# THE MOST-FAVOURED-NATION STANDARD IN BRITISH STATE PRACTICE

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In the course of its growth, international law has evolved various standards of conduct which are of special significance for one of its most recent offshoots, namely, international economic law. These standards may be classified as the Minimum Standards of International Law, developed in bilateral treaties and, to some extent, in international judicial practice; the standards of the Open Door and of Equitable Treatment, laid down in a number of recent collective agreements; and, finally, the following standards which owe their origin largely to bilateral treaties: the standards of Reciprocity, National Treatment, Preferential Treatment and Most-Favoured-Nation Treatment. The present article is devoted to a discussion of the last-mentioned standard.

Most-favoured-nation treatment (for which the abbreviation m.f.n. treatment will be used in this article) has come to mean something very different from what that term prima facie suggests and—it may be added—what has been its original meaning: i.e. the treatment of a State as more favoured than any other. Used in its technical sense, the m.f.n. standard may be defined as treatment on a footing not inferior to that of the most favoured third State.[1]

This international standard is characterized by four elements inherent in the conception of m.f.n. treatment: (*a*) m.f.n. treatment is incompatible with any discrimination on the part of the promisor against the beneficiary and in favour of third States. M.f.n. treatment excludes preferential treatment of third States by the promisor.

(*b*) M.f.n. treatment does not exclude the grant by the promisor of additional advantages beyond those conceded to the most favoured third State. M.f.n. treatment is compatible with preferential treatment of the beneficiary by the promisor.

(*c*) States other than the promisor and beneficiary form the *tertium comparationis*. M.f.n. treatment requires the absence of discrimination as compared with third States. It does not imply either national or reciprocal treatment of the beneficiary.

(*d*) M.f.n. treatment does not demand compliance with any definite and objective rules of conduct. The rights actually enjoyed under the standard are merely the counterpart of the rights granted by the promisor to third States. In the absence of undertakings to third States, the m.f.n. standard is but an empty shell, and, in operation, it is a shell with variable—and continuously varying—contents.

[1] "Treaty concluded with" means a treaty between this country with the State mentioned. On the meaning and scope of this field of international law, see the present writer's "The Development of International Economic and Financial Law by the Permanent Court of International Justice", *Juridical Review*, 54 (1942), pp. 21 *et seq.*



## I. *The Functions of the Most-Favoured-Nation Standard*

The m.f.n. standard forms one of the basic standards of international law, and it is not surprising that it can be traced back to the dawn of international law. Leaving aside earlier Imperial grants of customs privileges to cities within the Holy Roman Empire on the basis of favours obtained "by whatsoever other town",[1] the principles of m.f.n. and national[2] treatment make their first appearance in international law proper in the commercial treaties concluded during the twelfth century between England and Continental powers and cities.[3] A typical instance of the early formulation of the m.f.n. clause on a basis of reciprocity is presented by the Treaty between Henry V and the Duke of Burgundy and Count of Flanders of 17 August, 1417, in accordance with which *"les Maistres de Neifs et Maronniers de la Partie d'Engleterre, a leur venue es Ports et Haures de nôtre dit Pays de Flandres, porront faire licitement lier leur Neifs, es dis Ports et Haures, par la Maniere que feront Francois, Hollandois, Zellandois, et Escohais, sans encourir pour ce en aucune Fourfaiture ou Amende: Et semblablement, porront faire les Maistres de Nefs et Maroniers de Flandres es Ports et Haures de la Partie d'Engleterre"*.[4] By the end of the fifteenth century, English practice had evolved what is substantially the modern usage in the formulation of the m.f.n. standard. The privileges granted to the beneficiary are no longer necessarily defined with reference to one or several specifically named countries, the most favoured nations in the original meaning of the term. Thus, under the Treaty with Denmark of 1490, English merchants and other lieges of the King of England *"Regna Daciae et Norwegiae et alia Dominia sub Parte nostra existentia intrantes, in suis Personis Bonis Mercantiis et aliis Rebus quibuscumque, Veniendo et Redeundo, Stando et Conversando, Emendo et Vendendo, Piscando, ac etiam mercandizando, habeantur et sint ita liberi et Quieti Privilegiati et Immunes sicut aliqui alii Mercatores seu Homines Extranei, quacumque seu qualiacumque Libertates seu Privilegia de Gratia Usu vel Consuetudine infra Regna vel Dominia praedicta habentes vel obtinentes, cujuscumque fuerint status, Conditionis, Linguae seu Nationis, absque Molestatione, Exactione, Onere seu Impedimento aliquali"*.[5]

It is not possible within the compass of this article to trace step by step the history of the m.f.n. standard in English treaty practice. Yet it may safely be stated that the principle of m.f.n. treatment has not been absent from any of the stages of its evolution. It has been found congenial to the centuries of medieval trade and of mercantilist capitalism. It has adapted

[1] B. Nolde, "La Clause de la Nation la plus Favorisée et les Tarifs Préférentiels", *Recueil de l'Académie de la Haye*, vol. 39 (1932—vol. I, p. 26.)

[2] Cf. below under VIII, p. 118.

[3] Referring to G. F. Sartorius Freyherr von Waltershausen, *Urkundliche Geschichte des Ursprungs der deutschen Hanse*, Hamburg, 1830, vol. II, p. 3 (which, unfortunately, was not accessible for consultation), in his *Wirtschaftliche Gleichberechtigung*, Berlin, 1937, H. J. Held mentions agreements between this country and Cologne, concluded between 1154 and 1189, which are not recorded in the collections of Rymer or Dumont (*l.c.*, p. 17, note 2).

[4] Th. Rymer, *Foedera*, London 1721–35 (subsequently *Rymer*), vol. IX, p. 484. See also the Treaties with Flanders, Ypres, and Brabant of 17 August, 1447 (*ibid.*, vol. XI, p. 144) and with Burgundy of 5 January, 1467 (*ibid.*, vol. XI, pp. 596 and 610).

[5] *Rymer*, vol. XII, p. 383. Cf. also the Treaties with Florence of 1490 (*ibid.*, p. 391), with Burgundy of 1496 (*ibid.*, p. 581), and with Riga of 1494 (*ibid.*, pp. 702–3).

self to cycles of expanding and contracting trade and, though it has ourished more than ever before and after in the era of free trade, it has een found that neither partial nor total State control of foreign trade render necessary to dispense with the m.f.n. standard.[1] In the words of the Committee of Experts for the Progressive Codification of International Law, nations do not seem able to escape the use of the clause".[2] The types, rmulation and scope of the m.f.n. standard have varied in the eight undred years of its history. Yet what is remarkable is not the fact of such uctuations, but the constant character of the m.f.n. standard. Its permanent use suggests that there is something basic in this international attern of conduct. It indicates that the m.f.n. standard answers to constant eeds of international society, and it suggests that the functions fulfilled y the standard are not essentially affected by the peculiarities of time or lace or by differences in social and economic systems. As in other spheres, he significance to international law of such differences and "ideological" leavages between States need not be unduly magnified. They are much ess relevant than the realities of the, so far, remarkably enduring structure f the international society, the motive powers constantly at work behind t and the atmosphere and outlook which this peculiar environment impresses upon the members of the inter-State system. What is essential from ur point of view is the individualistic and acquisitive character of the nternational society, coupled, as it is, with the growing interdependence etween nations.[3]

While the maxim *pacta tertiis nec nocent nec prosunt* seems to correspond vith these characteristics, none of the members of the international society an help being acutely interested in—and possibly vitally affected by—the arrangements made between other States and the concessions made by them o each other.[4] Though any State is well content to be treated by another on more favourable terms than any third State and does not object to liscrimination practised in its favour, everyone of them must be continuously on its guard against any more successful competitor. However, assuming hat States are prepared to exchange a condition of unceasing vigilance and

[1] Cf. E. A. Korovine, "Soviet Treaties and International Law", *American Journal of International Law*, (subsequently A.J.I.L.) 22 (1928), pp. 754–5, and T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935, pp. 267 *et seq.* This point may be illustrated by reference to the treaty policy of the U.S.S.R. For recent instances of the stipulation of m.f.n. treatment in the treaty practice of the U.S.S.R., see the Treaty of Commerce with Latvia of 4 December, 1933, Art. 1 (*League of Nations, Treaty Series*, vol. 143 (1934), p. 163); the Customs Convention with Italy of 6 May 1933, Articles 1–4 (*ibid.*, vol. 168 (1936), pp. 65–9); the Provisional Commercial Agreement with France of 11 January, 1934, Articles 7 and 9 (*ibid.*, vol. 167 (1936), pp. 380 and 382); the Treaty of Commerce and Navigation with Czechoslovakia of 25 March 1935, Articles 1, 3, 5, 6, 11 and 15 (*ibid.*, vol. 181 (1936), pp. 287 *et seq.*); the Consular Convention with Czechoslovakia of 16 November, 1935, Art. 20 (*ibid.*, 169 (1936–7), p. 167); the Treaty of Establishment, Commerce and Navigation with Iran of 27 August, 1935, Articles 1, 3, 4, 11 and 12 (*ibid.*, vol. 176 (1937), pp. 301, 303 and 313); the Provisional Commercial Convention with Belgium and Luxemburg of 5 September, 1935, Articles 1, 3, 4, 5, and 16 (*ibid.*, 173 (1936), pp. 182, 183, and 186); the Agreement with Poland regarding Port Dues of 31 March, 1936, Articles 1 and 2 (*ibid.*, 186 (1939), pp. 215–16; the Commercial Agreement with the United States of America of 4 August 1937 (*ibid.*, 183 (1937–8), p. 114; and see below under VI, pp. 112 *et seq.*).

[2] League of Nations, 1927, V. 10, p. 12. *Cf.* also 1933, II. B. 1, and 1936, II. B. 9.

[3] *Cf.* the present writer's *Power Politics*, London, 1941, pp. 172 *et seq.*

[4] *See* Secretary Sherman's Letter to Mr. Buchanan of 11 January, 1898, Moore, *Digest of International Law*, vol. V, p. 278, and, similarly, Secretary Hull's Letter to President Roosevelt of 10 May, 1935, Hackworth, *Digest of International Law*, vol. V, p. 293.



never-ending uneasiness for the safer and more dignified position in which anybody's advantage accrues to everybody's profit, the standard of m.f.n. treatment is the very means to this end. It generalizes automatically the advantages granted by one State to any other included in the m.f.n. arrangement. Thus its main function consists in forming an agency of equality. It prevents discrimination and establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third State. How much the achievement of this object means to the chancelleries concerned may be gauged from the language of older treaties which, more openly than modern treaties in this sphere, reveal the particular jealousies and the actual competitors whom the contracting parties had very consciously in mind. To choose an instance at random, it is stipulated in the Treaty of Peace and Commerce between Denmark and the United Kingdom of 13 February, 1660–1, that "if the Dutch or any other nation whatsoever (the Swedish only excepted) hath already obtained, or hereafter shall obtain, of the King of Denmark and Norway, any better agreements, covenants, exemptions, and privileges than those contained in this treaty, the same and such like shall be communicated and effectually granted, freely and with all fulness, to the King of England and to his subjects; and on the other side, if the Dutch or any other nation whatsoever, hath obtained, or shall hereafter obtain, of the King of England, any better agreements, covenants, exemptions, or privileges than those contained in this treaty, the same and such like shall be communicated and effectually granted, freely and with all fulness to the King of Denmark and Norway, and to his subjects."[1]

Whatever has been or may be the internal political, social or economic structure of sovereign States, the egalitarian function of the standard corresponds to one of their permanent interests. This explains the historical continuity in the application of the m.f.n. standard. Yet what is continuity in time is universality in space. The standard of m.f.n. treatment is the common denominator on which primitive and developed countries, agricultural and industrial economies as well as capitalist and socialist States can meet, and the very indefiniteness and elasticity of the standard promotes its universal applicability.

There are, however, additional functions which are fulfilled by the m.f.n. standard. It is clear that m.f.n. clauses serve as an insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties. While it is thus true that the standard of m.f.n. treatment has the effect of putting the services of the shrewdest negotiator of a third country gratuitously at the disposal of one's own country, another aspect of the matter is more significant. The international society is highly dynamic and is involved in a continuous process of integration, disintegration and transformation. Thus unforeseen problems necessarily arise and changes occur which make desirable the adaptation of treaties to changed circumstances. As long as a country is content to enjoy treatment equal to that of the most-favoured third country, and the subject-matter of the treaty lends itself to such treatment, the use of the m.f.n. standard leads to the constant self-adapta-

[1] Art. 24. Hertslet, *Commercial Treaties* (subsequently *Hertslet*), vol. I, p. 186.

tion of such treaties and greatly contributes to the rationalization of international affairs.

Thus the functions of the m.f.n. standard may be described as the elimination of discrimination, the correction of oversights and the adaptation of treaties to changing circumstances. The indefiniteness and elasticity of the standard and the automatic nature of its operation are characteristics of the standard which have made possible the continuity and universality of its application.

## II. *The Types of Most-Favoured-Nation Clauses*

Much ingenuity has been spent on the best possible classification of m.f.n. clauses. Yet the test of any classification is whether it helps to clarify the subject or rather has the opposite effect. By way of an antidote to the tendency towards over-classification,[1] it is proposed in this paper to limit possible distinctions to two types of m.f.n. clauses and to discuss questions arising from any additional types in connection with the legal structure,[2] the scope of, and exceptions[3] from, the m.f.n. standard.

(*a*) *Unilateral and Bilateral M.F.N. Clauses.* In view of the fact that relations in the spheres to which m.f.n. treatment generally applies[4] are commonly based on the principle of reciprocity, the unilateral type of the clause is of an exceptional character. In British treaty practice, this type is to-day mainly of historical significance. It is limited to relations with countries which, at the time, were in the border-zones of Western civilization[5] —even to some of these States, Great Britain has granted at an early stage reciprocal treatment[6]—or with defeated countries during a transitional period from war to peace.[7]

However formulated, in substance, the bilateral m.f.n. clause represents a combination of two m.f.n. clauses on the basis of reciprocal obligations of the contracting parties. Frequently it is expressly stated that the parties

[1] Cf. M. L. E. Visser, "*La Clause de la Nation la plus favorisée dans les Traités de Commerce*", *Rev. Dr. Int. et Lég. Comp.*, 2nd series, 4 (1902), pp. 66 *et seq.*, pp. 159 *et seq.*, and pp. 270 *et seq.*; E. Lehr, "*La Clause de la nation la plus favorisée*", *ibid.*, 12 (1910), pp. 658 *et seq.*; St. K. Hornbeck, "The Most-Favored-Nation Clause", *A.J.I.L.*, 3 (1909), pp. 395 *et seq.*; T. E. Gregory, *Tariffs: A Study in Method*, London, 1921, pp. 460 *et seq.*; N. Ito, *La Clause de la Nation la plus favorisée*, Paris, 1930, pp. 118–19.

[2] Cf. below under III, pp. 102 *et seq.*

[3] Cf. below under IV, pp. 106 *et seq.*, and under V, pp. 109 *et seq.*

[4] Cf. below, p. 106.

[5] Turkish Capitulations of 1675, Articles 16 and 44 (Hertslet, II, pp. 350 and 357); Treaty with Morocco of 8 April, 1791, Art. 15 (*ibid.*, I, pp. 116–17); Treaty with the Chiefs of Samo (Africa) of 20 May, 1845, Article 14 (*ibid.*, VII, p. 69); Treaty with the Chief of Manna (Africa) of 1 January, 1847, Art. 4 (*ibid.*, VIII, p. 4); Treaty with the Sultan of Borneo of 27 May, 1847, Art. 2 (*ibid.*, pp. 86–7); Treaty with Japan of 14 October, 1854, Art. 5 (*ibid.*, IX, p. 978); Treaty with Siam of 18 April 1855, Art. 10 (*ibid.*, X, pp. 561–2).

[6] Treaty with Morocco of 28 July, 1760, Art. 12 (*ibid.*, I, p. 105); Treaty with Muscat of 31 May, 1839, Arts. 1 and 3 (*ibid.*, V, pp. 611–12); Treaty with the Sandwich Islands of 1 July, 1843, Arts. 1 and 8 (*ibid.*, VII, pp. 960 and 965); Treaty with Abyssinia of 2 November, 1849, Arts. 4 and 9 (*ibid.*, IX, pp. 1–3); Convention with China (regarding Burma and Tibet) of 1 March, 1894, Art. 17 (87 Br. and For. St. Papers (1894–5)), p. 1311.

[7] Peace Treaties of St. Germain with Austria, Arts. 220 and 228b; of Neuilly with Bulgaria, Arts. 150, 152, and 158b; of Versailles with Germany, Arts. 264–7; and of Trianon with Hungary, Arts. 203 and 211b.



*intend to establish a "strict", "perfect" or "complete" system of reciprocity*,[1] that they grant m.f.n. treatment "on condition of reciprocity",[2] or that it is "their intention to secure to each other reciprocally the footing of the most favoured foreign country".[3] The equivalent of the grant of m.f.n. treatment does not necessarily consist in the reciprocal grant of the same status, but may consist in concessions of a different kind.[4] Yet in the absence of evidence to the contrary, the presumption is that m.f.n. treatment is given and taken *on condition* of reciprocity, and that the contracting parties intend to use the bilateral m.f.n. clause.[5]

(*b*) *Conditional and Unconditional M.F.N. Clauses.* In accordance with the conditional formulation of the m.f.n. clause, favours granted to a third State in return for a compensation accrue to the beneficiary only in consideration of an equivalent concession. Under the unconditional clause, the beneficiary partakes simultaneously and automatically, without request and without compensation, of any favour granted to a third State. Or so put the issue in the words of a report made in 1848 by the Law Officers of the Crown, the question is whether a beneficiary "can claim the Boon without the Price, or whether the Price must not be taken to be an inherent element of the Boon".[6]

With the exception of the relatively short period between 1810 and 1857 during which Great Britain concluded a number of commercial treaties based on the conditional type of the m.f.n. clause,[7] this country has been the steadfast champion of unconditional m.f.n. treatment.[8] In 1923, it had the satisfaction of witnessing the conversion to this principle of the United States of America[9] who, until then, had with equal determination taken her stand on the basis of the conditional clause.[10]

[1] Treaty with Denmark of 11 July, 1670, Art. 40 (*Hertslet*, I, p. 201); Treaty with Spain of 29 November, 1713, Art. 11 (*ibid.*, II, p. 205); Treaty with Portugal of 19 February, 1810, *Arts.* 7 and 25 (*ibid.*, pp. 36 and 57); Treaty with Mexico of 26 December, 1826, Art. 11 (*ibid.*, III, p. 252); Treaty with Uruguay of 26 Aug., 1842, Art. 10 (*ibid.*, VI, p. 932); Treaty between Egypt and Palestine of 6 June, 1926 (*L.o.N., T.S.*, vol. 80 (1928), p. 279).

[2] Treaty with Albania of 10 June, 1926 (*L.o.N., T.S.*, vol. 43 (1926), p. 82.)

[3] Treaty with Turkey of 1 March, 1930, Art. 7 (*ibid.*, vol. 108 (1930), p. 212.)

[4] Treaty with France of 30 May, 1814, Art. 12 (*Hertslet*, I, p. 253); British Order in Council (Prussian Trade with British Colonies) of 3 May, 1826 (*ibid.*, III, p. 360); Treaty with Oldenburg of 4 April, 1844, Art. 5 (*ibid.*, VI, pp. 585–6).

[5] Cf. the Exchange of Notes between France and Great Britain modifying the Anglo-French Convention relative to Tunis of 18 Sept., 1897, 8 and 23 March, 1919 (Permanent Court of International Justice, Series C 2, pp. 99–100, at p. 100) and H. Isay, "*Meistbegünstigungs- und Gleichberechtigungsklauseln im internationalen Recht*", *Zeitschrift für Völkerrecht*, 12 (1923), pp. 278–9.

[6] Sir Arnold McNair, *The Law of Treaties*, Oxford, 1938, p. 287.

[7] Treaties with Portugal of 19 Feb., 1810, Art. 2 (*Hertslet*, II, p. 29), and of 3 July, 1842, Art. 4 (*ibid.*, VI, pp. 801–2); Treaty with the Two Sicilies of 29 April, 1845, Art. 8 (*ibid.*, VII, pp. 973–4); Treaty with Ecuador of 3 May 1851, Art. 4 (*ibid.*, IX, p. 243); Treaty with the Sandwich Islands of 10 July, 1851, Art. 3 (*ibid.*, p. 886).

[8] Cf. Commercial No. 3 (1907) [Cd. 3395] and Foreign Office, *Handbook of Commercial Treaties with Foreign Powers*, London, 1931.

[9] Cf. the Exchange of Letters between Secretary Hughes and President Harding and the Instructions of Secretary Hughes to American diplomatic officers of 18 August, 1923 (Hackworth, *l.c.*, vol. V, pp. 271 *et seq.*). See also J. D. Larkin, *The President's Control of the Tariff*, Cambridge (Mass.) 1936, pp. 54 *et seq.*

[10] Cf. S. B. Crandall, *Treaties*, Washington, 1916, pp. 404 *et seq.*, Ch. Ch. Hyde, *International Law*, Boston, 1922, vol. II, pp. 73 *et seq.*, and B. H. Williams, *Economic Foreign Policy of the United States*, New York, 1929. The chief European supporters of the conditional interpretation were F. von Martens, *Völkerrecht*, Berlin, 1883, vol. II, p. 225, and J. Westlake, *International Law*, Cambridge, 1904, Part I, p. 283. On the exceptional position granted to Switzerland, see

The chief disadvantage of the conditional clause is that it deprives the m.f.n. standard of its automatic operation and reduces the right of the beneficiary to that of a party to a *pactum de contrahendo*. Furthermore, the conditional clause opens the door to easy circumventions of the obligations undertaken by the promisor and it causes difficulties in achieving agreement as to what constitutes an equivalent concession. Finally, the uncertainty and complication thus introduced into international treaty relations no longer serve any purpose once the promisor grants unconditionally to any third State privileges previously granted conditionally to other States; for then the beneficiaries under conditional clauses, too, may claim gratuitous participation in the gratuitously bestowed favour. If the promisor wishes to avoid this result, his hands are tied once and for all and he is prevented *in future* from applying—and himself benefiting from—the unconditional type of m.f.n. treatment.

Bearing in mind the drawbacks resulting from the conditional interpretation of the m.f.n. treatment, Earl Granville expressed the view that the conditional type of m.f.n. treatment constituted "an infraction of the most-favoured-nation clause as hitherto interpreted in the law of nations".[1] While this dictum may overstate the position, there is much to be said for the view that a type of m.f.n. clause which, to a large extent, deprives it of its automatic operation and, instead of eliminating discrimination, is actually conducive to it, cannot claim to be considered as a m.f.n. clause proper. From this it seems to follow that, in principle, m.f.n. clauses ought to be interpreted unconditionally. This was the line taken by the Marquess of Salisbury: "Her Majesty's Government holds that those clauses have the same meaning whether that word[2] be inserted or not".[3] But this rule of interpretation must be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type as a principle of national treaty policy.

### III. *Legal Source and Structure of the Most-Favoured-Nation Standard*

A host of problems arise when the m.f.n. standard is subjected to analytical scrutiny. However, the discussion must be limited here to three main issues: the source of the standard, some aspects of its legal structure, and the question of the identification of the beneficiary of m.f.n. treatment.

(*a*) *Source of the M.F.N. Standard.* It is probably futile to attempt to derive claims to m.f.n. treatment from the principle of freedom of commerce.

[*Note continued from previous page.*]

Crandall, *l.c.*, p. 382; on the French origin of the conditional type of the m.f.n. clause, see V. G. Setser, "Did Americans Originate the Conditional M.f.n. Clause?", *Journal of Modern History*, 5 (1933), pp. 322–3; on the reasons for the popularity of the conditional interpretation in the United States, see W. S. Culbertson, *Commercial Treaties*, Encyclopaedia of Social Sciences, vol. 24, p. 27.

[1] In his Dispatch of 12 February 1885 to the British Minister in Washington, Parl. Papers, 1884–5. LXXI (Commercial No. 4 (1885)), p. 97.

[2] "Unconditionally".

[3] Note of 27 July 1885 to the Venezuelan Minister in London (77 Br. and For. St. Papers (1885–6), p. 796).



In the first place, though widely recognized in treaties by which States grant to each other reciprocal freedom of commerce,[1] it cannot be admitted that that principle has as yet developed into a rule of customary international law.[2] Even if it were held that freedom of commerce were a generally accepted principle of law, all the principal standards of international economic law[3] are compatible with it. It would, therefore, be impossible to determine the nature and scope of any one of these standards by reference to the all-embracing notion of freedom of commerce. This necessarily leads to the conclusion that treaties, bilateral or multilateral,[4] must be the foundation of m.f.n. treatment. It is true that there are cases in which States have granted m.f.n. treatment by autonomous action. Yet this means either that there exists a tacit agreement between the States concerned, or that the beneficiary cannot of right claim such treatment.

The stipulation of m.f.n. treatment is usually compressed into the so-called m.f.n. clause or clauses of a treaty. Yet not infrequently the whole of the treaty is concerned with the grant of m.f.n. treatment.[5] It is well to keep in mind the warning voiced by Judge Anzilotti[6], and more recently by Sir Arnold McNair, that "speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination".[7] While this rule certainly applies to questions related to the scope of, and exceptions from, concrete m.f.n. clauses, it cannot—and is not meant to—give any guidance in cases in which, in a rather summary fashion, States grant each other m.f.n. treatment.[8] Legal issues between the parties may then have to

[1] Cf. the Treaty with France of 25 April, 1606, (J. Dumont, *Corps universel du droit des gens* Amsterdam and The Hague 1726–31 (subsequently Dumont), vol. V, Part II, p. 632; Treaty with the United Provinces of 1608, Art. 6 (*Rymer*, vol. XVI, p. 675); Treaty with France of 3rd Nov., 1655 (*Dumont*, vol. VI, Part II, p. 121); Treaty with Spain of 23 Mar., 1667, Art 4 (*Hertslet*, II, p. 141); Treaty with Spain of 28 Nov., 1715, Art. 2 (*ibid.*, p. 205); Treaty with the United States of America of 3 July, 1815, Art. 1 (*ibid.*, p. 387). Similar clauses may be found, too, in most of the more recent commercial treaties concluded by the United Kingdom. See *l.c.* in note 3, page 101.

[2] Even the naturalists did not maintain more than that freedom of trade was an imperfect right or, as in the case of Gentili, Grotius and Zouche, they interpreted the conception rather narrowly or as subject to all important exceptions. Cf. Victoria, *De Indis Novis Inventis* (1532), Section III, titles 1–7 (J. B. Scott, *The Spanish Origin of International Law*, Oxford, 1934, pp. XXXVI–XXXVII); Grotius, *Mare Liberum* (1609), New York, 1916, pp. 7 and 54; Gentili, *De Jure Belli Libri Tres* (1612), Bk. I, Ch. XIX, Oxford, 1933, pp. 89–90; Zouche, *An Exposition of Fecial Law and Procedure* (1650), Part II, Section V, 3, Washington, 1911, pp. 109–10; Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), Bk. I, 5, Oxford, 1931, pp. 12–13; Vattel, *Le Droit des Gens* (1758), Bk. II, Ch. II, paragraphs 23 and 26, Washington, 1916, pp. 121–2; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), Ch. II, par. 189, Oxford, 1934, p. 99. See also Qu. Wright, "*International Law and Commercial Relations*", Proceedings of the American Society of International Law, Washington 1941, p. 37.

[3] See above, p. 96.

[4] Though, as a rule, m.f.n. treatment is the subject of bilateral treaties, this is not exclusively so. See the Protocol between Great Britain, Spain and Germany regarding the Sulu Archipelago of 11 March, 1877, Art. 3 (*Hertslet*, vol. XIV, p. 515); the Convention between Great Britain, Austria-Hungary, Belgium, &c., of 3 July, 1880, Art. 17 (71 Br. and For. St. Papers (1879–80), p. 644); the Convention and Statute on the International Régime of Maritime Ports of 9 Dec. 1923, Art. 2 (*L.o.N., T.S.*, vol. 58 (1926), p. 301); or the Ouchy Convention between Belgium and The Netherlands (open to all States) of July 18, 1932, Art. 6: "The High Contracting Parties undertake to apply to their reciprocal exchanges the unconditional and unlimited régime of the most-favoured-nation" (M.O. Hudson, *International Legislation*, vol. VI, p. 98).

[5] Cf. the Treaty with Egypt of 3 March 1884 (*Hertslet*, vol. XVII, p. 337) or the Treaty with Brazil of 10 August, 1936 (*L.o.N., T.S.* 172 (1936), p. 274).

[6] *Corso di diritto internazionale* (French transl., 1929), p. 438.

[7] *L.c.*, p. 285, note 1.

[8] Cf. the Treaties between New Zealand and Sweden of 24 May 1933 (*L.o.N., T.S.*, 159 (1935), p. 144) or between the Union of South Africa and Egypt of 8 May, 1939 (*ibid.* vol. 199 (1939), p. 298).

be solved by reference to the m.f.n. standard as such. Though there is no such thing as *the* m.f.n. clause, it is equally necessary to emphasize that there is such a thing as *the* m.f.n. standard. As has happened in the case of the minimum standards of international law, the m.f.n. standard owes its clarification to innumerable individual treaties by which it has been developed. The application of the m.f.n. standard in inter-State relations depends on agreement to this effect. Yet the m.f.n. standard and its four inherent elements[1] are clear and definite enough to permit the determination of controversies between parties to such agreements.

(*b*) *Legal Structure of the M.F.N. Standard.* The object of any attempt to give legal expression to the m.f.n. standard is to enable the beneficiary automatically to acquire the rights, present and future, granted by the promisor to any third State. The device by which this end can be achieved most conveniently is to consider the relevant stipulations of treaties between the promisor and third States as automatically becoming part of the treaty between the promisor and the beneficiary. As in other spheres of municipal and international law,[2] so here the resort to legal fictions has enabled draftsmen to popularize a new legal principle.[3] Again, in accordance with the general trend in the growth of legal systems, once the new principle had been widely accepted, the fiction could be discarded and the new standard openly proclaimed.

As stated in the British-Japanese Convention of 14 October 1854, the privileges granted by the promisor to third States accrue to the beneficiary "as of right".[4] Unless renounced by him,[5] the beneficiary continues to enjoy these privileges as long as the treaty between the promisor and the third State continues in operation, or as long as the promisor actually grants these rights to the third State.[6] It is of no consequence on what ground the third

[1] See above, p. 96.

[2] For other instances of the use of fictions as agencies of the development of international law, cf. the present writer's "Diplomatic Immunity", *Modern Law Review*, V (1941), p. 64, and *International Law and Totalitarian Lawlessness*, London 1943, p. 99.

[3] Thus, e.g., it is provided in Art. 38 of the Treaty with Spain of 13 May, 1667, that "the people and subjects of either of the said kings shall have and enjoy in the lands, seas, ports, havens, roads, and in all other places whatever, all the same privileges, securities, liberties and immunities, whether they concern their persons or trade, which have been already granted, or hereafter shall be granted, by either of the said kings, either to the most *Christian* king or to the *States General* of the *United* Provinces or to the *Hanseatans*, or to any other kingdom or state whatsoever, by their treaties or royal cedulas with all the beneficial and favourable articles and clauses contained in such grants, in as ample manner and form, and to as full and valid effect, as if the same were particularly transcribed and inserted in this present treaty" (*Dumont*, vol. VIII, Part I, p. 32). Or cf. the Treaty with Savoy of 19 Sept., 1669, Art. 15 (*Dumont*, vol. VII, Part I, p. 119).

[4] Art. 5 (*Hertslet* vol. IX, p. 980).

[5] Cf. the British Note of 23 May, 1832, renouncing the rights of Great Britain under the Treaty between Portugal and Transvaal of 1 Dec., 1875 (*ibid.*, vol. XV, pp. 206–8).

[6] Principles which become at a later stage commonly accepted and are taken for granted are usually fully set out in the earlier treaties. Thus it is stipulated in Article 18 of the Treaty with Denmark of 18 Feb. 1660–1 that "the people and subjects of the King of England shall have, possess and enjoy all and singular the things contained and granted in this article, without any molestation and interruption, so long and during all the time that the subjects or any of the people of the United Provinces of the Netherlands have, possess, and enjoy, or ought, or might have, possess, or enjoy the same, or the like, by any treaty, covenant agreement, or permission, whatsoever made or to be made" (*ibid.*, vol. I, pp. 183–4). The position, however, is different in the case of treaty-making by reference. Then the enjoyment of the advantages by the beneficiary continues irrespective of the subsequent cancellation or obsolescence of the treaty between the promisor and the third State. Cf. the Report by the Law Officers of the Crown of 25 October, 1872 (*McNair, loc. cit.*, pp. 304–5).



State's favour is based, be it "law or treaty, convention or agreement"[1] or merely a privilege bestowed *de facto* on the third State. As, however, foreign countries normally form the *tertium comparationis*, the positive formulation of m.f.n. clauses prevents, as a rule, the beneficiary from claiming m.f.n. treatment with respect to State contracts between the promisor and foreign companies or with international trusts and cartels.[2]

In the formulation of the m.f.n. standard, British State practice makes equal use of positive and negative m.f.n. clauses. With the growth of intensive contacts and in periods of expanding international co-operation, the emphasis lies more on "whatsoever privileges, advantages, favours, or immunities have been or may hereafter be accorded" to other States[3] than on the negative formulation of the m.f.n standard. Yet even when conditions do not encourage the generalization of favours, the m.f.n. principle can still fulfil its constant minimum function and assure the absence of discrimination against the beneficiary. In this form, the standard guarantees to the beneficiary as a minimum the status of the least disfavoured country. Thus, in their Temporary Commercial Agreement of 1936, Brazil and the United Kingdom promised each other that the goods produced and manufactured in either country "shall not be subject on importation, or subsequently, to other or higher customs duties or charges, to other prohibitions or restrictions, to other or more onerous customs formalities or licensing requirements than those to which like goods, the produce or manufacture of any other foreign country, are subject."[4]

(*c*) *The Beneficiary of the M.F.N. Standard.* According to the clear text of a great number of treaties concluded by this country and providing for m.f.n. treatment, there is no doubt as to the intention of the contracting parties in this respect. Thus it is stipulated in Article 1 of the Commercial Treaty between France and the United Kingdom of 28 February 1882 that both countries "guarantee to each other most-favoured-nation treatment."[5] Yet, in view of the British practice of making provision in commercial treaties for the protection of the person and property of individuals,[6] there are equally frequent clauses which speak of the rights of individuals to m.f.n. treatment.[7] Nevertheless it would not be advisable to draw from this fact hasty conclusions regarding the international personality of individuals. Many of these treaties refer exactly in the same manner to goods which are to receive treatment not less favourable than that granted to goods of any other

[1] Treaty with Guatemala of 6 June, 1935, Art. 10 (*L.o.N., T.S.*, vol. 152 (1932), p. 20).

[2] Cf. the Report by the Queen's Advocate of 6 May, 1853 (McNair, *loc. cit.*, pp. 303–4); the Exchange of Notes with Guatemala of 22 February, 1923 (*L.o.N., T.S.*, vol. 97 (1929), pp. 237–9); the Agreement between Greece and Spain of 11 July, 1932 (*ibid.*, vol. 148 (1934), p. 399), *L.o.N.*, 1937, V. 10, p. 5, and Qu. Wright, "The Most-Favored-Nation Clause", *A.J.I.L.*, 21 (1927), p. 761.

[3] Treaty with Spain of 3 Jan., 1836, Art. 2 (*Hertslet*, vol. XVII, p. 1019).

[4] *L.o.N., T.S.*, vol. 172 (1936), pp. 276–7.

[5] *Hertslet*, vol. XV, pp. 134–5. See also Art. 2 (*ibid.*, p. 136), or the Treaty with Persia of 2 May, 1857, Art. 9 (*ibid.*, vol. X, p. 949, and *loc cit.* in note 8, p. 101 above).

[6] Sir William Malkin, "International Law in Practice", *Law Quarterly Review*, 49 (1933), p. 489.

[7] See, e.g., the Treaty with Spain of 3 Dec., 1715 (*Hertslet*, II, p. 223) and *loc cit.* in note 8, page 101.

foreign country[1] and to the treatment on such a footing of ships[2] or aircraft.[3] British treaty practice does not make any recognizable distinction between individuals and other objects of international law; it certainly does not offer any evidence for their international subjectivity. The most that may be inferred from some of these clauses is that it has been the intention of the contracting parties automatically to transform their mutual obligations towards the subjects of the other party into rules of municipal law and thus to endow their nationals with rights mutually enforceable in each other's countries. In the absence of obstacles presented by English law in cases in which it may require additions to, or alterations of, the existing law for the enforcement of a particular treaty,[4] such a construction of m.f.n. clauses in favour of individuals may draw support from the Advisory Opinion of the Permanent Court of International Justice on the *Jurisdiction of the Courts of Danzig* (1928).[5]

### IV. *Scope of the Most-Favoured-Nation Standard*

The scope of m.f.n. treatment varies considerably in accordance with the national needs and policies of the States applying it. Though the principle of reciprocity affords a certain amount of protection to smaller States,[6] they may challenge the limitations imposed on the m.f.n. standard by the greater Powers only at the risk of being excluded from the benefits of the standard in extensive areas of the world. Thus, in spite of the treaty basis of the m.f.n. standard, the m.f.n. policies of world and greater Powers show clearly distinctive features. It is proposed to sketch the peculiarities in this respect of British m.f.n. policy and to examine the personal, territorial, temporal and functional aspects of the scope of the m.f.n. standard, as applied in British State practice.[7]

[1] See, *e.g.*, the Treaty between Brazil and India of 21 July, 1932, Art. 1 (a), (*L.o.N., T.S.*, 130 (1932), p. 94). A curious formulation of the rights of another category of potential candidates for international personality may be found in Part I (2) of the Protocol forming part of the Agreement between Estonia and the United Kingdom of 11 July, 1934 (*L.o.N., T.S.*, vol. 152 (1934), pp. 139-40: "The sale in Estonia of herrings, salted or cured in the United Kingdom and exported therefrom, shall . . . take place under conditions of free and fair competition with other herrings whether caught by Estonian vessels or salted or cured in Estonia, or imported salted and cured from other sources, and such other herrings shall not be placed in any more favourable position by subsidies in any other manner than herrings salted or cured in the United Kingdom and exported therefrom".

[2] See, *e.g.*, the Treaties with Japan of 14 Oct., 1854, Art. 5 (*Hertslet*, vol. IX, p. 975) and with Siam of 23 Nov., 1937, Art. 13 (2) (*L.o.N., T.S.*, 188 (1938), p. 344).

[3] See, *e.g.*, the Treaty with the United States of America of 28 March, 1935, Art. 4 (II) (*ibid.*, vol. 162 (1935), p. 42).

[4] See McNair, *loc. cit.*, pp. 13 *et seq.*

[5] Series B 15, pp. 17–18. Such an interpretation, however, has certainly not recommended itself to either the Courts of France or of the United States in their interpretation of m.f.n. obligations. See *Chenoweth* v. *Davis* (1926) (Clunet, 1927, p. 420) or *George S. Warren* v. *United States* (1938), 94 F. (2d) 597, in which the Court refers with approval to *Taylor* v. *Morton* (1855), 2 Curtis 454: "The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. . . . The contract is to legislate in conformity with a rule therein given. This necessarily addresses itself, exclusively, to the legislative power. It is a rule of their action, and not of the action of courts of justice".

[6] Cf. the present writer's "The Three Types of Law", *Ethics*, vol. 53 (1943), pp. 30 *et seq.*, and "International Law and Society", *Virginia Quarterly Review*, vol. 20 (1944), pp. 577 *et seq.*

[7] On the practice of the United States of America, see *loc. cit.* in note 10, p. 101; on the practice of the U.S.S.R. see *loc. cit.* in note 1, p. 98; on the practice of Germany, see the literature quoted in Hald, *loc. cit.* in note 3, p. 97; and on the practice of France, see S. Basdevant, "Clause de la Nation la plus Favorisée", in A. de Lapradelle et J. B. Niboyet, *Répertoire du Droit International*, Paris, 1929, vol. III, pp. 483 *et seq.*



(*a*) *Personal Scope.* With regard to individuals, there has been a tendency to extend the operation of the m.f.n. standard not only to "all the subjects of His Majesty", but also to "all persons under His Majesty's protection", including foreigners "ordinarily resident" in the parts of the British Empire to which the treaty applies. British companies are defined as including "all limited liability and other companies, partnerships and associations formed for the purpose of commerce, finance, industry, transport or any other business". They must be either constituted in accordance with the laws in force in the United Kingdom or in those other parts of the British Empire to which the treaty applies or ordinarily there carry on their business.[1] Accordingly, the United Kingdom has refused to comply with requests to "agree to any stipulations which would have the effect of placing Her Majesty's subjects of any particular religious belief in a less advantageous position than others of Her Majesty's subjects in regard to their treatment in foreign countries",[2] or to consent to any other kind of discrimination between British subjects. The nationality of British vessels is either left to be determined in accordance with British municipal law, or it is expressly provided that they must be registered in a port within the British Commonwealth of Nations.[3] In the case of aircraft, the registration principle applies.[4] Goods, from whatever place arriving, are considered to be British if they are the growth, produce or manufacture of the United Kingdom or of any other part of the British Empire covered by the treaty.[5]

(*b*) *Territorial Scope.* In accordance with a practice of long standing,[6] commercial treaties concluded by the United Kingdom do not automatically extend to any other parts of the British Empire. Usually, the United Kingdom reserves the right to extend on notice and on a basis of reciprocity such treaties to any of His Majesty's colonies, overseas territories, protectorates or mandates in respect of which the mandate is exercised by the Government in the United Kingdom. Equally, the United Kingdom reserves to itself as a rule the right of accession to the treaty by notification

[1] For recent instances see the Treaty of the United Kingdom and India with Yemen of 1 Feb., 1934, Art. 5 (*L.o.N., T.S.*, vol 157 (1935), p. 65), and the Treaties of the United Kingdom with Brazil of 27 March, 1935, Art. 12b (*ibid.*, vol. 160 (1935), p. 316), and with Siam of 23 Nov., 1937, Protocol (*L.o.N., T.S.*, vol. 186 (1938), p. 352). For an exceptional formulation of the criterion of the nationality of British companies, see the Treaty with Poland of 23 Nov., 1923, Art. 7 (*ibid.*, vol. 28 (1924), p. 435): "Associations and companies established for the development of the petroleum industry and regarded by the two contracting parties as of British nationality shall enjoy in Poland all the rights and privileges which may be accorded to such associations and companies of any third Power".

[2] Note of the Earl of Derby of 23 Nov., 1876 to Prince Ghika (Rumania) (Parl. Pap. 1877, LXXXIX. 5 (C. 1766), No. 99, p. 46). Cf. also the Treaty with Morocco of 9 Dec., 1856, Arts. 11 and 16 (*Hertslet*, vol. X, p. 908). See, by way of contrast, the Treaty between the Union of South Africa and Germany of 1 Sept., 1928, Art. 25 (*L.o.N., T.S.*, vol. 95 (1929), p. 302)

[3] Cf. the Treaties with Yugoslavia of 12 May, 1927, Art. 52 (*ibid.*, vol. 81 (1928), p. 179), with Yemen (*loc. cit.* in note 1 above, p. 65), and with Siam (*ibid.*, p. 362). Cf., however, the Treaty with the U.S.S.R. of 16 Feb. 1934, Art. 6 (*ibid.*, vol. 149 (1934), p. 454).

[4] Cf. the Treaty with the U.S.A. of 28 March, 1935, Art. 2, paragraph 2 (*ibid.*, vol. 162 (1935), p. 48). See also the Treaty with Greece of 30 May, 1939, Art. 1 (IV), (*ibid.*, vol. 202 (1940), p. 10).

[5] See the Treaty with the United States of America of 17 Nov., 1938, Art. 2 (*ibid.*, vol. 200 (1940–1), p. 296). On the question of the "naturalization" of goods and of "important transformation" of such goods in another country, cf. *L.o.N.*, 1938, II, B.1, pp. 16–18.

[6] See the Instruction by Lord Salisbury to the British Minister at Brussels of 28 July, 1897 (Parl. Pap. 1877, LXXXVIII (C. 8442, No. 2, p. 1), p. 83) and, e.g., the Treaty with Rumania of 31 Oct., 1905, Art. 17 (Commercial No. 3 (1907), p. 45).

on behalf of any Member of the British Commonwealth of Nations, whose Government may desire that such accession should be effected, including dependencies and mandates of such Dominions. In addition, it is generally stipulated in their favour that as long as such territories grant *de facto* m.f.n. treatment to the other contracting party they are to enjoy corresponding treatment.[1]

(c) *Scope ratione temporis.* The controversy in the literature on the scope of m.f.n. treatment in this respect is not of much practical significance with regard to British treaties. From an early date onwards, it is expressly provided in the treaties concluded by this country that m.f.n. treatment does not merely extend to favours already granted to third States by the other contracting party but also to those that "shall be hereafter granted to any other prince or people".[2] This formulation equally serves the purpose of clarifying that it is the *grant* of the privilege to a third State and not the actual *claim* of the privilege by the third State under its treaty with the promisor which brings the standard into operation.[3]

(d) *Functional Scope.* Though it would be tempting to elaborate in detail the functional scope of the m.f.n. standard as applied in British State practice, limitations of space permit merely to give the barest indication of its field. Compared with the clauses of earlier treaties, the scope of m.f.n. treatment is more concretely defined in modern treaties. In matters affecting import and export trade, the reign of the standard is undisputed. It shares its popularity with the standard of national treatment[4] in matters related to navigation, fisheries, land and air transport, and regarding the personal and proprietary rights of foreigners. It is also widely applied in order to define the status of consular officers. Occasionally even the status of diplomats, missionaries, and men-of-war is settled on this footing. Some of the older treaties provide clauses of real rarity value: the payment of slave-charges of liberated British subjects and the punishment of British subjects on a m.f.n. basis.[5] For practical purposes it is essential to bear in mind the exact scope of each particular m.f.n. clause; for m.f.n. treatment can only be claimed with respect to favours *ejusdem generis* granted by the promisor to third States.[6]

[1] Cf. the Treaties with Siam, Arts. 22–5 (*loc. cit.* in note 1 above, p. 107), pp. 349–50) and with Muscat of 5 Feb., 1939, Arts. 1, 19 and 20 (*Ibid.*, vol. 196 (1939), pp. 304–5 and 310).

[2] Treaty with Portugal of 29 Jan., 1642, Art. 15 (*Hertslet*, I., pp. 6–7). For a *recent* instance, see Art. 2 of the Treaty with the United States of America (*loc. cit.* above in note 4, p. 107).

[3] Cf. the Report by the King's Advocate of 12 Sept., 1834 MacNair, *loc. cit.*, pp. 291–2.

[4] See below under VIII, pp. 118 *et seq.*

[5] Cf., *e.g.*, the Treaty with Algiers of 10 April, 1682, Arts. 12 and 16 (*Hertslet*, I. pp. 61–3).

[6] For an interesting application of this principle, see the decision of the Umpire of the British-Venezuelan Mixed Claims Commission in the case of the *Aros Mines* under the Protocol of 13 Feb., 1903. It was held that the relevant m.f.n. clause on which Great Britain relied and which extended to the administration of justice only applied to rights before national courts, but not, as Great Britain had maintained, to the proceedings of the international Mixed Commission (Ralston, *Venezuelan Arbitrations of* 1903, Washington, 1904, pp. 344 *et seq.*). The question whether rolled and hammered iron are to be considered as "like articles" forms the subject of a prolonged correspondence between Great Britain and the United States of America in the years between 1816 and 1821. Cf. especially Mr. Stratford Canning's Note of 26 Nov., 1821, to the United States Secretary of State, the Hon. J. Q. Adams (9 Br. and For. St. Pap. (1821–2), pp. 641 *et seq.*, at pp. 642–3). On the controversy between France and the United Kingdom regarding the latter's right to claim the benefits of Art. 13 of the Franco-Italian Consular Convention of 28 Sept., 1898 (23 Martens *N.R.*, 2nd series, p. 363), see the



### V. *Exceptions*

In British State practice, exceptions to the operation of the m.f.n. standard are stipulated in the interest of preferential treatment and on grounds of national or international public policy.

(a) *Exceptions in Favour of Preferential Treatment.* In an inter-State system composed of more than three States, the standards of m.f.n. and preferential treatment are mutually exclusive. While the unity between mother country and colonies cannot be challenged by another State,[1] the position is different if a composite State such as the British Empire and Commonwealth consists of a number of entities with distinct international personalities of their own, as in the case of the Dominions, international Protectorates or the A-Mandates.[2] In order to make possible preferential treatment between the members of this family of nations, the commercial treaties of the United Kingdom—particularly since the Imperial Economic Conference of Ottawa of 1932[3]—either contain an express reservation allowing for such preferential treatment, or the same object is achieved by limiting m.f.n. treatment to that of any other *foreign* country and by defining at the same time a foreign country in relation to the United Kingdom as "any country or territory not under the sovereignty, protection, suzerainty or mandate of His Majesty."[4] Equally, the United Kingdom has frequently conceded corresponding exceptions to other States in the interest of frontier traffic, neighbouring States, customs unions, protectorates and regional collaboration.[5]

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[*Note continued from previous page.*]

Advisory Opinion of the Permanent Court of International Justice on the *Nationality Decrees in Tunis and Morocco* (1923), B 4, p. 31. Cf. also the Note of Earl Granville to M. Challemel-Lacour of 20 May, 1881 (Permanent Court of International Justice, C2, p. 531).

[1] See the Report by the Law Officers of the Crown of 14 Jan., 1832, McNair, *loc. cit.*, p. 298, and Lord Lansdowne's Despatch to Sir E. Monson of 13 Jan., 1903 (Parl. Papers 1903, LXXV (Cd. 1470), No. 1, p. 1 (p. 579): "The attitude of His Majesty's Government in regard to the matter has never varied. They have declined altogether to agree that Great Britain should be under any obligation to treat the British Colonies as foreign countries".

[2] Under the mandate treaties and treaties with the United States of America, the United Kingdom is under an obligation to apply in A- and B-Mandates the standard of equality of opportunity. See below under VIII, pp. 118–119.

[3] Cf. Parl. Papers, 1931–2, X (Cmd. 4174, pp. 10–11), pp. 710–11.

[4] Cf. the Treaties with the U.S.S.R., Art. 7 (*loc. cit.* above in note 3 (p. 101), p. 464, and with the United States of America, Art. 21, and Exchange of Notes (*loc. cit.* in note 5 (p. 101) above, pp. 396 and 470).

[5] Chief amongst them are those covered by the so-called Austrian Empire, Baltic, Central American, Iberian, Scandinavian and Ottoman Empire clauses. See, however, the adverse Report of the Committee on Commercial Relations with Foreign Countries, which was approved by the Ottawa Conference, on preferential agreements on a regional basis between foreign countries, *loc. cit.* in note 3 above, pp. 821–2 (Cmd. 4174, pp. 25–6). In the absence of an express reservation, a State can demand under the m.f.n. standard the benefits of exclusive preferential treaties, bilateral or multilateral, between the promisor and third States, such as customs unions which leave the international personalities of the contracting States intact. Yet if the convention is an open one, there is much to be said *for* the view that the beneficiary should not claim the benefits of such a convention without sharing the burdens connected with it, or at least that it should claim the fulfilment of m.f.n. obligations only in so far as it accords itself in fact to the other State the benefits which it claims. Cf. the Convention regarding the Immunity of State-Owned Vessels of 10 April, 1926, Arts. 6 and 10 (*L.o.N., T.S.*, vol. 176 (1937), p. 209); the Agreement between the United States of America, the Economic Union of Belgium and Luxemburg, Colombia, &c., of 15 July, 1934 (*Ibid.*, 165 (1936), p. 10), and the letter of Secretary Hull to President Roosevelt of 10 May, 1935 (*Hackworth*, *loc. cit.*, vol. V, p. 93).

(b) *Exceptions on Grounds of National Public Policy* cover import and export restrictions and prohibitions imposed for the protection of public health, on moral or humanitarian grounds, or for the protection of animals and plants; they may relate to the importation and exportation of silver and gold or to the export of national treasures of artistic, historic or archæological value; or they become necessary for reasons of public security, owing to a state of war or because of the international obligations of one of the contracting parties as a neutral power.[1]

The question whether all or some of these reservations are legitimate even if not expressly stipulated is part of the wider issue of the proper interpretation of commercial treaties and cannot be answered within the compass of this paper.[2] Yet even in the case of the application of such prohibitions and restrictions there is still scope for the operation of the m.f.n. standard. The imposition of such protective measures is incompatible with the standard if it does not extend to other countries in regard to which like grounds for applying such measures exist, or if such measures constitute trade restrictions in disguise.[3]

(c) *Exceptions on Grounds of International Public Policy.* In the more recent commercial treaties of the United Kingdom there is a standard clause to the effect that "this treaty shall not be deemed to confer any right or to impose any obligation in contravention of any general international convention to which either of the contracting parties are or hereafter may be parties". Or, more narrowly, import and export prohibitions are authorized if imposed by either contracting party in pursuance of obligations under international agreements in force on the day of the signature of the treaty in question.[4] Such reservations cover some, if not all, of the issues which may arise from the obligations of States under a collective agreement which provides for the application of economic and financial sanctions. During the Italo-Ethiopian War, the problem arose with regard to the application of sanctions under Article 16 of the Covenant of the League of Nations. It appears that at least two aspects of the matter require separate discussion:

In the first instance, in spite of m.f.n. obligations towards the aggressor, members are bound and entitled to apply sanctions against such a State, at least if the aggressor is a member of the collective system or has otherwise recognized the legitimacy of sanctions.[5] This follows from the aggressor's submission to the *lex societatis*. Such consent given in advance deprives the

[1] Cf. the Treaties with Portugal of 11 May 1933, Art. 6 (*L.o.N., T.S.*, vol. 161 (1933), p. 290) and with the United States of America, Arts. 4 and 16 (*loc. cit.* in note 4 (p. 107) above, pp. 296 and 304).

[2] See the Report by the Queen's Advocate of 28 July, 1845 (McNair, *loc. cit.*, p. 236), the Report by the Law Officers of the Crown of 18 March, 1867 (*ibid.*, p. 241), the Dissenting Opinions of Judge Anzilotti and Judge Huber in the *Wimbledon* case, Permanent Court of International Justice, A 1, pp. 36–7, and A. T. Kleta, "Neutrality Laws and Exceptions to Commercial Treaties", *Proc. Am. Soc. Int. Law*, Washington, 1936, pp. 141–2.

[3] See pp. 112 *et seq.* below under VI.

[4] Cf. the Treaty with Austria of 22 May, 1924, Art. 22 (*L.o.N., T.S.*, vol. 36 (1926), p. 188). Other Treaties specifically refer to multilateral treaties such as the International Opium Convention of 1925 or the Convention on Narcotic Drugs of 13 July, 1931.

[5] Cf. the present writer's *The League of Nations and World Order*, London, 1936, pp. 105 *et seq.*, and *Modern Law Review*, 3 (1939), p. 152.



aggressor of any claim against the sanctionist States, based on the alleged violation of m.f.n. treatment, and of any right to retaliation.[1]

*Secondly*, if, in accordance with Article 16, paragraph 3, of the League Covenant or under corresponding clauses of other international agreements, sanctionist States grant special concessions to those amongst them who have suffered special losses from the application of sanctions, third States cannot claim under the m.f.n. standard to be entitled to the same benefits. In the case of members of the collective system, such a claim would be contrary to the spirit of their collective obligations.[2] When such a request was actually made by Hungary to the Government of the United Kingdom, it met appropriately with a refusal.[3] In the case of non-members, the same result follows from the general rules applying to the interpretation of commercial treaties which do not contemplate "economic relations of so exceptional a nature as those which are here under consideration".[4]

Exceptions of any kind hamper the automatic operation of the m.f.n. standard and are a possible cause of friction and dispute. In the absence of express stipulations in the treaties in question, there is no presumption which can be applied automatically to all three categories of exceptions. It is, however, believed that the following presents an accurate summary of the position:

(1) There is no presumption in favour of exceptions on grounds of preferential treatment.

(2) Presumptions in favour of exceptions on grounds of national public policy can generally be derived from the context in which m.f.n. treatment has been arranged as, for instance, in the case of conventions in the spheres of commerce and communications.

(3) There is a presumption in favour of the overriding character of exceptions on grounds of international public policy.

[1] This is expressly provided in Art. 44 of the Agreement concerning the Regulation of Production and Marketing of Sugar of 6 May, 1937 (I.L.O., *Intergovernmental Commodity Control Agreements*, Montreal, 1943, p. 41).

The special difficulty raised by Austria that, under Art. 234 of the Peace Treaty of St. Germain, she was equally bound to grant freedom of transit for goods coming from or going to Italy, is merely imaginary. Like other obligations of a commercial character, they are suspended in emergencies such as war and aggression (see above, note 2 (p. 110), if incompatible with the *lex specialis* applying in such cases. (See the Report of the Legal Sub-Committee of the Co-ordination Committee of the League of Nations, *O.J.*, Spec. Suppl. 145, p. 21).

[2] See L.o.N., Spec. Suppl. 145, p. 26.

[3] Hungary asked the United Kingdom to accord to imports of Hungarian poultry the same customs concessions as had been granted to imports from Yugoslavia as a compensation for losses incurred by the operation of sanctions against Italy. The claim was rejected, as the concessions to Yugoslavia had been made "in virtue of a decision of the League of Nations of which Hungary was also a member and the decisions of which Hungary was also obliged to carry out" (*The Times*, 9 Jan., 1936, p. 9 (d)).

[4] *Loc. cit.* in note 2 above, p. 26. See also Arts. 5, 11 and 12 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 8 Nov. 1927, Handbook, *loc. cit.* in note 8 (p. 101) above, pp. 971 and 973–4, note 2 (p. 110) above, and, on the wider issues involved, Ch. Rousseau, "*De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International*", *Rev. Gén. Dr. Int. Public*, 39 (1932), pp. 133 *et seq.*, and H. Lauterpacht, "The Covenant as the 'Higher Law'", this *Year Book*, 17 (1936), pp. 54 *et seq.*

### VI. *The Most-Favoured-Nation Standard and the Growth of Collective Planning*

As in the spheres of the law of neutrality and of State immunity, the growth of collective economy and planning has brought about a shift of emphasis from traditional to apparently novel aspects of basic international conceptions, without leading to a "breakdown" of international law.[1] The same phenomenon may be observed in the sphere of international economic law in general and with regard to the m.f.n. standard in particular. In order to arrive at a proper assessment of the impact of that transformation of national and international affairs on the m.f.n. standard, it should be remembered that the non-commercial spheres in which the standard has continued to be applied as hitherto, have not at all been affected by these changes.[2] Furthermore, in the interval between the two world wars, these changes have not been the only ones that are significant from our point of view. The principle of the free convertibility of currencies in the international market has not remained sacrosanct. Neither has it been possible any longer to take the stability of currencies for granted. Finally, during that period, a number of countries had forged their national economies into at least potential mechanisms for commercial warfare.[3]

In the field of international economic relations, the disintegration and transformation of world trade has exercised a fourfold effect on the operation of the m.f.n. standard. This process has affected the automatic operation of the standard, its functions, its scope and its durability.

(*a*) *Effect on the Automatic Character of the Standard.* In the cases of quantitative limitations of imports or of a managed currency, the chief problem for foreign merchants consists in receiving a fair allocation of the available licences, quotas or currency. While the absence of any international understanding on matters of this kind produces accidental discrimination or administrative favouritism, absolute equality may be highly unfair to States which, in the past, have been the chief-suppliers of the country in question, and for which the continuation of such exports may be of vital importance. In such cases the principle of equitable treatment on a basis of non-discrimination makes it possible to take such circumstances into account and creates a state of proportionate equality between the importing countries on the basis of the m.f.n. standard.[4] Yet if such procedures are adopted, there is no longer room for the automatic operation of the standard, and internal planning is achieved at the price of international uncertainty and tiresome inter-State negotiations.

(*b*) *Effect on the Functions of the Standard.* Beyond the assurance of equitable treatment no favour can be bestowed in such circumstances on a foreign country other than the guarantee that allocations of licences, quotas and currency will be made "on conditions not less favourable than allocations to any other foreign country".[1] Thus, again, the m.f.n. standard has been reduced to the fulfilment of its minimum—and permanent—function, namely, the prevention of discrimination. This function of the standard acquires still further significance in the relations between capitalist and socialist States. It serves here as the only legal guarantee of equality of opportunity in trading with a State monopoly of foreign trade as it is practised by the U.S.S.R. Only in this way can the object be achieved that, "in considering any given transaction, regard shall be had to financial and commercial considerations only".[2]

(*c*) *Effect on the Scope of the Standard.* The scope of the m.f.n. standard as taken for granted in the era of free trade already became gradually restricted before the First World War by the limitation of production and the division of the world's markets by means of understandings between a growing number of international cartels, concerns and trusts.[3] In the interval between the two World Wars, this trend became more pronounced,[4] and governments took a more active part in such arrangements or even went to the length of concluding amongst themselves bilateral barter treaties, compensation agreements and multilateral commodity control conventions.[5] Thus, by means of private understandings between combines and of a considerable increase in inter-State planning, the scope of transactions between individual firms on the m.f.n. basis has been considerably narrowed in favour of agreed import and export restrictions.

The same trend was intensified by the growing interest taken by States in their home production and markets and the general atmosphere of economic nationalism pervading the post-1919 period.[6] Following the example set by France,[7] other countries, including the United Kingdom, began to split up the comprehensive m.f.n. clauses of the pre-1914 era

[1] See W. Friedmann, *The Growth of State Control over the Individual and its Effect upon the Rules of International Responsibility*, this Year Book, 19 (1938), pp. 115 *et seq.*, and *loc. cit.* in note 2, p. 104 above, 1943, pp. 42 *et seq.*

[2] Cf. the Report of the F.B.I. International Trade Policy Committee on *International Trade Policy*, London, 1944, No. 41 (p. 11). See, however, Empire Economic Union, *Post-War Economic Policy*, London, 1945, pp. 20 *et seq.* A balanced review of this Memorandum will be found in the leading article on "The Most Favoured Nation" in *The Times* of 30 Jan., 1945.

[3] Cf. E. Korovine, "*Les Pactes de Non-Agression Economique*", *The New Commonwealth Quarterly*, vol. I (1935), pp. 203 *et seq.*; E. Staley, *World Economy in Transition*, New York 1939, pp. 127 *et seq.*; Economic Committee of the League of Nations, *The-Most-Favoured Nation Clause*, Geneva 1936 (1936, II, B.9); and L.o.N., *The Transition from War to Peace Economy*, Geneva, 1943, pp. 19 *et seq.*

[4] See the Treaties with Poland, Art. 7 (*loc. cit.* in note 1 (p. 107 above) p. 186), with Siam, Art. 8 (*ibid.*, p. 340), and with the United States of America, Art. 5 (*loc. cit.* in note 2 (p. 107 above) pp. 267–8), and the Despatches of Secretary Hull to Ambassador Dodd (Berlin) of 9 Oct. 1933, and of the Assistant Secretary of State (Moore) to the United States' Chargé d'Affaires *ad interim* to Estonia of 9 Sept., 1936 (*Hackworth, loc. cit.*, vol. V, pp. 277 and 286–7).



[1] Art. 7 of the Treaty with Poland (*loc. cit.* in note 1 (p. 107 above) p. 186).

[2] Treaty with the U.S.S.R. of 16 Feb., 1934, Art. 4 (*L.o.N., T.S.*, vol. 149 (1934), p. 450). See also the explanation of the function of the m.f.n. standard in commercial relations with the U.S.S.R. given by the President of the Board of Trade during the discussion of the Treaty in the House of Commons and the new problems arising out of trade with the U.S.S.R. which are not covered by "the old m.f.n. phraseology", (*Hans.*, vol. 286 (1933–4), col. 1280) and the Treaty with the United States, Art. 6 (*loc. cit.* in note 4 (p. 107 above) p. 298).

[3] Cf. R. Liefmann, *Cartels, Concerns and Trusts*, London, 1932, pp. 148 *et seq.* and pp. 265 *et seq.* On the attitude taken by this country in the early stages of the development towards monopolies, see Lord Lansdowne's Instructions of 12 Dec., 1901, to the British Delegates at the Brussels Sugar Conference (Parl. Pap. 1902, C IV. (Cd. 103, p. 19), No. 24, p. 312).

[4] Cf. R. A. Brady, *Business as a System of Power*, New York, 1943, pp. 237 *et seq.*, and J. Borkin and Ch. A. Welsh, *Germany's Master Plan*, London, 1943.

[5] See F. E. Lawley, *The Growth of Collective Economy*, London, 1938, vol. II, and *loc. cit* in note 1, p. 112 above.

[6] Cf. *loc. cit.* in note 1, p. 111 above, pp. 266 *et seq.*

[7] See F. A. Haight, *French Import Quotas. A New Instrument of Commercial Policy*, London 1935, pp. 2 *et seq.*

and to reformulate them in a more individualized and concrete manner.[1] Furthermore, the number of the traditional exceptions to the m.f.n. standard has been increased by at least two newcomers: the anti-bounty and anti-dumping exceptions. From the end of the last century onwards, the issue was hotly debated whether the grant of export bounties by a State constituted an infraction of the m.f.n. standard or whether, on the contrary, countervailing duties[2], imposed in order to off-set such bounties, should be regarded as a violation of the m.f.n. principle. The former position was taken by Lord Salisbury and Lord Lansdowne in the controversy on the compatibility of Continental and, in particular, of Russian, sugar bounties with the m.f.n. standard. In their opinion, any such support granted to exporters amounted to an artificial disturbance of the balance of trade which could be legitimately redressed by corresponding anti-bounty duties.[3] While the arguments by which such export bounties were attacked in the British notes and pronouncements appear antiquated in an age in which *laissez-faire* economics have ceased to be the fashion of the day, there can be little doubt that if a State insists on granting export bounties, it is estopped from alleging the incompatibility of anti-bounty duties with the m.f.n. standard. Following, however, the example first set by Belgium, the commercial treaties of the United Kingdom now regularly contain an express reservation regarding countervailing duties.[4] Similarly, in accordance with the Safeguarding of Industries Act, 1921,[5] the United Kingdom now regularly reserves its freedom to apply special anti-dumping duties. Such dumping may consist in selling below cost price, more cheaply than in the country of production, or at lower prices than those obtaining in the British market (for instance, owing to the exploitation of foreign labour[6] or to the depreciation of foreign currencies[7]).

[1] See, e.g., Art. 15 of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, p. 302).

[2] As distinct from countervailing duties, there is much to be said for the view that contingent duties are incompatible with the m.f.n. standard. See *Bill v. United States* (1939), decided by the United States Court of Customs and Patent Appeals (*A.J.I.L.* 35 (1941), p. 160) and, on the different functions fulfilled by the two Customs duties, H. M. Catudal, "The Most-Favoured-Nation Clause and the Courts", *A.J.I.L.* 35 (1941), p. 45.

[3] See the *Correspondence relating to Sugar Bounties* (Parl. Pap. 1898, XCII (Cd. 8780), pp. 249–51); the instructions of Lord Salisbury of 31 May, 1898 to the British Delegates to the Brussels Sugar Conference (*ibid.*, (Cd. 8938—No. 2, p. 1), p. 283); the note of Lord Lansdowne of 20 Nov., 1902, to Baron Gravenitz (*ibid.*, 1903, LXXXV (Cd. 1401—No. 5, p. 19), p. 517). Cf. also W. P. B. Shepheard, "The Most-Favoured-Nation Article", *Journ. Soc. Comp. Leg.* N.S., vol. V (1903–4), p. 136, and W. Kaufmann, *Weltwackerindustrie und Internationales und Kolonialles Recht*, Berlin, 1904.

[4] See Art. 9 of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, pp. 298–300).

[5] 11 & 12 Geo. V, c. 47 (Part II, 2).

[6] A special exception usually affords protection against the importation of prison-made goods. See the Treaties with Portugal of 11 Sept., 1928, Art. 52 (6), (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 587) and with the United States of America, Art. 16 (*loc. cit.* in note 3 (p. 107) above, pp. 298–300).

On a British proposal for the international regulation of the sale of prison-made goods, see the Despatch of Lord Salisbury of 19 July, 1896, to Her Majesty's Representatives at Paris (Martens, *N.R.G.*, 2nd series, vol. 27, pp. 425–7). Cf. also the Foreign Prison-Made Goods Act (50 & 51 Vict., c. 63).

[7] See the Treaty with the United States of America, Arts. 9 and 18 (*loc. cit.* in note 4, p. 107 above, pp. 298–300 and 304), J. Viner, *Dumping: A Problem in International Trade*, Chicago, 1923, and Sir William Beveridge and others, *Tariffs: The Case Examined*, London, 1931, pp. 125 *et seq.*



(d) *Effect on the Durability of the Standard.* Generally speaking, the increase in State planning, coupled with the instability of the post-1919 period, has had the effect of making the operation of the m.f.n. standard much more elastic than was customary in the period between 1815 and 1914, and it has subjected the standard to the continuous risk of being terminated on the shortest notice. Various devices have been adopted in order to achieve the object of greater elasticity:

(1) In the absence of a clause regarding their termination, the commercial treaties of the preceding period were considered to be of perpetual duration[1] or, at least, were concluded regularly for the period of a decade. More recent commercial treaties are either provisional agreements which are renewed from time to time or are concluded for relatively short periods of one or, at the most, of several years.

(2) Sections of commercial agreements which are of a particularly fluctuating character, such as those relating to the fixing of quotas, are subject to revision at intervals of a few months. If one of the contracting parties proposes to introduce substantial alterations in the allotment of quotas, negotiations have to take place. In the absence of agreement within a very short period, usually one month, the party which wishes to make the changes, is free to do so, but the other party may terminate the agreement in its entirety.[2]

(3) A number of other clauses, designed to maintain an equilibrium which, at the time of the conclusion of the treaty, had been taken for granted by both sides, and to ensure the effectiveness of the agreement, have introduced the principle of the *clausula rebus sic stantibus* into recent commercial treaties. Such clauses may specifically refer to the state of the currencies of the contracting parties at the time of the conclusion of the treaty, the then existing balance of trade, the amount of exports of coal from the United Kingdom to the other contracting party, the then obtaining level of customs duties, or, more generally, they may cover any measures "which, while not conflicting with the terms of this Agreement, appear to the other High Contracting Party to have the effect of nullifying or impairing any of the objects of the Agreement."[3] If any of these contingencies should arise, the other contracting party may demand the opening of negotiations for a mutually satisfactory adjustment of the issue or, in the absence of such a settlement, may terminate part or the whole of the treaty.

(4) Finally, numerous commercial treaties of the United Kingdom, commencing with the Treaty concluded with Portugal in 1810,[4] contain general revision clauses which in periods of transformation and dislocation of international trade have acquired a significance incomparably greater than they had in the nineteenth century or in the pre-1914 period.

In order to grasp the present significance of the possibility of the speedy revision and termination of commercial treaties, it is necessary to recall the

[1] See Lord Palmerston's view to this effect regarding the Treaty of Commerce and Navigation with Colombia of 18 April, 1825, confirmed by the Treaty with Venezuela of 29 Oct., 1834 (Br. and For. St. Pap. 77 (1885–6), p. 773. Cf., however, McNair, *loc. cit.*, pp. 366–8.

[2] See Art. 15 (3) of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, p. 302).

[3] *Ibid.*, Art. 20 (*loc. cit.*, p. 304).

[4] Art. 33 (*Hertslet*, vol. II, pp. 63–4).

change in the functions of the m.f.n. standard which has been brought about by the increase in State planning. In the spheres affected by this development, the main purpose of the standard now consists in achieving a state of proportionate equality between States. As long as such an equilibrium is not disturbed by hasty or unwarranted changes in national policy, there is no need for new negotiations or the termination of the agreement. Should reasons of considerable weight call for such a step, a contracting party may do so at the peril of finding itself deprived of the advantages which it had itself derived from the treaty. Thus the devices by which these weapons are put in the hands of the other party actually serve the purpose of strengthening the stability of a laboriously achieved equilibrium. Somewhat paradoxically, the manifold provisions for the revision and termination of commercial treaties have a tendency to assure the continuity of their operation.

### VII. *Circumvention and Infraction of the Most-Favoured-Nation Standard*

In the realm of tariffs, circumventions and infractions of the m.f.n. standard require a minimum of ingenuity. Customs regulations and procedure, methods of verification and analysis, conditions of payment of duties, tariff classification and interpretation, drawbacks and rebates offer golden opportunities to what is euphemistically called administrative protectionism and what should more properly be described as the evasion of m.f.n. obligations.[1] The attack against the effective operation of the m.f.n. standard may also come from unscrupulous third parties who may make use of false indications of origin in order that their products might participate in the advantages agreed between parties to m.f.n. agreements.

Measures of protection against such abuses and false indications of origin have been taken by means of collective and bilateral treaties. Some of the commercial treaties of the United Kingdom contain a clause reiterating Article 7 of the International Convention relating to the Simplification of Customs Formalities of 3 November 1923: "The contracting States undertake to take the most appropriate measures by their national legislation and administration, both to prevent the arbitrary or unjust application of their laws and regulations with regard to customs and other similar measures, and to ensure redress by administrative, judicial or arbitral procedure for those who may have been prejudiced by such abuses."[2] Or, in accordance with the International Agreement for the Prevention of False Indications of Origin on Goods of 6 November 1925, parties to the Agreement are bound to seize such goods.[3] Additional engagements providing for the publicity of tariffs and for certificates of origin further serve the purpose of safeguarding the operation of the m.f.n. standard. Yet ultimately the standard owes its protection to the principle of reciprocity, which forms the basis and the most effective sanction in these spheres of international law, rather than

[1] For recent instances of such practices see J. M. Jones, *Tariff Retaliation*, Philadelphia, 1934, pp. 282–7. Cf. also Art. 285 of the Peace Treaty of Versailles of 1919 and O. Paranaguá, *Tariff Policy*, London, 1935, pp. 61 *et seq.*

[2] Handbook, *loc. cit.* in note 8 (p. 101 )above, p. 899.

[3] *Ibid.*, p. 963.



to any treaty clause. States which apply m.f.n. treatment restrictively or attempt to evade their obligations must expect retaliation. Accordingly, a liberal interpretation of the duties under the standard is likely to repay better than a narrow construction motivated by considerations of short-term advantages. Some of the treaties concluded by this country expressly lay down rules for their liberal interpretation. Yet none of them has surpassed in simplicity and wisdom Article 41 of the General Convention with Tunis of 19 July 1875: "If any doubt should arise with regard to the interpretation or the application of any of the stipulations of the present Convention, it is agreed that in Tunis the interpretation the most favourable to British subjects shall be given and in Her Majesty's dominions that most favourable to Tunisians."[1] If contracting States bear this injunction in mind, none of the issues which may arise between them are incapable of being solved by a reasonable interpretation founded on the application of uniform and objective tests.[2]

Though there are frequent instances of diplomatic controversies on the interpretation and application of m.f.n. clauses, there are only few instances of international adjudication on the subject of m.f.n. treatment.

Under the Convention of 1853, the Mixed Claims Commission between Great Britain and the United States had to deal with three cases calling for the interpretation of m.f.n. clauses.[3] In spite of some arbitration clauses on the model of the Protocol between Great Britain and Italy of 15 June 1883,[4] it cannot be said that, in the pre-1914 period, this country had automatically accepted the principle of arbitration in matters involving the interpretation and application of m.f.n. obligations. Thus, in the dispute with Russia over the Sugar Bounties,[5] the British Government did not consider the case "one proper to be submitted to the judgment of an Arbitral Tribunal".[6] In the post-1919 years, both under collective[7] and bilateral[8] treaties, the United Kingdom has readily undertaken to submit such disputes, in the absence of a settlement by diplomatic means, to the jurisdiction of the Permanent Court of International Justice or of the Permanent Court of Arbitration.

[1] *Hertslet*, vol. 14, p. 554.

[2] The rules of interpretation laid down in the Anglo-French Treaty of Commerce of 1606 still deserve attention: "*Convenium ulterius et concordatum est, quod hic Tractatus illum Sensum et Intellectum habeat quem ipsorum verborum Proprietas et Vis per se fert, nullamque hujusmodi Interpretationem admittat quae vim sibi formam et effectum, verbis apertis et simplicibus expressum, ulla in parte impedire queat, sed omni subtili Disquisitione rubata [quae Concordiae Contrahentium intellectum subvertere valet] quod bona fide hoc Tractatu agitur atque negotiatur, id etiam integre et sincere praestetur et observetur.*" *Rymer*, vol. XVI, p. 650. Cf. also the Despatch of Earl Granville to Colonel Mansfield of 21 Nov. 1882 (Br. and For. St. Pap. 77 (1885–6), pp. 778–9.

[3] Moore, *International Arbitrations*, vol. IV, pp. 3361–4. The case which was decided did not involve any point of general significance and, in the other two cases, the claims were withdrawn after a satisfactory settlement.

[4] *Hertslet*, vol. 15, p. 776.

[5] Cf. above, p. 144.

[6] Parl Pap. 1903. LXXV (Cd. 1401—No. 6, p. 20), p. 618.

[7] Art. 13, Para. 2 of the Covenant; Art. 36 of the Statute of the Permanent Court of International Justice; General Act of 1928, Art. 17; and the Convention on Simplification of Customs Formalities of 1923, Art. 22 (*loc. cit.* in note 2, p. 116 above, p. 908).

[8] Cf. Art. 14 of the Treaty with Poland of 27 Feb. 1935 (*L.o.N., P.S.*, vol. 182 (1935), pp. 150–92). Frequently, it is also provided that the Court can deal with such questions by means of summary procedure under Art. 29 of the Statute of the Permanent Court of International Justice.

### VIII. *The Most-Favoured-Nation Standard in relation to the other Standards of International Economic Law*

It remains to discuss the m.f.n. standard in relation to the other standards of international economic law.

(*a*) *The Minimum Standards of International Law.* In numerous bilateral treaties in the conclusion of which, from an early date, Great Britain has taken a leading part, and in the practice of Mixed Claims Commissions as well as of the Permanent Court of International Justice, principles have been elaborated which correspond to the minimum requirements of civilized communities regarding the treatment of individuals, and their personal and property rights. As compared with the m.f.n. standard, they are overriding in the sense that no State may infringe them and plead the excuse that it is treating the subjects of other States equally badly. Just as there are circumstances in which, in order to comply with the minimum standards of civilization, a State may have to treat foreigners better than its own nationals,[1] so every State can insist on a treatment of its subjects commensurate with the requirements of the minimum standards of international law, whether or not other States rest content with any other treatment of their own nationals.

Another aspect of the interaction between the two standards which deserves to be emphasized is that it has been the function of the m.f.n. standard to generalize the minimum standards of international law as formulated in bilateral treaties, particularly in those concluded with South and Central American States and some Oriental countries.

(*b*) *The Standard of Preferential Treatment.* If the international system consisted only of three States, it is perfectly conceivable that the promisor should grant to the beneficiary of m.f.n. treatment preferential treatment as compared with the State constituting the *tertium comparationis*. Yet in a world-wide system of inter-related m.f.n. treaties, the standards of m.f.n. and preferential treatment are mutually exclusive, and the one can be extended only at the other's expense.

(*c*) *The Standard of Reciprocal Treatment.* The reciprocity standard requires mutually identical treatment of the contracting parties, whereas the m.f.n. standard aims at the absence of discrimination. The principle of reciprocity finds its legitimate application to the m.f.n. standard in the bilateral grant of m.f.n. treatment. To attempt more, as has been done in construing the m.f.n. clause conditionally, means to achieve less or, at least, to sacrifice the automatic character of the m.f.n. standard to dubious gains in favour of the reciprocity standard.

(*d*) *The Standard of Equitable Treatment* may require discrimination in order to serve its purpose and may thus conflict with the m.f.n. standard. Yet in cases in which the object of equitable treatment is merely the avoidance of "excessive, unnecessary or arbitrary" measures,[2] the functions of

[1] Cf. the Judgments of the Permanent Court of International Justice in the cases of *German Interests in Polish Upper Silesia* (1926), A 7, pp. 32–3, and of the *Peter Pázmány University* (1933), A/B 61, p. 243.

[2] Art. 1 of the International Convention on the Simplification of Customs Formalities of 3 Nov., 1923 (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 897).



the two standards may coincide in practice or beneficially supplement each other. Moreover, in the spheres affected by the increase in State planning, the standard of equitable treatment becomes the only denominator on which m.f.n. treatment can still be achieved and creates the possibility of an at least proportionate equality between beneficiaries of the m.f.n. standard.

(*e*) *The Standard of the Open Door.* This standard aims at the same object as the m.f.n. standard: equality of opportunity for foreign States. Yet there is one essential difference between the two standards. In the case of the open door, the *tertium comparationis* is not primarily, or not only, third States, but any of the contracting parties. Thus, in contrast to the m.f.n. standard, any preferential treatment granted to any of the beneficiaries by the promisor is incompatible with this standard.

(*f*) *The Standard of National Treatment.* Under this standard, the nationals of the promisor form the *tertium comparationis*. Whereas the m.f.n. standard aims at foreign parity, the object of the national standard is inland parity. The following generalizations from British State practice may not unfairly summarize the relations between the two standards:

(1) There are aspects of customs duties on imports and exports where national treatment would be meaningless,[1] and where, therefore, the national standard has no opportunity of competing with the m.f.n. standard.

(2) There are other spheres such as the personal and property rights of foreigners, free access of foreigners to the courts, or equality with nationals in taxation or navigation, where the national standard enables foreigners to enjoy rights not accessible to them under the m.f.n. standard. In these fields, national treatment means more than m.f.n. treatment, and the latter must be considered to be implied in the former.[2] Frequently both national and m.f.n. treatment are stipulated regarding the same topic, and, in case of doubt, this means that these privileges are granted as cumulative—and not merely as alternative—rights.[3]

(3) As with regard to the minimum standards of international law so with regard to the national standard, the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State amongst the beneficiaries of m.f.n. treatment in the same field.

#### *Summary*

The conclusions reached in this paper may be shortly summarized as follows:

(1) The m.f.n. standard is one of the basic standards of international economic law.

(2) The essential features of the m.f.n. standard are that it is incompatible with discrimination against the beneficiary, that it does not exclude dis-

[1] This point is well put by W. McClure: "There would be no such thing as national treatment in customs because national produce is not imported and so does not come into contact with the customs house, and foreign goods are not exported." ("German-American Commercial Relations", *A.J.I.L.*, 19 (1925), p. 692.)

[2] Cf. Art. 1 of the Protocol forming part of the Treaty with Turkey of 1 March, 1930 (*L.o.N., T.S.*, vol. 108 (1930), p. 432). For an instance of an exceptional case in which m.f.n. treatment ensures a better position than national treatment, see Art. 8 of the Treaty with Switzerland of 6 Sept. 1855 (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 668).

[3] See, *e.g.*, Art. 4 of the Treaty with Poland of 26 Nov., 1923 (*L.o.N., T.S.*, vol. 28 (1924), pp. 432–3).

crimination in favour of the beneficiary, that third States constitute the *tertium comparationis*, and that it does not require compliance with any definite and objective rules of conduct.

(3) The continuity in, and universality of, the application of the m.f.n. standard is due to its functions which are in constant demand: its egalitarian function and its part as an agency for the automatic adaptation of treaties and for the rationalization of inter-State relations. The indefiniteness and elasticity of the standard and the automatic character of its operation enable it effectively to discharge these functions.

(4) The classification of the types of m.f.n. clauses may be limited to two principal categories: unilateral and bilateral, and conditional and unconditional m.f.n. clauses. The presumption is in favour of the bilateral and unconditional interpretation of m.f.n. clauses.

(5) Treaties are the legal basis of m.f.n. clauses, but out of the multitude of treaties concluded throughout centuries, the standard of m.f.n. treatment has emerged with the essential features enumerated under (2). There are innumerable m.f.n. clauses, but there is only *one* m.f.n. standard.

(6) British State practice does not reveal any indication that either this country or any of the other contracting parties envisage any beneficiaries other than themselves in relation to the m.f.n. standard under international law.

(7) The scope of the m.f.n. standard is mainly, but not exclusively, limited to the field of international economic law in the wider sense of the term.

(8) Exceptions to the operation of the standard are the normal means of limiting its scope. Exceptions in favour of preferential treatment cannot be presumed. Exceptions based on considerations of national policy may be presumed on grounds other than those to be derived from the m.f.n. standard. Exceptions on grounds of international public policy are overriding and suspend the operation of the m.f.n. standard.

(9) The growth of collective planning has led to adaptations of the standard to such changed conditions in spheres affected by the transformation of national economies and of world trade, but it has not brought about the breakdown of the m.f.n. standard. The result of this development has been:

(*a*) to impair the automatic operation of the standard;

(*b*) to change the emphasis from the positive to the negative functions fulfilled by the standard and, by the combination of the m.f.n. standard with that of equitable treatment, to produce proportionate equality of treatment on a m.f.n. basis;

(*c*) to lead to an increase in the customary types of exceptions;

(*d*) to make the application and durability of the m.f.n. standard more elastic.

(10) Circumventions and infractions of the m.f.n. standard are, in the long run, kept in check by the reciprocal interest of the contracting parties in its operation.

(11) Disputes on the interpretation and application of the m.f.n. standard are eminently justiciable disputes.

(12) A comparison between the m.f.n. standard and the other standards of international economic law leads to the following conclusions:



(*a*) The m.f.n. standard, far from interfering with the operation of the minimum standards of international law, contributes to their generalization.

(*b*) In an international system composed of more than three States, the m.f.n. and preferential standards are mutually exclusive.

(*c*) The standard of reciprocal treatment is compatible with the m.f.n. standard if conceived as implying the bilateral grant of m.f.n. treatment. Otherwise, the objects of the two standards are different. The aim of the m.f.n. standard is the prevention of discrimination between foreign States; that of the reci*procity* standard the identical treatment of the contracting parties.

(*d*) The standard of equitable treatment may require discrimination between foreign States and, to this extent, is incompatible with the m.f.n. standard. Used as a subsidiary standard, the former has contributed to the creation of a state of proportionate equality on the m.f.n. basis.

(*e*) The standard of the open door, though identical in its object with the m.f.n. standard, differs from it in that discrimination in favour of one of the contracting parties by the promisor is incompatible with the former.

(*f*) The object of the national standard is inland parity, whereas the m.f.n. standard aims at foreign parity. In case of doubt, the national standard implies the m.f.n. standard. If both standards are applicable to the same subject-matter, the presumption is in favour of their cumulative application.