for reciprocal advantages to American products did not violate the most-favored-nation clause in the British treaty with Hawaii. This view is strengthened by the fact that during the diplomatic interchanges between Hawaii and Great Britain in regard to this matter it developed that Lord Clarendon, British secretary of state for foreign affairs, had informed the Hawaiian Government in 1856, when the unratified reciprocity treaty of 1855 between the United States and Hawaii was under consideration, that—

as the advantages conceded to the United States by the Sandwich Islands are expressly stated to be given in consideration of, and as an equivalent for, certain reciprocal concessions on the part of the United States, Great Britain can not, as a matter of right, claim the same advantages for her trade under the strict letter of the treaty of 1851.

Germany, although having no commercial treaty with Hawaii, also protested against the alleged discrimination against her products in favor of the United States. The matter was amicably settled by the conclusion of a commercial treaty between Germany and Hawaii on September 19, 1879, which provided that each party should extend to the other in matters of commerce and navigation most-favored-nation treatment, freely, if it was freely granted, or for the same compensation, if conditional. By this treaty the German Government recognized that the preferential treatment accorded American products by Hawaii was rightly exclusive as between the two contracting parties. The exact language as annexed to the German-Hawaiian treaty follows:

Certain relations of proximity and other considerations having rendered it important to the Hawaiian Government to enter into mutual arrangements with the Government of the United States of America by a convention concluded at Washington, the 30th day of January, 1875;

The two high contracting parties have agreed that the special advantages granted by said convention to the United States of America, in consideration of equivalent advantages, shall not in any case be invoked in favor of the relations sanctioned between the two high contracting parties by the present treaty.

1884.

A reciprocity treaty between the United States and Mexico was signed on January 20, 1883. While this treaty was pending ratification in the United States Senate, Secretary of State Frelinghuysen, in response to a note from Mr. Romero, the Mexican minister in Washington, inquiring into the interpretation of the most-favored-nation clause in that treaty, replied, under date of May 2, 1884 (MS. Notes to Mex., IX, I), as follows:

While this Government can not agree with that of Mexico, that under the provisions of the most-favored-nation clause another nation becomes entitled to privileges

granted by a reciprocity treaty, still, as there are various considerations affecting the question as now presented, I content myself with a courteous denial that the most-favored-nation clause applies to reciprocity treaties, without now entering into any argument on the subject.

Under date of June 10, 1884, the British minister at Washington called the attention of the Secretary of State to the fact that, as a consequence of recent treaties, or of treaties which might be negotiated, the commerce between the United States and the Hawaiian Islands, Mexico, Central America, etc., was, or was likely to be, placed on a more favored footing than the commerce between the United States and the British West Indies. He pointed out that the United States enjoyed complete most-favored-nation treatment in the British West Indies and requested that like treatment be accorded British West Indian products in the ports of the United States. The reply of Secretary of State Frelinghuysen was, in part, as follows (MS. Notes to Great Britain, XIX, 514):

It is clear that the second article of the treaty of 1815 has not authorized and could not authorize Great Britain to ask for the products or shipping of the United Kingdom, favors identical with or equivalent to those which Spanish American and West Indian colonial products and shipping may receive in the ports of the United States by reason of special reciprocity treaties. The formal extension of this article to the British West India colonies therefore would not give them other rights than those now enjoyed by the United Kingdom. Those colonies possess, as a matter of fact, and without express stipulation, the complete most-favored-nation treatment now accorded to the mother country. British vessels and their cargoes from any part of the world are admitted into ports of the United States on the same terms as to duties, imposts, and charges as those of the United States.

It may, in view of the limited formulation of Lord Granville's proposition, be premature to assume that his lordship contemplates the negotiation of a reciprocity treaty which shall secure for the trade of the West Indian colonies with the United States special favors, although the negotiation of the Canadian reciprocity treaty of 1854 would show that this class of international engagements, applying only to particular colonies, is not in violation of the policy of Her Majesty's Government.

In an instruction to Mr. Bingham, American minister to Japan, under date of June 11, 1884 (MS. Inst., Japan, III, 253), Secretary of State Frelinghuysen commented upon the respective British and American interpretation of the most-favored-nation clause, as follows:

The English contention has hitherto been, under the most-favored-nation clause of the treaties, that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent, the like favor must be granted to England without equivalent.

The Japanese contention is the reverse of this, being that if a favor for a specific condition be stipulated with any one nation no other may enjoy the favor except upon identical or equivalent conditions.

The theory on which this Government views the question is akin to that of Japan. For example, the United States have just concluded a commercial treaty with Mexico by which each country especially favors the other by putting on its free list certain dutiable products. Under the favored-nation clause of our treaties with other nations we are not bound to give their products the benefit of our free list, even though such country may not impose any duty on the articles which Mexico has free listed in our favor. But we would be willing to stipulate to give a third power the favor we give Mexico in exchange for some equivalent favor not general as toward the rest of the world.

A reciprocity treaty between the United States and Spain for Cuba and Porto Rico was signed on November 18, 1884.¹ In the course of the negotiations Secretary Frelinghuysen, under date of June 28,

¹ Never ratified.

1884 (MS. Inst., Spain, XIX, 601), instructed Mr. Foster, the American minister at Madrid, as follows:

It appears that Señor Elduayen deems a specially favoring treaty impracticable at present, in view not only of the distressing condition of the Antillean finances, but because he holds that other nations having the most-favored (nation) clause in their treaties with Spain would be entitled to all the benefits of any special arrangement with the United States.

The minister's statements can not have failed to impress you with some surprise. You are aware that this Government has always assumed that Spain held the same view as ourselves respecting the effect of a reciprocity treaty in connection with the most-favored-nation clause in other treaties. This country has that clause in many of its compacts with foreign States, but it has never occurred to them or to us to suppose that we were thereby constrained to grant to those treaty powers, without equivalent, the privileges which we had by special engagements stipulated to concede to countries like Hawaii and Canada for a valuable consideration.

1886.

During the revision of our treaties with Japan in 1886 Secretary of State Bayard, in an instruction to Mr. Hubbard, the American minister at Tokyo, under date of July 17, 1886 (MS. Inst., Japan, III, 425), defined the attitude of the United States Government in respect to most-favored-nation treatment in the following language:

In its commercial aspects the expediency of an unqualified favored-nation clause is questionable. The tendency is toward its formal qualification, by recognizing in terms (what most nations hold in fact and in practice, whether the condition be expressed in the clause or not) that propinquity and neighborliness may create special and peculiar terms of intercourse not equally open to all the world; or by providing that the most-favored treatment, when based on special or reciprocal concessions, is only to be extended to other powers on like conditions.

You will doubtless have understood that when the words "qualified" and "unqualified" are applied to the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms such a clause generally assumes in treaties, one containing a proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely, if freely given, or for an equivalent if conditional—the other, not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law, that such concessions are only gratuitous as to third parties when not based on reciprocity or mutually reserved interests as between the contracting parties. This ground has been long and consistently maintained by the United States. It was held by two of my predecessors, Mr. Clay and Mr. Livingston, that a covenant to extend to third parties privileges granted to a most favored nation only refers to "gratuitous privileges" and does not cover privileges granted "on the condition of a reciprocal advantage," that is, for a consideration expressed.

This distinction has since then been repeatedly affirmed and is accepted by publicists with great unanimity.

1887.

The interpretation invariably placed by the Department of State on the most-favored-nation clause has been more than once upheld in well-considered cases by the Supreme Court of the United States. The first leading case is that of *Bartram v. Robertson*, Collector of the Port of New York (122 U. S. Rep., 116). Importers of sugar from the Danish island of St. Croix claimed that this commodity was entitled to free entry on the same footing as Hawaiian sugar admitted free under our reciprocity treaty of 1875. The claim was based upon Articles I and IV, containing the most-favored-nation clauses, of our treaty of 1826 with Denmark. In a test case suit was brought against the collector of the port of New York to recover duties collected on a certain shipment of sugar from St. Croix. The case was

decided adversely to the plaintiffs by the circuit court, and an appeal was then taken by them to the Supreme Court of the United States. Mr. Justice Field delivered the opinion of the court, which read in part as follows:

Those stipulations * * * do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties—the United States and the King of Denmark—to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified, but if any particular favor should be granted by either to other countries in respect to commerce or navigation the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods, the produce or manufacture of that country, imported into the United States. It stipulates for the exemption from duty of certain goods thus imported, in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the treaty with Denmark, and if the exemption is deemed "a particular favor," in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions, which she has never proposed to make.

Our conclusion is that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty.

1888.

The decision in the foregoing case was followed by the Supreme Court in the case of *Whitney v. Robertson* (124 U. S., 190). Relying upon the most-favored-nation clause in Article IX of our then existing treaty of 1867 with the Dominican Republic, certain importers of sugar produced in Santo Domingo brought suit against the collector of the port of New York to recover duties collected on their merchandise, which they claimed should have been admitted free of duty on a parity with the sugar of the Hawaiian Islands.

Mr. Justice Field delivered the opinion of the court, saying, in part, as follows:

The counsel for the plaintiffs * * * point to the omission in the treaty with the Republic of Santo Domingo of the provision as to free concessions and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our Government to another country without that concession being at once extended to Santo Domingo. We do not think that the absence of this provision changes the obligations of the United States. The ninth article of the treaty with that Republic, in the clause quoted, is substantially like the fourth article in the treaty with the King of Denmark. And, as we said of the latter we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries in favor of articles of like character imported from any other country. It has no greater extent. It was

never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our Government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

1894.

Section 608 of the United States tariff act of 1894 placed salt upon the free list, but provided that if salt should be imported from any country that imposed a duty upon salt imported from the United States there should be levied on the salt of such country the rate of duty existing prior to the passage of the tariff act. Notwithstanding that American salt was dutiable on importation into Germany, the German Government demanded free entry of German salt into the United States by virtue of the most-favored-nation clauses (Articles V and IX) of the treaty of 1828 between the United States and Prussia. The question having been submitted to Attorney General Olney, he gave an exhaustive opinion, under date of November 13, 1894 (21 Op., 80-83), from which the following extracts are taken:

The most-favored-nation clauses of our treaties with foreign powers have from the foundation of our Government been invariably construed both as not forbidding any internal regulations necessary for the protection of our home industries and as permitting commercial concessions to a country which are not gratuitous, but are in return for equivalent concessions, and to which no other country is entitled except upon rendering the same equivalents. Thus, Mr. Jefferson, when Secretary of State in 1792, said of treaties exchanging the rights of the most-favored nation that "they leave each party free to make what internal regulations they please, and to give what preference they find expedient to native merchants, vessels, and productions." In 1817 Mr. John Quincy Adams, acting in the same official capacity, took the ground that the "most-favored-nation clause only covered gratuitous favors and did not touch concessions for equivalents expressed or implied." Mr. Clay, Mr. Livingston, Mr. Evarts, and Mr. Bayard, when at the head of the Department of State, have each given official expression to the same view. It has also received the sanction of the Supreme Court in more than one well-considered decision.

(Here follows quotation from the decision in the case of *Bartram v. Robertson*, 122 U. S., 116, which has been given, *supra*.)

This interpretation of the most-favored-nation clause, so clearly established as a doctrine of American law, is believed to accord with the interpretation put upon the clause by foreign powers—certainly by Germany and Great Britain. Thus, as the clause permits any internal regulations that a country may find necessary to give a preference to native merchants, vessels, and productions, the representatives of both Great Britain and Germany expressly declared, at the international sugar conference of 1888, that the export sugar bounty of one country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the most-favored-nation clause. So both Germany and Great Britain acquiesced in the position of the United States, that our treaty with Hawaii did not entitle those nations to equal privileges in regard to imports with those thus obtained by the United States, the privileges granted to the United States being in consideration of concessions by the United States which Germany and Great Britain not only did not offer to make but in the nature of things could not make.

If these established principles be applied to the case in hand but one result, seems to be possible. The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American salt shall have its salt dutiable here under the preexisting statute. In other words, the United States concedes free salt to any nation which concedes free salt to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the most-favored-nation clause which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.

1895.

In 1895 the Russian minister at Washington inquired of the Department of State the reasons why Russia should not enjoy the benefits of the Hawaiian reciprocity treaty of 1875, claiming that the failure to extend those benefits to Russian products imported into the United States was in contravention of Articles VI and XI of the treaty of 1832 between the United States and Russia. Acting Secretary of State Adee, in a note addressed to Mr. Somow, Russian chargé d'affaires ad interim, under date of July 30, 1895 (For. Rel., 1895, II, 1121), set forth the reasons why Russia was not entitled to the preferential tariff treatment accorded to the Hawaiian Islands. This reply read, in part, as follows:

The exceptional advantages granted to the Hawaiian Islands by the tariff laws of the United States, in conformity with the provisions of the reciprocity treaty with Hawaii, have been yielded to that Government in return for certain valuable and exclusive considerations and by reason of the peculiar geographical and commercial relations that exist between the two countries. The course of this Government has been consistent in holding that such privileges do not fall within the favored-nation clause of any treaty, the concessions which the United States have extended to these islands having been made for considerations of such a character as not to be included within the stipulations for most-favored treatment contained in the treaties with other powers. From the early days of this Government it has been held that a covenant to extend to the most-favored nation privileges otherwise granted only refers to gratuitous advantages, and does not cover those granted on condition of a reciprocal benefit, and the tariff reductions on Hawaiian products have uniformly been considered as falling within this rule. The Hawaiian Government has held the same position in the interpretation of its treaties with other powers.

1896.

Secretary of State Olney, in an instruction to Mr. Dun, the American minister at Tokyo, under date of November 12, 1896 (For. Rel., 1896, 429-431) explained the unilateral most-favored-nation clause which appeared in our treaty of 1854 with Japan, as follows:

Article IX of our treaty with Japan of March 31, 1854, contains, it is presumed, the most-favored-nation clause to which you refer. It reads as follows:

"It is agreed that if at any future day the Government of Japan shall grant to any other nation or nations privileges and advantages which are not herein granted to the United States and to the citizens thereof, that these same privileges and advantages shall be granted likewise to the United States and to citizens thereof, without any consultation or delay."

* * * I may remark that, in the department's judgment, the provision of the treaty of 1854, to which you refer, does not mean if Japan shall grant privileges to Germany in consideration of similar privileges granted by the latter to the former, the same privileges shall be granted gratuitously to the United States. The clause "that these same privileges and advantages shall be granted likewise to the United States and to the citizens thereof, without any consultation or delay," only refers, in my opinion, to privileges granted gratuitously to a third power and not to privileges granted in consideration of concessions made by another Government.

1898.

In 1898, during the reciprocity negotiations between the United States and the Argentine Republic, under the provisions of section 4 of the United States tariff act of July 24, 1897, Mr. Buchanan, the American minister at Buenos Aires, reported to Secretary of State Sherman that the Argentine Government was apparently deterred from entering into a treaty of reciprocity with the United States because it assumed that it would be compelled to extend any

tariff concessions which it might make in such a treaty with the United States to European countries with which the Argentine Republic had commercial treaties providing for most-favored-nation treatment.

In reply to this dispatch Secretary of State Sherman instructed Minister Buchanan, under date of January 11, 1898 (MS. Inst., Arg. Rep., XVII, 306) as follows in regard to the United States construction of the most-favored-nation clause:

This department, after the appointment of Mr. Kasson as special plenipotentiary for negotiating conventions of reciprocity under the recent tariff act, referred to him for consideration your number 359, dated June 15, 1897, from which I quote the following observation:

“While any arrangement might be carried through here contemplating a general tariff reduction on articles, the most-favored-nation clause in the treaties between this country and Europe would be a bar to a plan specifically specifying concessions to a country.”

The plenipotentiary is of opinion, and this department gives its sanction to the position, that the foregoing construction of the most-favored-nation clause is erroneous; that it does not control the right of the nations adopting it to make exclusive compensatory agreements in just reciprocity with other nations.

The clauses referred to are expressed in various forms of language in the many treaties which contain them, but the intent is the same in all the conventions between civilized countries, whether the favored-nation clause stands alone or is qualified by the other customary clause respecting particular favors. That intent is to secure for the contracting party equality with all competing nations in the conditions of access to the markets of the other. This meaning is usually expressed substantially in the language of Articles I and IV of the treaty (1826) between the United States and Denmark; Articles V and IX of the treaty (1828) between the United States and Prussia; Articles VI and XXIV of the treaty (1871) between the United States and Italy; and Articles III and IV of the treaty (1853) between the United States and the Argentine Confederation. Assuming that the favored-nation clauses of the conventions between the Argentine Republic and the European nations, to which you refer, are of corresponding significance, the rule of interpretation adopted by this department will equally apply to them.

It is clearly evident that the object sought in all the varying forms of expression is equality of international treatment, protection against the willful preference of the commercial interests of one nation over another. But the allowance of the same privileges and the same sacrifice of revenue duties to a nation which makes no compensation that has been conceded to another nation for an adequate compensation, instead of maintaining destroys that equality of market privileges which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.

The neighborhood of nations, their border interests, their differences of climate, soil, and production, their respective capacity for manufacture, their widely different demands for consumption, the magnitude of the reciprocal markets, are so many conditions which require special treatment. No general tariff can satisfy such demands. It would require a certainty of language which excludes the possibility of doubt to justify the opinion that the Government of any commercial nation had annulled its natural right to meet these special conditions by compensatory concessions, or held the right only on condition of extending the same to a nation which had no compensation to offer. The fact that such concessions if made would inevitably inure to the equal benefit of a third competitor would often destroy the motive for, as well as the value of, such reciprocal concessions.

But instead of such certainty of expression, one of the articles in each of the treaties referred to contains a distinct recognition that special and compensatory commercial arrangements may be made, notwithstanding the most-favored-nation clause; and provides that in such cases the favors granted shall be enjoyed by the party claiming favored-nation treatment, gratuitously if so granted, or for equivalent compensation if granted for a price.

What will be an equivalent compensation is to be honorably determined by the governments concerned. So many considerations have necessarily entered into such special concessionary agreements, that no universal rule can be applied. The price has often been special privileges in the market of the other for certain manufactures or products of the contracting country; but it may also be a port, a bay, or an island,

or a protectorate, as well as an expanded market, or a privileged export trade. It may be anything within the range of the treaty-making power.

It is not to be supposed that a right of such importance in many national emergencies has been abandoned by the Argentine Republic, or that it is only held on condition of the repeated and gratuitous payment to other countries of the same consideration stipulated in reciprocity. The right of the other nations to enjoy the same special concessions depends on their ability to offer an equivalent compensation. When they do this, the favored-nation clause is rightfully invoked.

Such is the construction of the treaty clauses in question which the Government of the United States adopts in carrying out the late provisions of law for reciprocal commercial conventions with other States.

It rests not only upon sound reason, but upon continuous precedent.

After citing numerous precedents in our diplomatic history, Secretary Sherman concluded his instruction as follows:

The construction above given to the clause in question has been so long continued and so generally acquiesced in by other nations that it may now be fairly considered as a part of international law.

1899.

A reciprocal commercial agreement under the provisions of section 3 of the Dingley tariff of 1897 was signed between the United States and France on May 28, 1898, and put into force by a proclamation of the President. This agreement granted certain authorized reductions of rates in favor of French spirits, wines, and a few other articles, imported into the United States. Soon after it went into effect the Swiss minister at Washington, by direction of his Government, demanded that the reduced rates granted to France be immediately and gratuitously extended to the like products of Switzerland, by virtue of Articles VIII to XII, inclusive, providing for most-favored-nation treatment, in the treaty of 1850 between the United States and Switzerland. The Swiss minister called attention to the fact that these clauses were absolutely unqualified and in language that varied widely from the usual phraseology of the most-favored-nation clause. He also claimed that it had been distinctly understood between the negotiators that the unlimited rights of the most favored nation were to be reciprocally accorded.

Upon investigation by the Department of State it was found that the claim of the Swiss Government as to the manifest intention of the negotiators of the treaty of 1850 was well founded. In that respect, therefore, the Swiss treaty constituted a radical departure from the uniform policy of the United States, and for this reason our Government gave formal notice to the Swiss Government, on March 23, 1899, of its intention to terminate Articles VIII to XII at the expiration of one year, in accordance with the conventional provisions for denunciation. The articles in question ceased to be operative on March 23, 1900.

During the interval of one year, however, Switzerland was given the benefit of the reduced rates of duty previously granted to France.

Germany also claimed the benefit of the reciprocity rates accorded to France, and in support of this claim invoked the most-favored-nation clauses (Articles V and IX) of our treaty of 1828 with Prussia. In making this claim Germany referred particularly to the temporary concessions made to Switzerland under circumstances above explained.

The Department of State declined to extend gratuitously these concessions to Germany and pointed out that the grant to Switzerland could by no means be considered a precedent. Secretary of State

Hay, in an instruction to Ambassador White, under date of February 28, 1899 (For. Rel., 1899, 298), said, in part, as follows:

A comparison of the most-favored-nation clauses in our treaties with Switzerland and with Prussia will show the radical difference between their stipulations. The plain provisions of Article IX of the Prussian treaty of 1828 (reproduced from the former treaty of 1799, Art. XXVI) do not exist in the Swiss treaty. Much more conclusive than this, however, is the assurance obtained by an examination of the official papers connected with the negotiation and ratification of the Swiss treaty. This examination revealed the fact that the construction of the treaty claimed by Switzerland was expressly understood at the time by both negotiators and by both ratifying powers. Under these circumstances this Government was bound in honor to yield to the contention of Switzerland, and did so in the official communication of which I inclose you a copy. You will observe in the inclosure that this Government made the concession to Switzerland expressly on the ground of the original agreement of the two parties upon the intent of the peculiar language of the Swiss articles in question.

* * * * *

Nothing has been conceded to Switzerland which under like conditions would not have been given to Germany.

In a second instruction to Ambassador White, dated April 7, 1889 (For. Rel., 1899, 300), Secretary Hay said:

Under the discovery of the actual understanding of the parties to that treaty at the time of its ratification, the attention of this Government was for the first time in the half century of the treaty's existence directed to its variance from our well understood national policy; and the Swiss Government was advised that if not modified by a new agreement in harmony with that policy, we should feel obliged to terminate the treaty.

Again, in an instruction to Ambassador White dated April 8, 1899 (For. Rel., 1899, 301), Secretary Hay recalled a previous occasion when the subject of the interpretation of the most-favored-nation clauses was under discussion, as follows:

The question appears to have arisen between Germany and Hawaii in 1878, as a result of the reciprocity convention of 1875 between the United States and Hawaii. The Hawaiian special envoy to Berlin, Mr. Carter, discussed it at that time, and reported to his Government that "an article was framed by which it was agreed that the special advantages granted to the Government of the United States in consideration of equivalent advantages should not in any case be invoked in favor of Germany." (See Foreign Relations of United States, 1878, p. 403; also pp. 382 and 405.)

While we do not deny the right of Germany to adopt the same construction which controls the action of this Government, it should be remembered that whatever construction is adopted it must be applied uniformly to all governments whose interests are protected by the like treaty clauses. Otherwise Article XXVI of the convention would be violated. If the compensatory privileges should be extended to any third nation, which has given no special compensation for them, it is evident that as to that nation the grant would be gratuitous, and, by the express provision of Article XXVI, "shall immediately become common to the other party, freely."

This point should not be overlooked in any serious discussion of the subject on the part of your embassy. It is evident that Germany can not apply one construction in her relations with this Government and another in her relations with an European government.

- 1911.

The United States Court of Customs Appeals at Washington has recently decided a case (*Shaw & Co. et al. v. U. S.*) involving the construction of the most-favored-nation clause of our treaty of 1815 with Great Britain. Under the United States tariff act of 1897 the regular duty on whisky and other spirits was \$2.25 per proof gallon. By the provisions of our reciprocity agreement with France, concluded, as above stated, in accordance with the terms of section 3 of the same act, the regular rate of duty was reduced to \$1.75 per proof gallon in favor of French spirits. The importers of whisky

produced in the United Kingdom claimed the same favorable rate for their merchandise, invoking Article II of the treaty of 1815 between the United States and Great Britain. This claim was disallowed by the customs officers and an appeal was taken by the importers to the United States Court of Customs Appeals. Judge De Vries, in delivering the opinion of the Court (Treasury Decision 31500), said, *inter alia*:

THE QUESTION, therefore, is presented in this case for the consideration of this court whether or not section 3 of the tariff act of 1897 was in conflict with the most-favored-nation clause of the treaty of 1815 with His Britannic Majesty. We think not.

Section 3 of the tariff act of 1897 was a general law; its attitude toward every nation was uniform. It offered no special favor to France, or Germany, or Italy, or any other country. Every foreign nation was treated alike by the terms of the law. It was equally within the opportunity of England to negotiate a reciprocity treaty as it was within the opportunity of France. * * *

Moreover, we think that in logic or effect the negotiation of a treaty upon a consideration does no violence to that treaty provision with His Britannic Majesty. The reciprocity treaty with France is one founded upon mutual considerations. This country gave considerations for the considerations given in exchange therefor by France. If, therefore, this country should concede to Great Britain without consideration what it has conceded to France for consideration, it would not be conceding to England a favor it conceded to the other country, but it would be conceding to England more than it conceded to the other country, because England in such case gives no consideration for the concession for which France gave a consideration.

The extension of the \$1.75 rate upon spirituous liquors in this case to England without any mutual concession therefrom would be conceding not what was conceded France, but something more than that which was conceded France, and, therefore, can not be within purview of the most-favored-nation clause of the treaty with His Britannic Majesty without consideration, which has not been given.

Respectfully submitted.

JOHN BALL OSBORNE.

BUREAU OF TRADE RELATIONS,
DEPARTMENT OF STATE,
May 1, 1911.

